



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

In the Matter of)	PCX-2011-5
SUMITOMO CORPORATION OF AMERICA,)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION; EXHIBITS "A" - "C"
Petitioner,)	
vs.)	
DIRECTOR, DEPARTMENT OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU,)	
Respondent,)	
and)	
ANSALDO HONOLULU JV,)	
Intervenor.)	

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

I. INTRODUCTION

On June 30, 2011, Petitioner Sumitomo Corporation of America ("Sumitomo") filed its Petition for Hearing ("Petition") in this matter, which was assigned case number PCX-2011-5.

On May 7, 2011, Respondent Director, Department of Budget and Fiscal Services, City and County of Honolulu ("City") filed a motion for partial summary judgment as to Sumitomo's claims that Intervenor Ansaldo Honolulu JV ("Ansaldo") should have been disqualified for failing to comply with the Hawaii contractor licensing laws set forth in Hawaii Revised Statutes

("HRS") Chapter 444 and that Ansaldo should have been disqualified for failing to timely register as a partnership pursuant to HRS Chapter 425.

On May 7, 2011, Ansaldo filed a Motion for Dismissal and/or Summary Judgment ("Ansaldo Motion") as to Sumitomo's Petition. This Motion by Ansaldo raised several arguments:

A. Sumitomo's protest as to contractor licensing and partnership registration is untimely because it is based on the content of the RFP.

B. Alternatively, Ansaldo timely met all contractor licensing and partnership registration requirements.

C. Sumitomo's arguments based upon Exhibit 10 should be dismissed for lack of jurisdiction.

D. The City properly determined that Ansaldo was a responsible offeror.

E. Ansaldo's bid is not imbalanced.

F. Ansaldo's bid conformed to the RFP.

G. The City's scoring was not flawed.

On May 7, 2011, Sumitomo filed a Motion for Summary Judgment Based Upon Ansaldo Honolulu JV's Violation of Contractor Licensing Law, asserting that Ansaldo should have been disqualified for failing to comply with the Hawaii contractor licensing laws set forth in HRS Chapter 444 and for failure to timely register as a partnership pursuant to HRS Chapter 425.

On May 7, 2011, Sumitomo filed a Motion for Summary Judgment Based Upon: (1) Ansaldo's Submission of a Prohibited Alternate Offer; and (2) the City's Failure to Perform a COPA.

Oral argument was heard on the above motions on July 20, 2011.

On July 20, 2011, the Hearings Officer orally preliminarily granted the City's Motion for Partial Summary Judgment, granted that portion of Ansaldo's Motion for Dismissal and/or for

Summary Judgment pertaining to Sumitomo's claim that Ansaldo should be disqualified for failing to comply with the Hawaii contractor licensing laws set forth in HRS Chapter 444 and for failure to timely register as a partnership pursuant to HRS Chapter 425, and denied Sumitomo's Motion for Summary Judgment Based Upon Ansaldo Honolulu JV's Violation of Contractor Licensing Law. A final written order confirming the results of the oral preliminary order is attached hereto as Exhibit "A" and incorporated by reference herein.

On July 20, 2011, the Hearings Officer orally preliminarily denied Sumitomo's Motion for Summary Judgment Based Upon Ansaldo's Submission of a Prohibited Alternate Offer. A final written order confirming the results of the oral preliminary order is attached hereto as Exhibit "B" and incorporated by reference herein.

On July 22, 2011, the Hearings Officer in a letter stated that Sumitomo's Motion for Summary Judgment Based upon the City's Failure to Perform a COPA would be denied. While there is no requirement for findings of fact and conclusions of law in connection with the denial of a motion for summary judgment, the letter outlined some reasons for the decision. Sumitomo's Motion for Summary Judgment Based upon the City's Failure to Perform a COPA is hereby formally denied.

On July 20, 2011, Ansaldo orally moved for dismissal on the basis that Sumitomo's Petition did not meet the 10 percent jurisdictional requirements of Act 175, which are applicable to this proceeding, which motion the City joined.

On July 21, 2011, the City filed a Supplemental Memorandum in Opposition to Sumitomo's MSJ re: Alternate Offer/COPA, in which Ansaldo joined, and which specifically addressed the issue of the ten percent minimum value threshold required by HRS § 103D-709(d).

Also on July 21, 2011, Ansaldo filed a Supplemental Memorandum to the Ansaldo Motion, wherein Ansaldo specifically addressed the ten percent threshold issue. The City joined in that Supplemental Memorandum.

SUMITOMO filed a Supplemental Memorandum in response to the City's and Ansaldo's Supplemental Memoranda.

In a letter dated July 23, 2011, the Hearings Officer advised that Ansaldo's Motion for Dismissal and/or Summary Judgment insofar as it was based upon Ansaldo's Supplemental Memorandum filed July 21, 2011, would be denied. While there is no requirement for findings of fact and conclusions of law in connection with the denial of a motion for summary judgment, the letter outlined some reasons for the decision. Ansaldo's Motion for Dismissal and/or Summary Judgment insofar as it was based upon Ansaldo's Supplemental Memorandum filed July 21, 2011 is hereby formally denied.

At the conclusion of oral argument on July 20, 2011, the Hearings Officer took the remainder of Ansaldo's Motion for Dismissal and/or Summary Judgment under advisement. In a letter dated July 24, 2011, the Hearings Officer issued a preliminary ruling that Ansaldo's Motion for Dismissal and/or Summary Judgment would be granted with respect to its Argument "C," dismissing for lack of jurisdiction Sumitomo's protest insofar as it is based upon a claim that Ansaldo's Exhibit 10 was materially nonresponsive. A final written order confirming the results of the oral preliminary order and dismissing Sumitomo's claim pertaining to Ansaldo's Exhibit "C" for lack of jurisdiction is attached hereto as Exhibit "C" and incorporated by reference herein.

In that letter dated July 24, 2011, the Hearings Officer also issued preliminary rulings that Claims D through G of Ansaldo's Motion for Dismissal and/or Summary Judgment

would be denied. While there is no requirement for findings of fact and conclusions of law in connection with the denial of a motion for summary judgment, the letter outlined some reasons for the decision on these claims. Accordingly, Ansaldo's Motion for Dismissal and/or Summary Judgment with regard to Claims D through G in that Motion is hereby formally denied.

On July 19, 2011, Ansaldo filed a Motion to Strike and Exclude Testimony of Sumitomo Corporation of America's Expert Witnesses. On July 20, 2011, the City filed a substantive joinder in this motion. By letter ruling dated July 23, 2011, the aforesaid motion by Ansaldo and the City's substantive joinder therein were denied without prejudice.

An evidentiary hearing on the remaining issues commenced on July 27 and 28, and August 1 and 2, 2011.

After the conclusion of Sumitomo's presentation of evidence, the City orally moved for dismissal of all matters in Sumitomo's Petition, pursuant to Hawaii Administrative Rules "HAR" § 3-126-70. Ansaldo joined in the motion. The motion and joinder were taken under advisement.

After the presentation of all of the evidence by the parties, the City orally renewed its motion for dismissal and Ansaldo renewed its joinder. The renewed motion and joinder were taken under advisement.

The evidentiary hearing involved the testimony of the following witnesses: William J. Rennie; Nabil N. Ghaly; Charles P. Elms; Kerry J. Stevenson; Simon Zweighaft; James M. Dunn; and Christopher M. Gambla.

The following exhibits were admitted into evidence: Joint Exhibits J-1 – J-143; Exhibits Sumitomo-1 – Sumitomo-23, Sumitomo-26, Sumitomo-30, Sumitomo-33, Sumitomo-92, Sumitomo-93, Sumitomo-95 – Sumitomo-97, Sumitomo-103 – Sumitomo-106, Sumitomo-131, Sumitomo-132 (subject to the City's and Ansaldo's objections), only Section V.E.5 of

Sumitomo-133, Sumitomo-134 (subject to the City's and Ansaldo's objections), Sumitomo-139 – Sumitomo-144, Sumitomo-148 – Sumitomo-151, and C-2 – C-7; and the City's Exhibits CC-4, CC-5, CC-8 except for Section 3.3, and CC-9.

At the conclusion of the hearing, the Hearings Officer requested that the parties submit written closing arguments and proposed findings of fact and conclusions of law. On August 4, 2011, all parties filed their proposed findings of fact and conclusions of law and closing briefs.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following Findings of Fact, Conclusions of Law and Decision. The parties' proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority; otherwise, they were rejected or they were irrelevant.

II. FINDINGS OF FACT

In making the following Findings of Fact, the Hearings Officer at times refers to various exhibits admitted into evidence at the hearing. The parties submitted joint exhibits as well as their own respective exhibits. The Findings of Fact, however, may refer to only one exhibit even though the same document may also be in evidence as another exhibit. In doing so, the choice of one party's exhibit under these circumstances is solely a matter of convenience due to the limited time available to the Hearings Officer after the closing of the hearing to issue a decision by the statutory deadline and should not be taken in any way as favoring the party whose exhibit is referenced or disfavoring the party or parties whose exhibit or exhibits are not referenced.

In making the following Findings of Fact, the Hearings Officer at times refers to various specific portions of the transcript of testimony at the hearings. Those references will be identified as "TR" followed by the hearing date and the pertinent page numbers of the transcript. Witnesses

were often asked the same or similar questions by different parties. In addition, witnesses were often asked the same or similar questions by one party during the course of that party's examination or cross-examination of the witness. Further, multiple witnesses often testified about the same question or questions. Due to the limited time available to the Hearings Officer after the closing of the hearing to issue a decision by the statutory deadline, the Findings of Fact may refer to one example of testimony about a particular fact without referring to all instances of that witness' testimony about that fact and/or all instances of the testimony of other witnesses about that fact. As with the references to exhibits discussed above, this is solely a matter of convenience and should not be taken in any as favoring the party examining the witness at the point that testimony is cited or disfavoring the party or parties who examined the witness on the same point at a different time in the hearing.

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On April 9, 2009, the City issued Request for Proposal No. RFP-DTS-198413, CT-DTS-1100194, Core Systems Design-Build-Operate-Maintain Contract for the Honolulu High-Capacity Corridor Transit Project (“RFP”). See J-1 at CC014364-000065.
2. The RFP involved a two-step process. The first step determined the Priority-Listed Offerors which were deemed qualified to submit design and price proposals. See J-1 at CC014364-000042
3. The term of the Contract to be entered pursuant to the RFP “is expected to extend from May 2010 through December 31, 2028. The Contract may extend only through December 31, 2023 or after 5 years upon completion of the Core Systems, if the CSC’s O&M performance is deemed unsatisfactory upon City’s evaluation.” See J-1 at CC014364-000047.

4. The Instructions to Offerors (“ITO”) contained in RFP Part 1 advised offerors to carefully review the terms of the RFP and to make written inquiries to the Chief Procurement Officer concerning defects and questionable material, and further cautioned that it was the offeror’s responsibility to examine the RFP and to seek clarification of any requirement that may not be clear. See J-1 at CC014364-000050; CC014364-000061 (ITO § 7.9).

5. On June 4, 2009, three offerors submitted their proposals in response to RFP Part 1, including Ansaldo and SUMITOMO. See J-109 to J-113; J-70 to J-82.

6. The City determined that Ansaldo, SUMITOMO, and Bombardier Transportation (Holdings) USA, Inc. (“Bombardier”) were all qualified to receive the second part of the RFP.

On August 17, 2009, the City issued RFP Part 2 to the Priority-Listed Offerors.

7. The Instructions to Priority-Listed Offerors (“ITPLO”) contained in RFP Part 2 again provided that the Priority-Listed Offerors had a duty to notify the City, at any time during the RFP Part 2 process, of any mistake, error or ambiguity in any of the documents supplied by the City. See J-10 at CC014364-000110.

8. As it had done in RFP Part 1, the City again advised offerors to carefully review the solicitation and to make written inquiries to the Chief Procurement Officer concerning defects and questionable material related to RFP Part 2. Id. at CC014364-000116.

9. On June 7, 2010, the Priority-Listed Offerors submitted their proposals in response to RFP Part 2. See J-83 to J-94; J

10. On December 8, 2010, the City issued its first request for best and final offers (“BAFO 1”). See J-54.

11. On January 18, 2011, the Priority-Listed Offerors were required to submit their responses to the City's first request for BAFO's.
12. On February 9, 2011, the City issued a second request for best and final offers ("BAFO 2"). See J-59 to J-65.
13. On February 24, 2011, the Priority-Listed Offerors were required to submit their proposals in response to the City's second request for BAFOs.
14. On March 14, 2011, the Evaluation Committee recommended the award of the Contract to Ansaldo.
15. On March 21, 2011, the City awarded the Contract to Ansaldo.
16. Sumitomo requested a debriefing as to the award to Ansaldo, which occurred on April 4, 2011.
17. On April 11, 2011, Sumitomo filed a protest with the City of the award to Ansaldo ("Protest").
18. In the Protest, Sumitomo asserted the following arguments:
 - a. The Evaluation Committee did not properly consider Ansaldo's past performance in determining that Ansaldo was a responsible offeror. Id. at pp. 5-7.
 - b. Ansaldo's past performance should have been considered in connection with the scoring for price realism. Id. at p. 8.
 - c. Ansaldo's proposal contained imbalanced pricing. Id. at pp. 8-9.
 - d. Ansaldo's technical proposal did not conform to the City's specifications because it did not propose a communications-based train control system. Id. at 9-12.
 - e. Ansaldo's proposed project schedule was non-compliant and unrealistic. Id. at 12-13.

- f. Ansaldo submitted an alternate offer. Id. at 13.¹
- g. Ansaldo relied upon future negotiations. Id. at 13.
- h. Ansaldo did not comply with Hawaii's contractor license law or partnership law. Id. at 14-16.²
- i. The Evaluation Committee's price realism analysis was flawed, including its analysis of:
 - (i) Section 6.1.2 (DD) entitled "Consistency of the Proposal Periodic Payment with the Proposed Baseline Schedule for the DB Portion of Work";
 - (ii) Section 6.1.2(EE) entitled "Realism and Reasonableness of Prices"; and
 - (iii) Section 6.1.2(FF) entitled "Life Cycle cost comparison combining capital and operating costs against the Proposed Baseline Schedule". Id. at 16-23.
- j. That the City had failed to perform a Cost and/or Price analysis. Id. at 24-25.

19. On June 23, 2011, the City denied Sumitomo's protest.

20. On June 30, 2011, Sumitomo filed the Petition wherein it identified the

following issues in its protest:

- a. The City did not follow the past performance evaluation requirements of the RFP;
- b. The City did not follow the RFP requirements or Hawaii law in evaluating Ansaldo's pricing;
- c. Ansaldo's proposal was not responsive to the RFP;³
- d. [Contractor licensing and partnership registration issues already dismissed on summary judgment.]
- e. The City failed to perform the required Cost and/or Price Analysis.

¹ As set forth above, this claim has already been dismissed on summary judgment.

² As set forth above, these claims have already been dismissed on summary judgment.

³ The portion of this claim alleging an unauthorized alternate proposal has already been dismissed on summary judgment.

A. ANSALDO'S PAST PERFORMANCE

21. The two-stage RFP process was designed to determine a list of those offerors who would be considered acceptable or potentially acceptable in performing the contract, if they were subsequently awarded the contract, so that the City could effectively conduct an in-depth technical and price analysis at the RFP Part 2 stage. See J-1, CC014364-000042.⁴

22. The terms of the RFP provided that past performance was to be one of the scoring criteria in RFP Part 1. Exhibit J-1, CC014364-000062.

23. The terms of the RFP provided that past performance was not a responsive/non-responsive issue pursuant to RFP Part 1. Id.

24. The terms of the RFP provided that past performance was not listed in the evaluation criteria as part of the price realism evaluation. Id.

25. The technical review committee ("TRC") designated by the City to assist in the review of proposals followed the RFP's criteria and did not consider past performance as part of its price realism and reasonableness evaluation. See CC-5 at 3, 4; TR 8/1 at p. 724:24-725:9, 797:16-798:3.

26. Simon Zweighaft, the chief project officer and a member of the Evaluation Committee, confirmed that the Evaluation Committee did not take past performance into consideration in scoring price realism and price reasonableness because it was not a factor in those evaluation criteria, and therefore they could not have considered past performance as part of price realism. TR 7/28 at p. 484:14-23; TR 8/1 at p. 616:10-23.

⁴ The references beginning "CC" are references to the Bates-stamp numbering on the specific page of the joint exhibit.

27. William Rennie, Ansaldo's designated expert on price realism, acknowledged that past performance was not a criterion in the terms of the RFP relating to the evaluation of price realism, but instead advocated that past performance should be an evaluation criterion that is not included in the listed RFP evaluation criteria and should not be disclosed to the prospective offerors. TR. 7/27 at p. 90, ln. 13-22.

28. Sumitomo did not file a protest as to the fact that the RFP evaluation criteria only considered past performance as part of RFP Part 1 and not as part of the price realism evaluation prior to the City's receipt of proposals for BAFO 2.

29. The City received RFP Part 1 submissions from only three companies. TR 8/1 at p. 603.

30. All three companies who submitted RFP Part 1 proposals were deemed by the Evaluation Committee as being capable of completing the project, thus each was evaluated to be able to advance to the RFP Part 2 stage. At this point, the Evaluation Committee did not consider it necessary to score the individual submissions and gave each submission a 100% evaluation score for RFP Part 1. There was no evidence that the offerors had to obtain any minimum evaluation score on their RFP Part 1 submittal in order to advance to the RFP Part 2 stage. RFP Part TR 8/1 at p. 614, ln. 25-p.615, ln 5.

31. The evaluation scores from RFP Part 1 did not carry over into RFP Part 2. TR 8/1 at p. 615, ln 20-23.

32. Ansaldo's RFP Part 1 proposal was approximately 1500 pages of information about Ansaldo's infrastructure and performance. Exhibits J-109 through J-113, CC014365-13837 to CC014365-15328.

33. Included in Ansaldo's RFP Part 1 Proposal was detailed information about the Copenhagen Driverless Metro System, which was completed on time and on budget. J-109, CC014365-013890 to 91.

34. As noted in its RFP Part 1 submission, Ansaldo received several awards for its Copenhagen project, including Best Metro in Europe for 2008 and 2009. J-109, CC014365-013910.

35. The City considered this project to be similar to the driverless vehicle system proposed for Honolulu. TR 8/1 at p.609, ln. 13-24.

36. Ansaldo's RFP Part 1 proposal also described in detail its award winning project in Naples, which was completed two years ahead of schedule. J-109, CC014365-013910.

37. Ansaldo also provided information about their successful Genoa project, which was again completed prior to the planned completion date, with no claims or litigation. Id.

38. There was no evidence that, at the time of evaluating RFP Part 1, any past performance problems of Ansaldo resulted in any termination of an Ansaldo contract by the purchaser of Ansaldo vehicles, other rail-related equipment, and/or rail-related services.

39. There was no evidence that, at the time of evaluating RFP Part 1, Ansaldo was without contracts to work on due to any Ansaldo past performance problems.

40. The Evaluation Committee considered that the type of problems described for Ansaldo past performances were typical of those that had vast experience in the transportation industry. TR 8/1 at pp. 610, ln.18-25; 613, ln.14-p.614, ln. 1.

41. William Rennie, an expert witness called by Sumitomo, concurred with this analysis in stating that, "Since 1964, with only one or two exceptions that I have been

able to identify, there are no examples of initial cost and schedule estimates ever having been successfully met in a greenfield rail project.” SUMITOMO-132, at p. 16.

42. The City considered both the strengths and the weaknesses of each of the offerors who made the priority list.

43. The Evaluation Committee reviewed the RFP Part 1 applications for a period of more than a week. TR 7/28 at p. 463, ln. 15-17.

44. With respect to Ansaldo the Evaluation Committee members each discussed their own experiences with Ansaldo. See TR 7/28 at p. 478:3-9.

45. The Evaluation Committee had a general industry view of Ansaldo, which Simon Zweighaft characterized as “not as positive as some of the other major suppliers, but certainly they had a record of performance in the industry.” See TR 7/28 at p. 478:10-19.

46. The Evaluation Committee understood that Ansaldo had had some negative issues with Ansaldo’s past performance, but Simon Zweighaft did not characterize it as a negative past performance history. See TR 7/28 at p. 484:2-13.

47. The Evaluation Committee considered all of the information they had received and the knowledge of the industry in evaluating Ansaldo’s past performance. TR 7/28 at p. 478:10-14.

48. Having determined that each Priority-Listed Offeror was qualified to pass to the RFP Part 2 phase, any score with regard to past performance would have had the same effect. TR 8/1 at p. 615:20-23.

B. LIFECYCLE COST

49. The ITPLO issued with BAFO 1 listed the Quality Criteria factors that it would score in evaluating the proposals. J-54, CC014364-012963.

50. Under the category of Price Realism, the ITPLO states that “The following criteria will be considered in the price realism evaluations...” J-54, CC014364-012964.

51. Among the items listed is (FF), which states, “Life Cycle cost comparison combining capital and operating costs against the Proposed Baseline Schedule.” J-54, CC014364-012964.

52. Thus, the terms of the RFP specifically provided that the life cycle cost comparison would only be compared against the proposed Baseline Schedule. Id.

53. The “Proposed Baseline Schedule” is further defined in the ITPLO as “the time-scaled, critical path network depicting project Sections, price items and subordinate activities and their respective durations, sequences and inter-relationships that represent the Priority-Listed Offeror’s Work plan for designing, constructing and obtaining passenger service on the dates stipulated in SP 4.1.” J-54, CC014364-012949.

54. Referring to Special Provision 4.1, the solicitation clearly states the schedule deadlines for the project, identifying the following deadlines:

- (1) Intermediate O&M period – December 15, 2015
- (2) Intermediate O&M period – October 15, 2017
- (3) Full O&M period – March 15, 2019

J-55, CC014364-013115.

55. The RFP specifically provided that the lifecycle cost analysis to be performed would only be performed over the life of the contract.

56. Technical Provisions 3.1.5, 3.1.6, and 3.1.7 clarify that beginning with the Intermediate O&M Period, the O&M portion of the contract continues through a maximum of 13 years and 3 months after the DB stage, ending at March 2029. J-55, CC014364-013601.

57. William Rennie, recognized as an expert in the area of financial analysis, including life cycle cost analysis, price realism, and price reasonableness confirmed that the Baseline Schedule was only for the term of the contract. See TR. at p. 115:14-25, p. 116:1-7.

58. William Rennie admitted that the 30 year life cycle cost analysis he is alleging that the City should have performed is not based on a requirement of the RFP, but rather on extrinsic sources. See TR 7/27 at p. 155:1-9.

59. Prior to the City's receipt of proposals for BAFO 2, Sumitomo did not file a protest as to the fact that the RFP provided that the lifecycle cost analysis would be performed only as to the term of the contract.

60. William Rennie's testimony and the sources cited in his report confirm that there are numerous ways to calculate life cycles and that the appropriate way to calculate useful life of an asset beyond the lifecycle period is to include residual value in the calculation. See TR 7/27 at p. 109:4-15.

61. The City performed the life cycle calculation using a formula which compared the capital and operations and maintenance costs over the life of the contract as stated in the RFP evaluation criteria. See Exhibit J-140.

62. The City's life cycle calculations also included a residual value to account for the remaining useful life of any asset that existed beyond the term of the contract. Exhibit J-140.

63. The purpose of the lifecycle cost analysis to be performed in the RFP was to evaluate which of the three proposals had the lowest true cost over the contract period for which they were being evaluated. TR 8/2 at p. 845:2-11.

64. At this point in time, it is unknown what effect the pricing under this contract will have on the costs incurred by the City after this contract ends.

65. The evidence presented does not show that the Evaluation Committee erred in performing the life cycle cost analysis as provided for in the ITPLO.

66. In his report, William Rennie calculates the price difference between the Ansaldo proposal and the Sumitomo proposal as \$54 million. SUMITOMO-132 at p. 11.

67. William Rennie used the information submitted by Ansaldo and Sumitomo in their respective Exhibits 16 and 17 to their proposals, but did not escalate any of the numbers to year of expenditure dollars, nor was it clear to him from Exhibits 16 and 17 which numbers were year of expenditure dollars and which were not. See TR 7/27 at pp. 137:21-138:1, 143:5-19.

68. For the design-build phase and the intermediate O&M phase, the City solicited pricing in year of expenditure dollars, but for the full and optional O&M periods, which is a ten year total, the City solicited pricing in year of proposal dollars, meaning 2011 dollars. See TR 8/2 at p. 850:4-852:11.

69. The RFP required offerors to incorporate escalation into its prices in Exhibits 17 and 17a, and to not escalate its prices in Exhibits 17b through 17d. See J-54 at CC014364-012957.

70. The analysis by William Rennie escalated all of the year of proposal values. After that, however, he did not discount the sum to present value in his life cycle cost

analysis. This would have decreased the difference between the costs of Ansaldo's and Sumitomo's offers. See Tr. 8/2 at pp. 849:18-850:3, 852:12-19.

71. The Hearings Officer does not accept the projections beyond the life of the contract that are contained in William Rennie's life cycle cost analysis. While the City may have done a one year projection in connection with its financial plan, in light of the evidence that operation costs after the contract period could potentially be quite variable, Sumitomo did not establish by a preponderance of the evidence that a multi-year straight line projection of future costs was reasonable.⁵

Sumitomo did not establish by a preponderance of the evidence that another life cycle cost analysis based upon its proposed methodology would result in a more favorable result in terms of the cost over the life of the contract for Sumitomo in comparison with Ansaldo. The evidence did establish that taking Mr. Rennie's escalated figures back to present value would decrease differences between the life cycle cost analyses of Sumitomo and Ansaldo.

C. SUMITOMO'S CLAIM THAT EVALUATION OF ANSALDO'S PRICE PROPOSAL WITH RESPECT TO PRICE REALISM AND REASONABLENESS DID NOT CONSIDER PAST PERFORMANCE

One of the evaluation factors for RFP Part 2 was Price Realism. In conducting that price realism and reasonableness evaluation, the following criteria were to be considered:

- A) Consistency of the Proposal Periodic Payment with the Proposed Baseline Schedule for the DB portion of Work;
- B) Realism and Reasonableness of Prices (Exhibits 16 and 17;; and
- C) Life Cycle cost comparison combining capital and operating costs against the Proposed Baseline Schedule.

⁵ Similarly, the Hearings Officer does not accept Mr. Christopher Gamble's projection of future costs based on only two data points that are years apart. While Mr. Gambla's testimony on this point is not accepted, nevertheless Sumitomo still did not establish that its post-contract projections were acceptable.

J-10 at CC014364-000150 (ITPLO §6.1.2.7); They appear to also be identified as DD, EE, and FF in J-54 at CC014364-012964.

The above-referenced Exhibits 16 and 17 were the schedules of prices submitted by the offerors. Exhibit 16 was for the DB portion of the work, and Exhibit 17 was for the O & M portion of the work.

The RFP criteria for the price realism and reasonableness evaluation did not consider past performance as part of the evaluation.

The guidance to offerors in ITPLO §6.1.2.7 did not consider past performance as an evaluation factor in the price realism and price reasonableness analyses. Exhibit J-54 at CC014364-02965.

Mr. James Dunn prepared a guidance document for the City's evaluators related to Price Realism and Reasonableness of Prices. The document, Exhibit J-142 at CC014398, lists Mr. Dunn's key factors in assigning scoring points for realism and reasonableness of prices. None of those key factors relate to past performance as an evaluation factor.

Mr. William Rennie advocated that past performance should be considered as part of the scoring criteria even though it was not listed in the RFP as one of the criteria for evaluation of price realism or price reasonableness.

Sumitomo appears to attempt to claim that the definition of "best value" somehow requires consideration of past performance when scoring for price realism and in evaluating price reasonableness. See Sumitomo proposed findings of fact numbers 131-132.

In its statement of claims in the protest letter of April 11, 2011, Sumitomo has a very brief section at page 8 on the claim that past performance should have been considered in connection with the scoring for price realism. It states in full:

Even if the City determined that Ansaldo need not have been disqualified as a result of its past performance problems, Ansaldo's history should nonetheless have been considered in connection with the scoring for price realism. A reasonable consideration of Ansaldo's history—as was required—should have resulted in substantially lower price realism scores for Ansaldo.

Sumitomo's protest letter claimed only that past performance should have been considered in connection with price realism and did not claim past performance should have been considered in connection with the evaluation for price reasonableness.

Neither the City's Technical Review Committee nor its Evaluation Committee considered past performance as part of their price realism and price reasonableness evaluations because it was not a factor in the criteria for those evaluations.

D. SUMITOMO CLAIMS OF AN UNREASONABLY LOW DESIGN BUILD PRICE

72. Parsons Brinckerhoff prepared an independent cost estimate of the various components ("Engineer's Estimate"). See TR 7/27 at p.73:6-16.

73. The Engineer's Estimate was developed based on the assumption that the proposals would be for a brand new concept vehicle, such that it that would require a great deal of engineering upfront, retooling of their factory to make parts, new assembly lines, and new subcontractors to provide materials. See TR 8/1 at pp. 721:13-722:7.

74. Ansaldo's DB phase cost estimate is 29 percent lower than the City's own independent cost estimate.

75. Sumitomo's and Bombardier's estimates for the DB phase were 15 percent and 14 percent, respectively, below the City's own independent cost estimate. It therefore appears that the City's Engineer's Estimate based on an assumption of a brand new concept vehicle was overstated.

76. According to their respective BAFO 2 offers, Ansaldo proposed a DB price of \$573,782,793 and SUMITOMO proposed a DB price of \$688,825,949, a difference of approximately \$115 million. J-131, CC014365-012909.

77. The difference is almost entirely accounted for in three categories, Revenue Vehicle (Section B), Traction Power (Section E), and Communications (Section D). See J-131, CC014635-012907 to 08, J-105, CC014365-004361 to 62.

78. The City evaluated the difference between the Ansaldo design/build proposal and the Engineer's Estimate, but after evaluating the entire proposal, determined that the disparity was reasonable in light of the fact that Ansaldo had proposed a vehicle similar to one that had already been designed and tested and was going to be in production for other transit systems. See TR 7/28 at p. 489:10-21.

79. It was not necessarily "economies of scale" (which implies economies due to production of a larger number of units) that were the only matter involved here as Sumitomo persistently stated. There was evidence of economies based on previous design, planning, and engineering where Ansaldo did not have to start from scratch.

80. The City did not do a detailed analysis of the differences between the production basis for the vehicles in Ansaldo's proposal and the production basis for the vehicles in the Engineer's Estimate. The Ansaldo vehicles in production were not exactly the same as the vehicles in Ansaldo's proposal. Those vehicles were being produced abroad, presumably in

Europe, and were not subject to the provisions of the Buy American Act (but given high costs in at least some areas of Europe there was no evidence of the financial significance of the Buy American Act differentiating factor). Much of Sumitomo's challenge here is to the City's relatively *ad hoc* procedures and the admittedly significant difference between Ansaldo's price and the Engineer's Estimate. However, Sumitomo failed to establish that the difference in production basis between Ansaldo's proposal and Sumitomo's proposal did not adequately account for the difference between Ansaldo's price and Sumitomo's price (which was itself much lower than the Engineer's Estimate).

81. Significantly, the TRC's own research related to the prices of vehicles demonstrated that Ansaldo's vehicle unit cost was within the range of rail vehicles of similar size and/or configuration. See CC-5 at 4; TR 7/28 at p. 453:1-15.

82. Further, Sumitomo's own expert, William Rennie acknowledged that one of the reasons why the price of the design build portion would be lower for one offeror than another would be if a supplier already had a vehicle in production. TR at p.163:10-19.

83. The price realism assessment team of the TRC, as well as the Evaluation Committee, determined that the prices proposed by Ansaldo were reasonable and realistic. See TR 7/28 at p. 452:10-14; 7/28 at pp. 489:10-490:10.

84. As the RFP is for a fixed-price design build contract, the concerns about cost overruns from a low design/build price are not applicable as the risks would be borne by the contractor.

85. William Rennie admitted that change orders for work outside the original scope of the contract would be equally applicable to all offerors regardless of whether the design build price was low or not. TR 7/27 at p. 168:2-p.169:25.

86. The City evaluated the potential risks in a just-in-time delivery schedule and determined that it was in the City’s interest not to accept early delivery of rail cars that would immediately start their warranty periods. TR 8/1 at p. 731:15-p.733:16.

87. William Rennicke agreed that a just-in-time delivery schedule would make sense “if you could pull it off.” See TR 7/27 at p. 172:9-12.

E. ANSALDO’S PROPOSED ROUND TRIP TIME

88. Sumitomo alleges that Ansaldo does not meet the RFP’s round-trip time requirements. Sumitomo’s contention, as stated by Sumitomo’s expert Charles Elms (“Elms”), is largely based on Sumitomo’s observation that Ansaldo inappropriately rounded down to the nearest whole second when listing station dwell times. See Ex. SUMITOMO-134 at p. 5.

89. According to Mr. Elms, if Ansaldo had rounded up, as he claims is industry-practice, Ansaldo’s round trip time would have been 40.2 seconds, or 0.67 minutes, higher, and would have exceeded the round trip time limit by approximately 13 seconds. Id. at p. 9.

90. The RFP, Technical Provision 3.4.2.5, “Travel and Round Trip Times,” states:

The round trip time is the time a train takes to complete one circuit around its route. Round trip time consists of the sum of all travel times and station dwell times on a route. The round trip time for all trains on the route between the East Kapolei and Ala Moana Center stations shall not exceed 90 minutes.

J-55, CC014364-013627 (BAFO 1, Technical Provision 3).

91. The RFP is entirely silent with regard to a rounding preference regarding dwell times.

92. The RFP contains provisions stating when the offerors must specifically round down, round up, or round to the nearest whole number, including the following, without limitation.

- a. TP 3.4.2.4, "Vehicle Loading / Unloading," requires load / unload times per lane to be "rounded downward to the nearest 0.1 units." J-55, at CC014364-013627.
- b. TP 3.4.2.8, "Vehicle Capacity," requires vehicle design and comfort load standing passenger capacities to be "rounded downward to the nearest integer." J-55, at CC014364-013628.
- c. TP 3.4.2.10, "Fleet Size, Train Length, and Spare Vehicles," requires the number of spare vehicles be determined by 15% of the peak period operating fleet, rounded up to a whole number. J-55, at CC014364-013629.

The above stated list demonstrates that, where a specific method of rounding was required, the RFP specifically advised the offerors how to perform the calculation.

93. Moreover, TP 3.4.2.5, "Travel and Round Trip Times," identifies that the calculation of round trip time will be the sum of dwell time and travel time. The calculation lists no other period to be added to this sum. J-55, CC014364-013627.

94. Ansaldo's proposal identified possible recovery or layover time, but this additional information was not required in the calculation for round trip time by the RFP. See Ex. J-135, CC014365-013014 to 013015 and J-55, CC014364-013627.

95. By calculating the round trip time solely based on the criteria requested in the RFP, the sum of dwell time and travel time, Ansaldo's proposed round trip time is 5,167 seconds, or 86.12 minutes. See Ex. CC-08 at p. 4. This is below the 90 minutes required by the RFP.

96. Even accepting Mr. Elms' conclusion that Ansaldo incorrectly rounded its dwell times, and adding the 40.2 seconds advocated by Mr. Elms to Ansaldo's round trip time of 86.12 minutes, the total round trip time becomes 86.79 minutes, which is below the 90-minute maximum round trip time required by RFP Section TP-3.4.2.5. See Ex. CC-08 at p. 4.

97. Notwithstanding the fact that the RFP contractually defined round trip time to include only dwell time and travel time, Ansaldo also provided figures in its proposal for a "service" round trip time that accounted for dwell time, travel time, and layover or recovery time. See TR. at pp. 832-33.

98. Ansaldo provided two such "service" round trip times in its proposal: (a) a time of 88.97 minutes in its Train Control Simulation Report, and (b) a time of 89.55 minutes in Volume 3, Part 2, Section 3.16.24 of its Proposal. See CC-08 at pp. 4-5.

99. SUMITOMO's expert calculated Ansaldo's round trip time by using a baseline time of 89.55 minutes found in Volume 3, Part 2, Section 3.16.2.4 of Ansaldo's proposal, and by then adding the 40.2 seconds of additional dwell time that he advocated. See Ex. CC-08 at p. 5.

100. However, Ansaldo also reported a baseline "service" round trip time that is found in Ansaldo's Train Control Simulation Report, and is 88.97 minutes. See Ex. CC-08 at p. 5.

101. The Train Control Simulation Report contains a calculated "service" round trip time of 88.97 minutes by adding travel time, station dwell time, and layover and recovery time at the terminals. See TR. at p. 831.

102. The 88.97 minute round trip time included in the Train Control Simulation Report is faster than the 89.55 minute time from Volume 3, Part 2, Section 3.16.2.4 of Ansaldo's

proposal, because the Train Control Simulation Report took into account Ansaldo's signaling system. See TR. at p. 832-33.

103. Using the 88.97 minute service round trip time, Ansaldo is compliant with the RFP even if one assumes (incorrectly) that the contractual round trip time includes layover and recovery time, and requires rounding up of dwell times. This is because the 88.97 minute service round trip time includes layover or recovery time, and because adding 40.2 seconds to the time results in a total round trip time of 89.64 minutes, which is still below the 90-minute maximum time specified in the RFP Section TP-3.4.2.5. See CC-08 at p. 5.

104. Under Sumitomo's calculations, rounding the dwell time up to the next whole second would add 0.27 minutes to Ansaldo's round trip time, resulting in a total round trip time of 90.22 minutes or 13.2 seconds. Under Sumitomo's calculations, this changes Ansaldo's headway to 159.2 seconds which in turn reduces Ansaldo's line capacity to 7190 pphpd. This would be slightly less than the City's requirement of 7,200 pphpd, a difference of approximately 0.14%.

105. Sumitomo provided no evidence as to the relative materiality or financial dimensions of this alleged deviation from the RFP's requirements.

F. LINE CAPACITY AND FLEET SIZE

106. Sumitomo's allegations regarding non-compliant line capacity and fleet size, outlined in Sections 1.2 and 1.3 of Mr. Elms' report, were wholly based on his calculation that the round trip time exceeded 90 minutes. See TR at pp. 338-39.

107. As stated above, the City correctly found that Ansaldo's round trip time complied with the RFP's requirements.

108. Sumitomo provided no evidence as to the relative materiality or financial dimensions of any alleged deviation from the RFP's requirements.

G. GANGWAY WIDTH

109. Sumitomo contends that Ansaldo's proposal is non-compliant because the proposal does not provide a "wide gangway," for passenger movement between cars.

110. Technical Provision 4.4.1 states, "Passenger movement between vehicles in a trainset shall be via wide gangways, full-width designs being preferred so as to provide clear sightlines throughout the train." J-55, at CC014364-013690. The RFP further requires that gangways maximize ease of passenger access and match the height, width, and profile of the vehicle body as closely as possible.

111. SUMITOMO did not present any evidence that the RFP required a specific width.

112. Ansaldo's BAFO 2 gangway width is 32.89 inches. J-135, CC014365-012992.

113. Sumitomo did not present any evidence that Ansaldo failed to meet any other standard, including the standard widths required by the Americans with Disabilities Act ("ADA"). See, e.g., TR. at p. 293 (Mr. Elms testifying that the ADA required gangways of 32 inches) and TR. at p. 918-19 (Sumitomo's counsel requesting that this Hearing Officer take judicial notice that the ADA requires a 30 inch gangway width).

114. Ansaldo's proposed gangway is wider than either interpretation of the ADA offered by SUMITOMO.

115. Moreover, SUMITOMO did not offer any evidence of an industry-wide standard for the term "wide" as it applies to gangways. See TR. at pp. 372-73 (Mr. Elms

testifying that wide must be defined “with respect to what’s not wide, such as narrow, okay. I mean, in common usage we, we all know when something is wide or particularly when it’s narrow.”)

116. Sumitomo’s challenge to the width of the Ansaldo gangway was essentially based on a simplistic comparison of the width of the gangway compared to the width of the car (minus the width of the car walls) and an assumption that there were no impediments to expanding the width of the gangway to utilize most if not all of the width of the car inside the car walls. Sumitomo did not offer sufficient evidence demonstrating that the car design in Ansaldo’s BAFO 2 could accommodate the wider gangway proposed in Ansaldo’s BAFO 1. Sumitomo did not offer any evidence that the structural and/or functional characteristics of the end of the Ansaldo car where the gangway is located allowed for a significantly wider gangway than the one proposed by Ansaldo.

117. Sumitomo provided no evidence as to the relative materiality or financial dimensions of any alleged deviation from the RFP’s requirements

118. The findings of fact on this issue are not based on any opinions on gangway width expressed by Mr. Christopher Gambla.

H. TURNBACK HEADWAY

119. Sumitomo alleges that Ansaldo failed to provide evidence in its proposal that an analysis or simulation was performed to demonstrate that the proposal meets the proposed turnback headway of 159 seconds.

120. This argument misconstrues the requirements of the RFP Technical Provision 3, Section 3.4.2.11, “System Performance and Failure Management Analysis,” which states:

As part of its SPFMA, the Core Systems Contractor shall provide detailed turnback analyses of the East Kapolei and Ala Moana terminals that show how AM peak train operations will be sustained for the first year of the Full O&M Period at those locations... The Core Systems Contractor shall provide an illustrated network analysis (stringline chart) of the entire round-trip, continuous operation for two hours of the AM peak for the first year of the Full O&M Period, and assume the civil configuration of the alignment and terminals provided as part of these Contract documents.

J-55, CC014364-013631 (emphasis added).

121. Thus, the RFP is clear that the offerors must provide a turnback headway analysis for the first year of the Full O&M period.

122. In Ansaldo's Proposal, the peak headway for the Full O&M period is 178 seconds, not 159 seconds. J-135, CC014365-013015.

123. Ansaldo provided a detailed turnback headway analysis in its proposal for the first year of the Full O&M period, using this 178 second headway. See J-135, CC014365-013106 to 013113 (AF-902 Train Control System Simulation Report).

124. Sumitomo established through its expert witness, Mr. Charles Elms, that Ansaldo's proposed operational headways of 153, 150 and 148 seconds for years 3, 4, and 5 of the Optional O & M Period, respectively, are all less than the proposed minimum operational headway of 154 seconds. This claim is not the same as the claim of a lack of detailed analyses for turnback headway discussed above.

125. Ansaldo has proposed to meet the line capacity requirements of Optional O & M Period Three, Four, and Five by using a headway that is less than its minimum operational headway. Mr. Elms' report quoted an unidentified member of one of the City's review teams that the consequences of using a 159 second headway could potentially require an 84-car fleet as opposed to an 80-car fleet as proposed.

126. There was no evidence of the monetary consequences of requiring an

additional four cars. In addition, this speculative consequence would appear to refer to turnback headway rather than operational headway

I. DOOR PLACEMENT

127. Sumitomo alleges that because Ansaldo's door locations are near the edges of the platform, boarding and deboarding will take longer than if the doors were moved away from the platform edges, so waiting passengers could enter from both sides of the door. Sumitomo-134, at p. 26.

128. Ansaldo's proposal is fully compliant with the vehicle length requirements of the RFP.

129. Technical Provision 4, Section 4.4.1, "Vehicle Type," states, "All vehicles shall be capable of being semi-permanently coupled into multi-vehicle consists of two, three or four vehicles to form one single bi-directional operating trainset or consist with an end vehicle at each end, not to exceed 73.15 m [240 ft] in length between the first and last side passenger doors." J-55, CC014364-013690.

130. Sumitomo's expert witness Charles Elms concedes that the maximum space between the outside ends of the doors in Ansaldo's proposal is 235.24 feet. Sumitomo – 134 at p. 26. This confirms that Ansaldo's train length is compliant.

131. Mr. Elms' report and testimony referred to platform doors and the matching up of platform doors with vehicle doors. There is nothing in the RFP about matching platform doors. There are no doors in the platform design at this time, and there was no evidence of when platform doors would be installed.

132. Sumitomo presented no evidence that the RFP had any specific requirements regarding the proximity of vehicle doors to station walls.

134. The City could not use any criteria not set forth in the RFP, and thus could not lawfully evaluate Ansaldo's proposal according to the standard proposed by Mr. Elms.

135. Moreover, Mr. Elms' criticism is of the design conceptions behind the City's RFP. The RFP stated a clear requirement for length, and the Ansaldo proposal meets that requirement. If the City deemed it to be preferable that a shorter distance between car doors and station walls be a limiting factor, the City could have set the vehicle length requirement at less than 240 feet. As it is, however, the Hearings Officer must conclude that Ansaldo's proposal meets the length requirements and that Mr. Elms' criticism is at best a substitution of his judgment over the judgment of the drafters of the RFP.

J. ADA COMPLIANCE

136. Sumitomo claims that Ansaldo's proposal has "questionable" ADA compliance. Sumitomo argues that the vertical gap between the vehicle floor and platform is larger than the maximum gap length required by law under the ADA.

137. Technical Provision 4, Section 4.5.1, "Critical Vehicle Dimensions," states that the floor of the train vehicle must be 1150 mm (3.77 feet) above the top of the rail. J-55, CC014364-013694.

138. Technical Provisions 4, Section 4.5.4.1, "Platform Height," similarly requires that the platform height will be 1150 mm above the top of the rail.

139. One drawing provided in Ansaldo's BAFO 2 proposal listed the floor height of the vehicles as 1180 mm. J-135, CC014365-013065.

140. If Ansaldo actually proposed vehicles with a floor height of 1180 mm, there would be a three centimeter difference between the station platform height and the vehicle floor height, which would be non-compliant with ADA standards for wheelchair access. See CC-08 at p. 8.

141. In reviewing Ansaldo's BAFO 2 proposal, the City determined that the single drawing which showed a floor height of 1180 mm was in error. See TR. at p. 892.

142. Mr. Elms testified that there is normally a requirement to rely upon a drawing over the text of an offeror's proposal. See TR. at p. 305-06.

143. However, it is not necessary for the Hearings Officer to determine whether such an industry standard of precedence exists, because Ansaldo's BAFO 2 proposal contained both text and drawings which showed that the vehicle floor height would be 1150 mm. See TR at p. 935.

144. Ansaldo provided three documents in its BAFO 2 proposal which showed the vehicle floor height as 1150 mm, as opposed to one drawing in the proposal which listed the floor height as 1180 mm. Id.

145. In addition, there were numerous documents submitted in connection with Ansaldo's BAFO 1 and RFP 2 proposals listing the 1150 mm floor height. Id.

146. Ansaldo's proposal stated that its vehicles would be fully compliant the ADA requirements. J-135, CC014365-012976. The City reasonably determined that it was so compliant.

K. WHETHER ANSALDO'S ATC SYSTEM IS EASILY UPGRADEABLE

147. Section 1.01(A)(2)(f) of the TP 8 "SECTION 34 44 00, Train Control System," states that:

All subsystems shall be designed and supplied for trains to meet the line capacity and shall be easily upgradeable. The first project shall accommodate incremental increases in capacity (without modification to the system elements) to accommodate the complete project capacity. This includes the design of the temporary terminals that later are retired with each subsequent line expansion. The ATC subsystem shall be modular and configured to facilitate expansion to ultimate capacity and the full HHCTCP system by adding ATC equipment and revising software. Expansion shall be implemented by

adding ATC equipment without major interruption of the ATC system in revenue operation.

J-55, CC014364-013830 (emphasis added).

148. Sumitomo claimed that Ansaldo's proposal was not easily upgradeable because the headway required for Ansaldo's system to meet the passenger line capacity requirements is 159 seconds, but that the Ansaldo proposal indicates that the minimum headway its system could achieve is 154 seconds. See TR at p. 103.

149. Sumitomo's allegation with regard to upgradeability is dependent upon the assumption that the term "easily upgradeable" refers to the ability to increase line capacity in the future. See TR (7/27/11 PM) at p. 102.

150. However, this assumption is unwarranted. The paragraph in Section 1.01(A)(2)(f) of TP 8 which requires the subsystems to be "easily upgradeable" must be read in its complete context.

151. The City's expert, James Dunn, P.E., stated as follows regarding the context of "easily upgradeable" in paragraph 1.01(a)(2)(f) of TP 8 in Exhibit J-55:

The expansion referred to in this paragraph requires some background in understanding the terms used in the contract . . . The following explains the relevant terminology:

- The "first project" is the scope of this contract. It extends from East Kapolei to Ala Moana Center, for approximately a 20 mile system. The "full HHCTCP System" is the 34 mile system, also known as the locally preferred alternative. (Refer to TP 1 Core System Description, Section 1.1 Project Overview.)
- The "complete project capacity" of the first project is the ultimate capacity of 12,100 passengers per hour per direction (pphpd) (refer to TP-1.1 Project Overview).
- Temporary terminals are end of line points either during the interim opening phases of the project or when extensions are added to the first project[[]].

With the understanding of these terms, TP-8 Upgradeability requires the following:

- The train control system shall be designed to accommodate interim openings of the contract and be expandable to include future extensions that are not within this contract.
- The first project shall be capable of 12,100 pphpd, the ultimate capacity.
- Adding extension shall be implemented without major impact to the revenue system.

See Ex. CC-04 at p. 2.

152. The City reviewed Ansaldo's proposal and found it compliant with the "easily upgradeable" requirement within the meaning of the RFP. See Ex. CC-04 at p. 2.

153. Moreover, the City properly determined that Ansaldo met the RFP's line capacity requirements. The Technical Provisions require that the "The System shall provide the following line capacity: Peak period operations minimum line capacity: 7,200 pphpd (persons per hour per direction)." J-55, CC014364-013628.

154. Ansaldo's proposal meets this requirement, achieving a 7,200 pphpd peak line capacity at a 159 second peak period operational headway. J-134, CC014365-012941 (Ansaldo's Executive Summary for BAFO 2).

155. When Sumitomo's expert, Dr. Ghaly, was questioned whether or not Ansaldo's proposal was compliant with the RFP's line capacity requirements, the following colloquy occurred.

Q: Do you remember the RFP requiring ultimate capacity of 7200 PPHPD?

A: There - - I'm not sure. I can't remember. I may have read it, but I can't remember.

Q: And are you aware that this is achievable with Ansaldo in a headway of 159?

A: That's, that's, that's what I remember, yeah. 159 is the capacity that is currently being required at 159 seconds.

TR (7/27/11 PM) at p. 111.

L. COST OR PRICE ANALYSIS

156. Sumitomo contends that the City failed to conduct a Cost and / or Price Analysis ("COPA").

157. The RFP precluded the City from analyzing cost data during its evaluation of proposals.

158. With respect to the evaluation of the offerors' proposals, the RFP specifically sought price information and not cost information.

159. The RFP asked the offerors to put cost information into escrow; however this information was to be held so that in the event of changes in the scope of the Project the City would have a point from which to begin negotiations on change orders. See TR p. 444: 2-8.

160. The Instructions to Priority-Listed Offerors issued as a part of RFP Part 2 stated that:

Each Priority-Listed Offeror shall assemble and deliver its Escrow Proposal Documents containing information regarding the Priority-Listed Offeror's assumptions made in calculating the Price Proposal, including assumptions regarding the scope of Work, and meeting all requirements in the SP-5.9 to a designated escrow agent.

See Joint Exhibit J-10 at CC014364-000123, § 3.4.1.

161. SP-5.9 of RFP Part 2 in turn provided that:

(e) Contents of Escrowed Proposal Documents. The Escrowed Proposal Documents Shall, inter alia, clearly itemize the estimated costs of performing the Work required by the Contract Documents. All Work shall be separated into sub-items as required to present a complete and detailed estimate of all costs. Crews, Equipment, quantities, and rates of

production shall be detailed. Estimates of costs shall be further divided into the Core Systems Contractor's usual cost categories such as direct labor, repair labor, Equipment ownership and operation, expendable Material, permanent Material, and subcontract costs, as appropriate. Plant and Equipment and indirect costs shall also be detailed in the Core Systems Contractor's usual format. The Core Systems Contractor's allocation of plant and Equipment, indirect costs, contingencies, markup, and other items to each direct cost item shall be clearly identified. The Escrowed Proposal Documents shall include all assumptions, quantity takeoffs, rates of production and progress calculations, quotes from Subcontractors and Suppliers, memoranda, narratives, and all other information used by the Core Systems Contractor to arrive at the Proposal Price or Change Order price, as applicable.

See Joint Exhibit J-12, CC014364-000289 at § 5.9(e).

162. The RFP limited the review of the escrowed cost data to the following circumstances:

(b) Availability for Review. The Escrowed Proposal Documents shall be available during business hours for joint review by the Core Systems Contractor and the City, in connection with review changes in the Baseline Schedule and/or PPS-C, negotiations of price adjustments and Change Orders, and the resolution of disputes.

See Joint Exhibit J-12, CC014364-000288 at § 5.9(b).

163. Likewise, no part of RFP Part 2 Exhibit 21, which was a form escrow agreement, provided that the City could review cost data during the evaluation phase of the RFP proposals. See Joint Exhibit J-10, CC014364-000208.

164. The language of SP-5.9(b) and (e), respecting the contents of escrowed documents and the City's right to review such documents remained unchanged through BAFO 2.

See Joint Exhibit J-61, CC014364-016218 – CC014364-016219.

165. On the other hand, the RFP made it clear that the Priority-Listed Offerors' price proposals would not be held in escrow and would thus be available to the City during the proposal evaluation process. See, e.g., J-59, CC014364-016104.

166. Accordingly, the RFP specifically sought price data for use in the proposal evaluation phase, but reserved cost information in escrow to be used only in the event of negotiations surrounding change orders.

167. The fact that cost data would not be used in the evaluation process was clear in the RFP from August 17, 2009, when RFP Part 2 was issued containing ITPL0 § 3.4.1 and SP-5.9, and this fact remained the same through the submission of BAFO 2 proposals by the offerors.

168. Nonetheless, SUMITOMO never filed a protest of the content RFP with respect to cost data prior its submission of a proposal.

169. Kerry Stevenson testified that as an employee of Parsons Brinckerhoff, he was primarily responsible for drafting the RFP. See TR. p. 434:14-19.

170. Further, Stevenson testified that he drafted the RFP such that it would require information to satisfy the requirements of Hawaii Administrative Rules. See Trans. Vol. 2, Part 2 at p. 435:1-23.

171. Specifically, Stevenson explained:

The basic template for the RFP was one I have used on other projects and other locations. So that was the primary reference. When, when we were looking at how we would be doing the scoring and the evaluation of the RFP, we looked at the Hawaii Administrative Rules to make sure that we were in compliance with all of the various provisions in 3-122, one of which is the requirement for a COPA. And in putting together the price realism part of that, we made sure that we were following all of the guidelines that are in the Hawaii Administrative Rules regarding COPA and what needed to be done and how.

Id. at p. 662.

172. In evaluating this data, the City evaluators analyzed the price data by analyzing each proposal against each of the other proposals, and against an independent engineers' estimate. TR. p. 440; TR at p. 663.

173. The documentary record is consistent with the City having performed this comparison. See J-142.

174. This process of comparing line by line each price to the other offerors' prices, and comparing each price to an independent estimate is specifically identified by the HAR as an acceptable means of completing the cost or price analysis requirement. See HAR § 3-122-130.

175. Had the City performed this function after the selection of an awardee, rather than throughout the process of selecting an awardee, the analysis would have been the same, except the City would have only performed the analysis on the awardee rather than all three. TR. at p. 669.

176. The City performed the COPA responsibly and fairly. Stevenson emphasized that his primary objective was to "make sure, and I say this both as an individual as well as the leader of the price realism technical analysis team, to make sure that the process was fair to all; that no offeror got treated either better or worse than the others." TR 8/1 at p. 669.

177. Similarly, all of the offerors' proposals were subjected to the same COPA, and no proposal was treated any differently than any other proposal. TR at p. 668.

178. The Hawaii Administrative Rules relating to COPAs require that the offerors submit price analysis data to the chief procurement officer, according to the terms of the RFP, and that the chief procurement officer use that data to evaluate whether the price offered is a good value to the purchasing agency. " See HAR §§ 3-122-125, 3-122-128, 3-122-129.

179. In evaluating the prices quoted, the purchasing agency should compare the prices or costs from each offeror to its own estimates, and to each other, to determine whether

the costs and prices are “reasonable and allocable under the pertinent provisions of chapter 3-122.” HAR § 3-122-130.

180. The COPA could be performed in connection with the price reasonableness portion of the overall price realism requirements cited above.

M. UNREALISTIC PROJECT SCHEDULE

181. Sumitomo’s protest alleged that Ansaldo had submitted an unrealistic project schedule.

182. This allegation was not included in Sumitomo’s Petition.

183. No testimony has been provided on this claim.

N. FUTURE NEGOTIATIONS

184. Sumitomo’s protest alleges that Ansaldo relied on future negotiations.

185. This allegation was not included in SUMITOMO’s Petition.

186. No evidence has been provided in support of this claim.

O. CONSISTENCY OF PAYMENT SCHEDULE

187. SUMITOMO’s protest alleged that there was a failure by the Evaluation Committee in evaluation of the SUMITOMO payment schedule.

188. This allegation was not included in SUMITOMO’s Petition.

189. No evidence has been provided in support of this claim.

P. ALTERNATE OFFER

190. Sumitomo alleged that Ansaldo’s proposal contained a prohibited alternate offer.

191. Sumitomo pre-hearing motion for summary judgment on this issue was denied. No cross-motion for summary judgment on this issue was filed by the City or Ansaldo.

192. Subsequent to the filing of the summary judgment motion, no further evidence has been provided in support of this claim.

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.

A. JURISDICTION

1. Under the Hawaii Public Procurement Code, HRS Chapter 103D, the hearings officer has the jurisdiction to consider and decide the protest of Sumitomo. Pursuant to HRS §103D-709(a), the hearings officer:

Shall have jurisdiction to review and determine de novo any request from any bidder, offeror, contractor, or person aggrieved under section 103D-106, or government body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.

2. This jurisdiction, however, is not unlimited. Of particular relevance to this proceeding are assertions that portions of Sumitomo's protest were not timely. HRS §103D-701(a) states that:

Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. Except as provided in sections 103D-303 and 103D-304, a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; ...provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for receipt of offers. (Emphasis supplied)

3. Absent some extenuating circumstances such as the procuring agency's delay or failure in providing relevant documents, a protestor must be in strict compliance with the timeliness requirements in HRS §103D-701(a). If a claim is not timely filed in accord with those

statutory requirements, the Hearings Officer does not have jurisdiction to hear the claim and decide the claim on its substantive merits.

1. Sumitomo's Contention that Past Performance Should Have Been Considered in the Scoring for Price Realism

4. Sumitomo claims that the City's evaluation of Ansaldo's price proposal with respect to price realism and reasonableness did not consider past performance. See Sumitomo proposed Findings of Fact numbers 128-134; Sumitomo proposed Conclusions of Law numbers 46-53. Under the terms of the RFP, past performance was not an evaluation criterion for scoring either price realism or price reasonableness.

5. William Rennie's opinion that past performance should be an unstated or unpublished evaluation criteria as part of price realism would be contrary to law in that HAR 3-122-46 requires that the evaluation criteria be stated in the request for proposals.

6. The definition of "best value" as meaning the evaluation and comparison of all relevant criteria in addition to price cannot implicitly be stretched, as Sumitomo advocates, to import other criteria such as past performance into a price realism or reasonableness evaluation.

7. While Sumitomo claims that it is desirable, or even standard in the industry, to consider past performance as part of a price realism or price reasonableness analysis, such a consideration was not contained in the terms of the RFP. Sumitomo is therefore challenging the terms of the RFP as not being prudent or sufficient, and such challenge was required to be made no later than the submission of Sumitomo's last proposal. Since Sumitomo did not raise this challenge until its later protest letter, its challenge is untimely under HRS §103D-701(a).

8. It should also be noted that Sumitomo's protest letter did not include a claim that past performance should be considered in a price reasonableness evaluation. Price realism is not the same as price reasonableness. Therefore, Sumitomo has failed to exhaust its administrative

remedies with respect to the claim that past performance should be considered in a price reasonableness evaluation.

9. Sumitomo's claim that past performance should be considered as part of a price realism or price reasonableness evaluation should be dismissed for lack of jurisdiction.

2. Sumitomo's Challenge to the Life Cycle Cost Period

10. The life cycle cost analysis required by the RFP was for a period of 18 years.

11. Sumitomo and its expert witness, William Rennie, advocated that a life cycle cost analysis should be done for a 30 year period. Their claims were based on several factors such as alleged financial industry standards, alleged Federal Transit Administration requirements, and experience on other projects.

12. Mr. Rennie's testimony was quite interesting, and there was an interesting contrast between his opinions and the opinions of the City's expert witness, Mr. Christopher Gambla. The Hearings Officer, however, does not have to decide who is "right" or what number of years should be utilized in a life cycle cost analysis when evaluating a light rail system. The essential point is that Sumitomo is claiming the City's life cycle cost analysis should have been for a significantly longer term than was required by the RFP.

13. Sumitomo is therefore challenging the terms of the RFP as not being prudent or sufficient for this project and that the terms should have been different. Such a challenge was required to be made no later than the submission of Sumitomo's last proposal. Since Sumitomo did not raise this challenge until its later protest letter, its challenge is untimely under HRS §103D-701(a).

14. Sumitomo's claim that the life cycle cost analysis time period should have been thirty years (and the alleged consequences favorable to Sumitomo if a thirty year time period had

been used) should be dismissed for lack of jurisdiction.

3. Sumitomo's Attack on the City's Price Realism and Reasonableness

Assessment

15. Sumitomo claims that a risk analysis concerning Ansaldo's proposed just-in-time delivery program should have been done as part of the price realism and realism analysis. See, e.g., pages 17 and 22 through 25 of Mr. William Rennie's report; Sumitomo's proposed Findings of Fact numbers 152-154; Sumitomo's proposed Conclusions of Law numbers 67-68.

16. Under the terms of the RFP, risk analysis pertaining to future contract performance was not an evaluation criterion for scoring either price realism or price reasonableness.

17. The definition of "best value" as meaning the evaluation and comparison of all relevant criteria in addition to price cannot implicitly be stretched, as Sumitomo appears to advocate, to import other criteria such as risk analysis into a price realism or reasonableness evaluation.

18. While Sumitomo may claim that it is desirable, or even standard in the industry, to consider risk analysis as part of a price realism or price reasonableness analysis, such a consideration was not contained in the terms of the RFP. Sumitomo is therefore challenging the terms of the RFP as not being prudent or sufficient, and such challenge was required to be made no later than the submission of Sumitomo's last proposal. Since Sumitomo did not raise this challenge until its later protest letter, its challenge is untimely under HRS §103D-701(a).

19. It should also be noted that Sumitomo's protest letter did not include a claim that risk analysis should be considered in a price realism or price reasonableness evaluation.

Therefore, Sumitomo has failed to exhaust its administrative remedies with respect to the claim

that risk analysis should be considered in a price realism or price reasonableness evaluation.

20. Sumitomo's claim that risk analysis should be considered as part of a price realism or price reasonableness evaluation should be dismissed for lack of jurisdiction.

4. **Sumitomo's claim that the City should have performed a Cost Analysis**

21. During the course of these proceedings, Sumitomo several times mixed together the concepts of cost analysis and price analysis (even though they are different types of analysis) and asserted that a cost and price analysis should have been done by the City. Sumitomo still appears to be mixing them together. See Sumitomo's proposed Conclusion of Law number 78. However, the RFP does not require a cost analysis.

22. Sumitomo is therefore challenging the terms of the RFP as not being prudent or sufficient for this project and claiming that the terms should have been different by including a requirement for a cost analysis. Such a challenge was required to be made no later than the submission of Sumitomo's last proposal. Since Sumitomo did not raise this challenge by that point in time, its challenge is untimely under HRS §103D-701(a).

23. Sumitomo's claim that a cost analysis should have been done should be dismissed for lack of jurisdiction.

5. **Sumitomo's Challenge to the Rounding of Dwell Times**

24. Sumitomo's challenge to the compliance of Ansaldo's proposal with regard to round trip times depended in part on how a train's dwell time at a station is determined. When dwell times were determined by Ansaldo to be in fractions of a second, Ansaldo rounded those figures down. Sumitomo's expert, Mr. Charles Elms, on the other hand, asserted his opinion that Ansaldo should have rounded those figures up.

25. The RFP contains some instructions on rounding other types of data but does not

contain any instruction on rounding dwell times. Mr. Elms claimed that, in that situation, the better practice, as well as the industry practice, was to round upward to the next higher second.

26. On this claim, Sumitomo is advocating an interpretation of a contract term and is not advocating for an addition to, or alteration of, a contract term. Accordingly, it was not required to file its claim concerning the rounding of dwell times prior to the submittal of its proposals.

27. The contention that Sumitomo's claim on dwell times should be dismissed for lack of jurisdiction is denied.

6. Sumitomo's Challenge to the Width of the Gangway

28. Sumitomo's challenge to the responsiveness of Ansaldo's proposal with regard to the width of the gangway depended in part on the opinion of its expert, Mr. Charles Elms, that the gangway width was not "wide" even though the terms of the RFP did not contain a definition of the term "wide."

29. On this claim, Sumitomo is advocating an interpretation of a contract term and is not advocating for an addition to, or alteration of, a contract term. Accordingly, it was not required to file its claim concerning gangway width prior to the submittal of its proposals.

30. The contention that Sumitomo's claim on gangway width should be dismissed for lack of jurisdiction is denied.

7. Sumitomo's Challenge to Ansaldo's Turnback Headway

31. Sumitomo's challenge to the responsiveness of Ansaldo's proposal with regard to turnback headway time depended on the opinion of its expert witness, Mr. Charles Elms. As part of his opinion, Mr. Elms stated that he could not find any evidence that any analysis or simulation was performed that demonstrated that Ansaldo's proposed operational headway met

the proposed turnback headway of 159 seconds.⁶

32. Mr. Elms further stated that he did actually find one analysis for the first year of the full O & M period.

33. Since the RFP only required a turnback headway analysis for the first year of the full O & M period, Mr. Elms' criticism of the lack of an analysis for subsequent years is a criticism of the terms of the RFP in that it did not require any further turnback headway analyses.

34. Sumitomo is therefore challenging the terms of the RFP as not being prudent or sufficient for this project and that the terms should have been different by including a requirement for additional turnback analyses. Such a challenge was required to be made no later than the submission of Sumitomo's last proposal. Since Sumitomo did not raise this challenge by that point in time, its challenge is untimely under HRS §103D-701(a).

35. Sumitomo's claim that additional turnback analyses should have been done should be dismissed for lack of jurisdiction.

8. Sumitomo's Challenge to Ansaldo's Door Placement

37. Sumitomo's challenge to the responsiveness of Ansaldo's proposal regarding placement of the doors on Ansaldo's vehicles is based on the testimony of its expert witness, Mr. Charles Elms. However, the evidence demonstrated, and Mr. Elms' conceded, that Ansaldo's proposal met the terms of the RFP regarding length of vehicle trainsets and door placement on the vehicles.

38. Sumitomo is actually challenging the terms of the RFP as not being prudent or sufficient for this project in terms of the consequences for passenger ingress and egress arising from the provisions on trainset lengths and door placements. Such a challenge was required to

⁶ Turnback headway is the average time period by which successive trains can depart an end-of-line station for the return trip.

be made no later than the submission of Sumitomo's last proposal. Since Sumitomo did not raise this challenge by that point in time, its challenge is untimely under HRS §103D-701(a).

39. Sumitomo's claim of non-compliance with door placement requirements is in reality a complaint about the underlying design that should be dismissed for lack of jurisdiction.

9. Objections to Evidence

40. The City and Ansaldo objected to the admission of testimonial and documentary evidence from Sumitomo's experts regarding matters for which there is no jurisdiction in this proceeding. In accord with the conclusions above, the City's and Ansaldo's objections to such evidence are

B. GENERAL CONSIDERATIONS APPLICABLE TO THIS PROCUREMENT PROTEST

41. Sumitomo has the burden of proof, including the burden of producing evidence, as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. HRS §103D-709(c).

Pursuant to HAR §3-122-57(a), the award herein:

Shall be issued to the responsible offeror whose proposal is determined in writing to provide the best value to the [City] taking into consideration price and the evaluation criteria in the request for proposals...Other criteria may not be used in the evaluation.

42. In making the determination referred to in HAR §3-122-57(a), HAR §3-122-57(c) states that such determination "shall be final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law."

43. In section 1.11.1 of the ITPLO, the City had the expressed right to waive any defects as may be deemed to be in the best interest of the public:

1.11.1 The City's Rights

The City may investigate the qualifications of any Priority-Listed Offeror under consideration, may require confirmation of information furnished by a Priority-Listed Offeror, and may require additional evidence of qualifications to perform the Work described in this Call for BAFOs. Without limiting any other rights, the City reserves the right, in its sole and absolute discretion, to:

...

O) Waive Weaknesses, informalities and minor irregularities in BAFOs;

See Exh. J-10 at CC014364-000112 (emphasis added).

C. RESPONSIBILITY

44. "The determination of an offeror's responsibility involves an inquiry into the offeror's ability and will to perform the subject contract as promised. Responsibility concerns how an offeror will accomplish conformance with the material provisions of the contract; it addresses the performance capability of the offeror, and normally involves an inquiry into the potential contractor's financial resources, experience, management, past performance, place of performance, and integrity." Browning-Ferris Industries of Hawaii, Inc., v. State of Hawaii, Department of Transportation, PCH-2000-4, at page 7.⁷ Past performance is only one of several areas to be reviewed in making a determination of responsibility.

46. The Evaluation Committee's determination of Ansaldo's responsibility will be given wide discretion and will not be interfered with unless the determination is unreasonable, arbitrary, or capricious. Id. at page 11.

47. While the City's evaluation process was not a textbook example of how such an evaluation should be accomplished, and the City would have helped itself if it had kept better records of the evaluation process, the scores for responsibility in RFP Part 1 became irrelevant

⁷ Quotation modified to refer to "offeror" rather than "bidder."

when only three offers were received. There was no requirement that any offeror receive a minimum score.

48. There was ample evidence of Ansaldo's responsibility even if it was not the most theoretically responsible offeror, including, but not limited to, the evidence cited by the City and referred to in the Findings of Fact as well as such important factors as the absence of any terminations due to past performance problems, Ansaldo's continuing business even if there were past performance problems, and Mr. Rennie's testimony that virtually every project of this kind has some performance problems. Mr. Zweighaft's inquiries in Los Angeles and Copenhagen after RFP Part 1 was completed verified that Ansaldo did not have problems serious enough to warrant a determination of non-responsibility.

49. Sumitomo has failed to present sufficient evidence to demonstrate that that the Evaluation Committee's determination of Ansaldo's responsibility was unreasonable, arbitrary, capricious, or contrary to law.

D. LIFE CYCLE COST

50. The City calculated lifecycle costs based on a formula which compared the capital and operations and maintenance costs over the life of the contract as stated in the RFP evaluation criteria.

51. The City's lifecycle calculations also included a residual value to account for the remaining useful life of any asset that existed beyond the term of the contract.

52. Sumitomo concentrated much of its presentation on this issue on a claim that the life cycle cost analysis should have been done on a 30 year basis. However, the RFP did not provide for a 30 year life cycle analysis but instead established the life of the contract as the period for the life cycle analysis.

53. Sumitomo did not establish by the preponderance of the evidence that the

lifecycle cost analysis performed by the City for the period of time set forth in the RFP was unreasonable, arbitrary, capricious or contrary to law.

E. SUMITOMO CLAIMS OF AN UNREASONABLY LOW DESIGN BUILD PRICE

54. The City evaluated the difference between the Ansaldo design/build proposal and the Engineer's Estimate and determined that the disparity was reasonable in light of the fact that Ansaldo had proposed a very similar vehicle to one that had already been designed and tested and was going to be in production for other transit systems.

55. In addition, there was no evidence that the disparity between Ansaldo's design build price and Sumitomo's design build price (which was itself substantially lower than the Engineer's estimate) was unreasonable.

56. Sumitomo did not prove by a preponderance of the evidence that the price realism analysis performed by the City was unreasonable, arbitrary, capricious or contrary to law.

57. In view of the fact that the design build price is fixed in the contract, Sumitomo failed to prove any monetary consequences to any unreasonably low design build price.

F. SUMITOMO'S CHALLENGE TO ANSALDO'S JUST-IN-TIME DELIVERY

58. The City evaluated the potential risks in a just-in-time delivery schedule and determined that it was in the City's interest not to accept early delivery of rail cars thereby resulting in improved cash flow for the City, delaying the start of the warranty period, and avoiding damage and/or deterioration to rail cars in storage because they were delivered in advance of when they would be used..

59. Sumitomo did not establish by a preponderance of the evidence that the analysis of the just-in-time delivery schedule performed by the City was unreasonable, arbitrary, capricious, or contrary to law.

G. SUMITOMO'S CHALLENGE TO ROUNDING ROUNDTRIP TIME

60. The Hawaii Supreme Court has consistently applied the rule of *expressio unius est exclusio alterius*—the express inclusion of a provision implies the intentional exclusion of another. See Kaina v. Gellman, 121 Haw. 202, 216 P.3d 128 (Haw. App. 2009) (citing Fought & Co., Inc. v. Steel Engineering and Erection, Inc., 87 Haw. 37, 55, 951 P.2d 487, 505 (1998)).

61. Based on this generally accepted canon of interpretation, the fact that the RFP states a specific rounding preference for other provisions (but not dwell time) in the same section as TP 3.4.2.3, demonstrates that the City did not require a specific rounding preference for dwell time.

62. Further, Sumitomo did not present sufficient evidence to demonstrate that the City's determination that Ansaldo's proposal was compliant with the RFP's requirements with respect to round trip time was clearly erroneous, arbitrary, capricious, or contrary to law.

H. ROUND TRIP TIME

63. Sumitomo's allegations regarding non-compliant line capacity and fleet size due to a failure to meet the RFP's requirements on round trip time, outlined in Sections 1.2 and 1.3 of Mr. Elms' report, were wholly based on his calculation that the round trip time exceeded 90 minutes. See TR at pp. 338-39.

64. However, as stated in the Findings of Fact, other information in Ansaldo's RFP resulted in a correct conclusion by the City that Ansaldo's round trip time complied with the RFP's requirements.

65. Under the figures appropriately used by the City, Sumitomo has not proven by a preponderance of the evidence that Ansaldo's proposal was not compliant with the RFP with respect to round trip time requirements.

66. To the extent that Sumitomo relies on other portions of the RFP to assert that dwell time should have been included in the calculation of round trip time, there is a patent ambiguity in the terms of the RFP. Sumitomo's challenge to the City's use of one portion of the RFP where dwell time was not included in round trip as opposed to another portion where dwell time is included in round trip time is therefore a challenge to the terms of the RFP that was required by HRS §103D-701(a) to be raised prior to the submission of Sumitomo's proposals. Sumitomo's failure to make such a challenge at that time means there is no jurisdiction to consider this portion of Sumitomo's claim based on its choice of one of two different calculation methods for round trip time.

67. Even if Sumitomo's calculations were correct and Ansaldo did not meet the round trip requirements and thus did not meet the line capacity requirements, Sumitomo failed to prove that Ansaldo's proposal's deficiencies in this regard were material and failed to establish the monetary value of any deficiencies on Ansaldo's part.

I. WIDTH OF GANGWAYS

68. There is no definition in the terms of the RFP as to what constitutes a "wide gangway".

69. Sumitomo did not offer any evidence of an industry-wide standard for the term "wide" as it applies to gangways. Sumitomo's own expert was unable to provide any clear definition of the term "wide."

70. Sumitomo has not proven by a preponderance of the evidence that the City's determination regarding gangway width was clearly erroneous, arbitrary, capricious, or contrary to law.

J. TURNBACK HEADWAYS

71. The City properly determined that Ansaldo had met its obligations to demonstrate that it could meet the turnback headway requirements.

72. Further, Ansaldo complied with the requirement of the RFP to provide a turnback headway simulation for the first year of the full O&M period.

73. Sumitomo did not prove by a preponderance of the evidence that the City's determination regarding turnback headway analyses was clearly erroneous, arbitrary, capricious, or contrary to law.

74. However, Sumitomo did prove by a preponderance of the evidence that Ansaldo's proposal regarding operational headway in Operational O & M Period Three, Four, and Five was not compliant with the terms of the RFP.

75. However, Sumitomo did not prove by a preponderance of the evidence that this was a material failure of compliance or establish the monetary consequences of this lack of compliance with the terms of the RFP.

K. DOOR PLACEMENT

76. Sumitomo presented no evidence that the Ansaldo vehicle failed to comply with any requirement of the RFP as to length of trainsets or location of car doors.

77. Sumitomo has failed to prove by a preponderance of the evidence that the City's determination regarding Ansaldo's length of trainsets or location of car doors was clearly erroneous, arbitrary, capricious, or contrary to law.

L. **ADA COMPLIANCE**

78. Ansaldo's proposal stated that its vehicles would be fully compliant with ADA requirements and included three separate references in its BAFO 2 proposal that confirmed this fact, while including only one reference which was different.

79. The City correctly determined that this one different reference was a mistake that did not call into question the compliance of Ansaldo's proposal with ADA requirements.

80. Sumitomo has failed to prove by a preponderance of the evidence that the City's determination on ADA compliance was clearly erroneous, arbitrary, capricious, or contrary to law.

M. **EASILY UPGRADEABLE**

81. Sumitomo's allegation with regard to upgradeability is dependent upon the assumption that the term "easily upgradeable" refers to the ability to increase line capacity in the future. See TR (7/27/11 PM) at p. 102.

82. However, this assumption is unwarranted. The paragraph in Section 1.01(A)(2)(f) of TP 8 which requires the subsystems to be "easily upgradeable" must be read in its complete context. The phrase refers to future project expansion to the full 34 mile system.

83. Sumitomo's and the City's expert witnesses agreed that the RFP's requirement of a capacity of 7200 pphpd was achievable with Ansaldo's headway of 159 seconds.

84. Contrary to the opinion of Sumitomo's expert, the RFP did not require that Ansaldo provide headway capacity beyond the requirements of the contract.

85. Sumitomo has failed to prove by a preponderance of the evidence that the City's determination that the term "easily upgradeable" as used in the context of the RFP refers to the expansion of the line to its ultimate capacity of 12,100 pphpd through the extension of the track to the full 34 mile system was clearly erroneous, arbitrary, capricious, or contrary to law.

86. In addition, Sumitomo failed to prove the monetary consequences of any failure of compliance with the terms of the RFP in this situation.

P. COST OR PRICE ANALYSIS

87. HAR §§ 3-122-123, state in pertinent part, “[the] procurement officer shall require cost or pricing data or both in support of the following... (1) Any contract, resulting from competitive sealed proposals or sole source procurement, expected to exceed \$100,000....” HAR § 3-122-123.

88. The section defines “cost or pricing data” as all facts as of the date of price agreement that prudent buyers and sellers would reasonably expect to affect price negotiations significantly.” HAR § 3-122-123.

89. As previously determined, the RFP did not require a cost analysis. The price analysis required by the RFP is referred to as the “COPA.”

90. In the context of this RFP, the rules require that the offerors submit price analysis data to the chief procurement officer, according to the terms of the RFP, and that the chief procurement officer will use that data to evaluate whether the price offered is a good value to the purchasing agency. See HAR §§ 3-122-125, 3-122-128, 3-122-129.

91. HAR § 3-122-130 provides that: “Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror’s cost estimates with those of other offerors and any independent state price and cost estimates.”

92. This process of comparing line by line each price to the other offerors’ prices, and comparing each price to an independent estimate is specifically identified by the HAR as an acceptable means of completing the cost or price analysis requirement. Moreover, the evaluation went well beyond merely comparing various figures on a spreadsheet.

93. The City performed the COPA responsibly and fairly as Stevenson emphasized that his primary objective was to “make sure, and I say this both as an individual as well as the leader of the price realism technical analysis team, to make sure that the process was fair to all; that no offeror got treated either better or worse than the others.”

94. Similarly, all of the offerors’ proposals were subjected to the same COPA, and no proposal was treated any differently than any other proposal.

95. The COPA as described by Mr. Stevenson met all of the requirements in the Hawaii Administrative Rules.

96. There is no requirement in the HAR or law that the COPA be in writing or that it be performed after the award. What is required is that the COPA be fair and reasonable, done in good faith, and consistent with the requirements of the Procurement Code and implementing regulations. The City’s COPA met and fulfilled all of those requirements.

97. Here, Sumitomo failed to prove by a preponderance of the evidence that the City did not properly perform the COPA as required by the HAR and the RFP.

O. ADDITIONAL ISSUES NOT RECEIVING TESTIMONY

98. Sumitomo’s protest contained several issues for which no testimony or documentary evidence was presented at the evidentiary hearing, including:

- a. Sumitomo’s claim that Ansaldo’s operations and maintenance costs included design/build costs and were thus imbalanced.
- b. Sumitomo’s claims relating to Ansaldo’s project schedule as set forth in pages 12-13 of Sumitomo’s protest.
- c. Sumitomo’s claim that Ansaldo relied on future negotiations.
- d. Sumitomo’s claim that Ansaldo presented a prohibited alternate offer.

99. Sumitomo failed to establish the validity of any of these claims by a preponderance of the evidence.

P. STANDING TO PROTEST

100. The City and Ansaldo allege that Sumitomo does not have standing to protest the award because Sumitomo has failed to establish that its protest met the jurisdictional requirements of the Hawaii Public Procurement Code that are applicable to this proceeding.

101. In order to have standing to protest the award, Sumitomo must meet the requirements of HRS § 103D-709 that it be a “person aggrieved,” have submitted a timely protest to the procuring agency, have filed a timely petition for administrative hearing with the Office of Administrative Hearings after agency denial of its protest, exhaust its administrative remedies with respect to the claims raised in the Petition, and post the appropriate bond.

102. A further condition on standing to make a procurement protest is that the matter at issue must be of a certain monetary value. Act 175 of the 2009 Legislature, which is applicable to this Petition, imposed certain conditions on bid protests, including the condition of HRS §103D-709(d), which states in relevant part:

Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that:

...

- (2) For contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten percent of the estimated value of the contract. (Emphasis added).

103. Pursuant to HRS §103D-709(j), the “estimated value of the contract” means the amount of Ansaldo’s proposal.

104. In response to this jurisdictional requirement, Sumitomo relied on the opinions of William Rennie related to the alleged improper lifecycle cost analysis performed by the City Evaluation Committee and the monetary consequences thereof. In Mr. Rennie's opinion, a proper life cycle cost analysis would have revealed that Ansaldo's costs over the life of the vehicles would add in excess of \$700 million

105. As determined above, Sumitomo's claim that the life cycle cost analysis should have been done for thirty years must be dismissed for lack of jurisdiction. Since a thirty year life cycle cost analysis was the basis for Mr. Rennie's opinions concerning monetary consequences greater than the required ten percent threshold, the dismissal for lack of jurisdiction eliminates any claim amount by Sumitomo that exceeds the ten percent threshold requirement.

106. Even assuming solely for the sake of argument that the ten percent threshold requirement pertains only to the allegation stage of the protest and does not apply to the protestor's ultimate obligation to prove such an allegation (which the Hearings Officer concludes is the appropriate interpretation of the law), there must be jurisdiction over such an allegation before the protestor has met the ten percent threshold requirement. A protestor cannot bootstrap itself into compliance with that requirement by alleging monetary consequences greater than ten percent by virtue of a claim over which there is no jurisdiction.

107. Further, Sumitomo failed to prove by a preponderance of the evidence that the monetary value of all of its claims over which there is jurisdiction in this proceeding exceed the ten percent threshold requirement under Act 175.

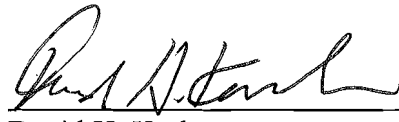
V. DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, as well as the Orders attached hereto as Exhibits "A," "B," and "C," the Hearings Officer finds:

- a. There is no jurisdiction in this proceeding to hear certain of Sumitomo's claims, as more fully enumerated in the foregoing, due to its failure to timely file a protest and/or its failure to exhaust administrative remedies, and those claims are dismissed.
- b. Sumitomo has failed to prove by a preponderance of the evidence that its protest concerns a matter equal to no less than ten percent of the estimated value of Ansaldo's proposal, that therefore Sumitomo does not have standing to bring this protest, and that the protest is therefore dismissed.
- c. In the alternative, should Sumitomo have standing to pursue this procurement protest for claims that have not been dismissed for lack of jurisdiction, that Sumitomo has failed to prove by a preponderance of the evidence that the award of the contract to Ansaldo was improper and/or not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation. Sumitomo has further failed to prove by a preponderance of the evidence that the City's denial of Sumitomo's procurement protest was improper and/or not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation. Accordingly, the City's denial of Sumitomo's procurement protest is affirmed and Sumitomo's Petition herein is dismissed..
- d. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

e. Sumitomo's cash or protest bond shall be deposited into the general fund.

DATED: Honolulu, Hawaii, August 13, 2021



David H. Karlen
Senior Hearings Officer
Department of Commerce
and Consumer Affairs



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

In the Matter of

SUMITOMO CORPORATION OF
AMERICA,

Petitioner,

vs.

DIRECTOR, DEPARTMENT OF BUDGET
AND FISCAL SERVICES, CITY AND
COUNTY OF HONOLULU,

Respondent.

and

ANSALDO HONOLULU JV,

Intervenor

PCX – 2011-5

ORDER: (1) GRANTING CITY AND COUNTY OF HONOLULU'S MOTION FOR PARTIAL JUDGMENT; (2) PARTIALLY GRANTING ANSALDO HONOLULU JV'S MOTION FOR DISMISSAL AND/OR SUMMARY JUDGMENT; AND (3) DENYING SUMITOMO CORPORATION OF AMERICA'S MOTION FOR SUMMARY JUDGMENT BASED UPON ANSALDO HONOLULU JOINT VENTURE'S VIOLATION OF CONTRACTOR LICENSING LAW

Hearing Date:

July 20, 2011

Hearing Location:

Office of Administrative Hearings
Department of Commerce and
Consumer Affairs
335 Merchant Street, Room 100
Honolulu, Hawai'i 96813

Hearings Officer: David H. Karlen

ORDER: (1) GRANTING CITY AND COUNTY OF HONOLULU'S MOTION FOR PARTIAL JUDGMENT; (2) PARTIALLY GRANTING ANSALDO HONOLULU JV'S MOTION FOR DISMISSAL AND/OR SUMMARY JUDGMENT; AND (3) DENYING SUMITOMO CORPORATION OF AMERICA'S MOTION FOR SUMMARY JUDGMENT BASED UPON ANSALDO HONOLULU JOINT VENTURE'S VIOLATION OF CONTRACTOR LICENSING LAW

EXHIBIT A

I. INTRODUCTION

On June 30, 2011, Petitioner Sumitomo Corporation of America (“Sumitomo”) filed its Request for Administrative Hearing (“RFAH”) in this matter, which Request was assigned case number PCX-2011-5.

On July 7, 2011, Respondent Director, Department of Budget and Fiscal Services, City and County of Honolulu (“City”) filed its Motion for Partial Summary Judgment. This Motion sought to dismiss that portion of Sumitomo’s RFAH alleging that Sumitomo’s protest should be sustained on the ground that the City did not comply with Hawaii law with regard to contractor licensing and partnership registration.

On July 7, 2011, Intervenor Ansaldo Honolulu JV (“Ansaldo”) filed its Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, Motion for Summary Judgment. Arguments “A” and “B” of that Motion also sought to dismiss that portion of Sumitomo’s RFAH alleging that Sumitomo’s protest should be sustained on the ground that the City did not comply with Hawaii law with regard to contractor licensing and partnership registration.¹

On July 7, 2011, Petitioner Sumitomo filed its Motion for Summary Judgment Based Upon Ansaldo Honolulu Joint Venture’s Violation of Contractor Licensing Laws. This Motion asserted that Sumitomo’s protest should be sustained because the City did not comply with Hawaii law with regard to contractor licensing and partnership registration.

Oral argument on all of the above motions was held on July 20, 2011. At the conclusion of oral argument, the Hearings Officer orally granted the City’s Motion, granted Ansaldo’s Motion in part, and denied Sumitomo’s Motion. This Order, based on the record

¹ For purposes of this Order, Arguments “A” and “B” will be referred to as “Ansaldo’s Motion”. Ansaldo’s Arguments “C” through “G” will be the subject of separate Orders.

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.

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 invite qualification proposals for the purpose of determining priority-listed offerors deemed qualified to proceed with RFP Part 2.

2. Section 6.9 of the Instructions to Offerors (“ITO”) which were part of the City’s RFP Part 1 provided in part:

All Persons participating in this procurement and/or the Contract at the time of Award must have obtained all licenses and permits and taken all necessary steps to conduct business in the State of Hawai’i and perform the Work required under the Contract and carrying out contracts consistent with the laws of the State of Hawai’i. Offerors must be properly licensed and capable of performing the Work as described in the RFP, including but not limited to an “A” general engineering contractor license. Out-of-state contractors shall comply with HAR 16-77-89, requiring a place of business in the State.

3. Ansaldo was formed as a general partnership on May 27, 2009.

4. Ansaldo submitted its response to RFP Part 1 on June 5, 2009.

5. An article in the Honolulu Advertiser on July 6, 2009, identified Ansaldo, Sumitomo, and Bombardier as the only remaining companies interested in pursuing the Contract.

6. Based upon the responses to RFP Part 1, the City determined that there were to be three priority-listed offerors: Ansaldo, Sumitomo, and Bombardier Transportation

(Holdings) USA Inc. (“Bombardier”). On August 17, 2009, RFP Part 2 was issued to those three priority-listed offerors. RFP Part 2 called for detailed technical and price proposals.

7. Section 3.1 of the Instructions to Priority Listed Offerors (“ITPLO”), which were incorporated into RFP Part 2, states:

At the time of the Award, all Priority-Listed Offerors must have all applicable licenses and permits and be registered to conduct business in the State of Hawai’i and perform the Work required under the Contract, consistent with the laws of the State of Hawai’i. Priority-Listed Offerors must be properly licensed and capable of performing the Work as described in the RFP, including but not limited to an “A” general engineering contractor license. Out-of-state contractors shall comply with Section 16-77-89, HAR, title 16, Chapter 77, Contractors, of the State Department of Commerce and Consumer Affairs, requiring a place of business in the State.

8. On March 18, 2010, the City issued Addendum No. 24 to the RFP, which stated in part:

Question #3

ITPLO Section 3.1, License and Permit Requirement:

We recommend that at the time of the Award, the Offeror must document its applications for the respective licenses provided that it also has, as part of its nominated team, a fully licensed subcontractor that is in compliance with HAR.

Response #3

As stated in the ITPLO, and in accordance with applicable Hawaii state law, including but not limited to Hawaii Revised Statutes (HRS) Chapter 444 and its promulgated rules, all licenses as required in the RFP must be in place at the time of the Award. A subcontractor cannot substitute for the CSC.

Question #8

ITPLO Section 3.1 License and Permit Requirement:

Please advise which “applicable licenses and permits” the Priority-Listed Offerors must possess at the time of Award of the Contract.

Response #8

ITPLO Section 3.1 stipulates “all applicable licenses and permits ...[to] perform the Work required under the Contract, consistent with the laws of the State of Hawai’i at

the time of Award. It is the Offeror's responsibility to determine the applicability of licenses and permits, including but not limited to, all licenses required under HRS Chapter 444 and its promulgated rules.

9. Ansaldo submitted its response to RFP Part 2 on June 7, 2010. In that response, Ansaldo disclosed that it did not have a contractor's license and was not registered in the State of Hawaii but was "in the process of being registered in the State of Hawaii and of obtaining all applicable licenses and permits."

10. Ansaldo registered with the State of Hawaii as a general partnership on July 1, 2010.

11. On September 5, 2010, an article in the Pacific Business News identified "the three finalists" for the Contract as Ansaldo, Bombardier, and Sumitomo.

12. On October 15, 2010, an "A" general engineering contractor's license was issued to Ansaldo by the State of Hawaii.

13. On November 4, 2010, the City issued a request for best and final offers ("BAFO #1).

14. Ansaldo submitted its BAFO #1 to the City on January 18, 2011.

15. On February 9, 2011, the City issued a second request for best and final offers ("BAFO #2").

16. A section identical to the above-quoted Section 3.1 of the ITPLO incorporated into RFP Part 2 was incorporated in the City's calls for BAFO #1 and BAFO #2.

17. Ansaldo submitted its BAFO #2 on February 24, 2011.

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

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

20. The City did not make the identity of the three priority-listed offerors publicly known until the Contract was awarded to Ansaldo.

21. On April 11, 2011, Sumitomo filed with the City its written protest of the award to Ansaldo. With respect to the license and registration issues, Sumitomo asserted:

a. Ansaldo did not hold the requisite contractor's license prior to submitting its proposals in response to RFP 1 and RFP 2.

b. While ITO §6.9 of RFP Part 1 and ITO §3.1 of RFP Part 2 (and the calls for BAFO #1 and BAFO #2) state that an appropriate contractor's license is required at the time of award, offerors must nevertheless comply with Hawaii law by holding the contractor's license at the time of the proposals for RFP Part 1 and RFP Part 2.

c. Therefore, Ansaldo should have been disqualified as a priority-listed offeror under RFP Part 1. As only priority-listed offerors can submit a BAFO, neither of Ansaldo's BAFOs should have been accepted.

d. Ansaldo's failure to timely register in Hawaii as a general partnership until after submitting its response to RFP Part 2 should have resulted in Ansaldo's disqualification.

22. On June 30, 2011, Sumitomo filed its RFAH protesting the award of the Contract to Ansaldo.

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.

2. The terms of the RFP required Ansaldo to hold the appropriate contractor's license and to register as a partnership only at the time of the award. The terms of the RFP did not require Ansaldo to hold the appropriate contractor's license and to register as a partnership at the time Ansaldo responded to RFP Part 1 or submitted a proposal in response to RFP Part 2. See Section 6.9 of the ITO for RFP Part 1 and Section 3.1 of the ITO for RFP Part 2. In its procurement protest letter of April 11, 2011, Sumitomo admitted that this is the correct reading of the RFP.

3. The undisputed facts are that Ansaldo held the appropriate contractor's license and was registered as a partnership at the time of award and thus complied with the terms of the RFP.

4. Sumitomo now claims in connection with the summary judgment motions that the language of the RFP can be read as requiring a contractor's license at the time Ansaldo responded to RFP Part 1 as well as when Ansaldo submitted a proposal in response to RFP Part 2. This claim cannot be accepted for the following reasons:

a. It is based on a misreading of the terms of the RFP, including, but not limited to: (i) a failure at page 7 of its Memorandum in support of its motion to fully quote the relevant RFP provisions, leaving out the RFP language about having a license at the time of award; and (2) misinterpreting Addendum No. 24 at page 10 of that Memorandum, ignoring the fact that the question quoted there refers to the time of the award.

b. Sumitomo's bid protest letter of April 11, 2011 did not assert or claim that the RFP language could be read as requiring a contractor's license at the time Ansaldo responded to RFP Part 1 or when it submitted a proposal in response to RFP Part 2. Due to this failure

on Sumitomo's part to exhaust its administrative remedies, there is no jurisdiction to consider this claim in this proceeding before the Hearings Officer.

c. To the extent Sumitomo claims that there is an ambiguity in the language of the RFP allowing it to be interpreted as Sumitomo advocates, Sumitomo did not raise such an ambiguity claim in its protest letter of April 11, 2011, and there is no jurisdiction to consider the claim in this proceeding before the Hearings Officer. In addition, this would also be tantamount to a claim that there is a mistake in the language of the RFP, a challenge to the terms of the RFP that requires a protest be filed no later than the submission of Sumitomo's BAFO #2. Any such challenge here is untimely under the terms of HRS §103D-701(a).

d. The only claim with respect to the absence of a contractor's license that Sumitomo clearly raised in its protest letter is that despite the RFP language requiring a license only at the time of award, offerors must nevertheless comply with Hawaii law by holding the contractor's license at the time of the proposals for RFP Part 1 and RFP Part 2. This claim was also asserted by Sumitomo in the summary judgment motions. Although the subject of several iterations, it is stated most succinctly on page 14 of Sumitomo's Memorandum in support of its motion when it claims:

SCOA's protest does not rely on an error in the solicitation but rather the failure of the City and Ansaldo to comply with state law. Regardless of the contents of an RFP, all offerors must comply with state law.

5. The definition of "contractor" is contained in HRS §444-1. The statute includes within that definition any person who "offers to undertake, or holds oneself out as being able to undertake," improvements to real property or the construction of various projects including railroads.

6. When it submitted responses to RFP Part 1 and RFP Part 2, Ansaldo offered to undertake, or held itself out as being able to undertake, improvements to real property or the construction of a railroad project and was therefore a “contractor” within the meaning of HRS §444-1. By engaging in those actions, Ansaldo was also acting as a contractor.

7. This Order will therefore assume that when it submitted responses to RFP Part 1 and RFP Part 2, Ansaldo was acting, or assuming to act, as a contractor in apparent violation of HRS §444-9.

8. The fact that Ansaldo did not “hold itself out” to be a “contractor” is not relevant. When Ansaldo offered to undertake the work, or “held itself out” to be able to “undertake the work,” it was acting as a contractor.

9. Hawaii law nevertheless does not require disqualification of Ansaldo even if Ansaldo was in violation of HRS §444-9 at the time of its responses to RFP Part 1 and RFP Part 2.

a. Hawaii law treats violations of the contractor licensing law differently depending upon the different circumstances of the violations. No provision of the contractor licensing laws in HRS Chapter 444 requires any such disqualification.

b. To the contrary, that part of HRS Chapter 444 specifically pertaining to the consequences of being unlicensed in the context of entering into construction contracts restricts those consequences only to cases where the contractor is unlicensed when it enters into a contract. HRS §444-22 provides:

The failure of any person to comply with any provision of this chapter shall prevent such person from recovering for work done, or materials or supplies furnished, or both on a contract or on the basis of the reasonable value thereof, in a civil action, if such person failed to obtain a license under this chapter prior to contracting for such work.

Ansaldo has never been in the situation of being penalized by the terms of HRS §444- 25.

c. The decision in In the Matter of Sea Engineering, Inc. v. Department of Business, Economic Development and Tourism, State of Hawaii, PCH-2008-8, is not to the contrary. In that case, the RFP required bidders to have a contractor's license. The Hearings Officer agrees with the statement at page 5 n.1 of the Sea Engineering decision that general contractors are required by HRS Chapter 444 to be licensed when they offer to perform contracting work. However, as explained in this Decision, failure to meet that requirement of Chapter 444 did not disqualify Ansaldo from the procurement in question as long as Ansaldo had the required license at the time of award.

d. The Hearings Officer does not in any way condone any violation of the licensing laws by Ansaldo. However, where, as here, Hawaii law does not explicitly require the disqualification penalty that Sumitomo argues for, the issue of what consequences should result because of Ansaldo's failure to have a license when submitting responses to RFP Part 1 and RFP Part 2 is left to the Contractors Licensing Board. HRS §444-4 authorizes the Board to enforce HRS Chapter 444 and, for example, suspend or revoke any license on account of licensing violations. HRS §444-23 authorizes fines for violation of the licensing laws. The Board has the authority to fashion a remedy and/or penalties it determines to be appropriate under the circumstances.

10. The City further claims that it utilized its ability to exempt this procurement from any requirement under HRS §444-9 that offerors needed a contractor's license at any stage of the procurement process prior to award.

11. HRS §444-2(10), part of a statutory section entitled “Exemptions,” provides that:

§444-2 Exemptions. This chapter shall not apply to:

. . .
(10) Any public works project that requires additional qualifications beyond those established by the licensing law and which is deemed necessary and in the public interest by the contracting agency.

12. Sumitomo argues at page 17 of its Memorandum in support of its motion that the “City made no attempt to obtain a determination of exemption” under this statute. However, the statute appears to allow “the contracting agency” to make the exemption determination itself, and Sumitomo provides no authority for its assertion that the City had to “attempt to obtain a determination of exemption” from some other authority that Sumitomo fails to identify.

13. The terms of this statute provide for an exemption from the requirements of “this chapter,” referring to the entirety of HRS Chapter 444. By explicitly requiring a contractor’s license only at the time of award, the City explicitly excused offerors from complying with only a portion of HRS Chapter 444 and explicitly required compliance with another portion of HRS Chapter 444. This can arguably be viewed as a decision not to invoke the exemption available under the terms of HRS §444-2(10). Alternatively, this can be viewed as creating a disputed issue of material fact on whether the City actually deemed at the time the RFP was issued (and not a couple of years later after an award is protested) that there were “additional qualifications beyond those established by the licensing law” when compliance with the licensing law was being required before commencement of the work. In either event, summary judgment in favor of the City on account of a claimed exemption under HRS §444-2(10) is not appropriate.

14. Ansaldo argues that Sumitomo's protest is untimely under HRS §103D-701(a) because Sumitomo knew from newspaper articles published in 2009 and/or 2010 that Ansaldo was one of the offerors. Ansaldo asserts that therefore Sumitomo should have investigated and raised Ansaldo's licensing status in a protest at that time rather than waiting a minimum of approximately seven months before raising the issue. If that were the case, the Hearings Officer would agree with Ansaldo that Sumitomo could not use the excuse that the City did not make the identities of the priority-listed offerors public until the time of the award as a justification for not filing a protest on the licensing issue seven months earlier.

15. 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).

16. While it might be reasonable to assume that Sumitomo was keenly interested in every aspect of this procurement and that Sumitomo would naturally follow news of the procurement in the Honolulu print media, summary judgment cannot be granted based on such assumptions. There was insufficient evidence in the record on this motion to establish as an undisputed fact that Sumitomo actually knew of the identities of the other priority-listed offerors prior to their identities being made known by the City at the time of the award. Accordingly, summary judgment on the basis of Ansaldo's argument of prior notice making this portion of Sumitomo's protest untimely is denied.

17. The Hawaii business registration statutes do not provide for a sanction or penalty for failure to file a partnership registration statement. In particular, they do not provide for the sanction of disqualification as advocated by Sumitomo.

18. The RFP did not require offerors to file a partnership registration (or other business registration) statement at the time they submitted proposals in response to the RFP.

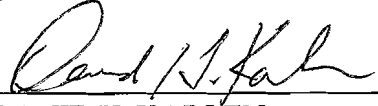
19. Due to the absence of such a provision in the RFP, Ansaldo could file a partnership registration statement with the Department of Commerce and Consumer Affairs at any time prior to the award of the Contract and be in compliance with the terms of the RFP. Cf. In the Matter of Browning-Ferris Industries of Hawaii, Inc., vs. State of Hawaii, Department of Transportation, PCH-2000-4.

IV. DECISION

For the reasons set forth herein, it is hereby ordered that:

1. The City and County of Honolulu's Motion for Partial Summary Judgment is granted.
2. Ansaldo Honolulu JV's Motion for Dismissal and/or Summary Judgment is granted with respect to Arguments "A" and "B" seeking to dismiss that portion of Sumitomo's RFAH alleging that Sumitomo's protest should be sustained on the ground that the City did not comply with Hawaii law with regard to contractor licensing and partnership registration
3. Sumitomo Corporation of America's Motion for Summary Judgment Based upon Ansaldo Honolulu Joint Venture's Violation of Contractor Licensing Law is denied.

DATED: Honolulu, Hawai'i, August 13, 2021.



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



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

In the Matter of

SUMITOMO CORPORATION OF
AMERICA,

Petitioner,

vs.

DIRECTOR, DEPARTMENT OF BUDGET
AND FISCAL SERVICES, CITY AND
COUNTY OF HONOLULU,

Respondent.

and

ANSALDO HONOLULU JV,

Intervenor

PCX – 2011-5

**ORDER DENYING SUMITOMO
CORPORATION OF AMERICA'S
MOTION FOR SUMMARY
JUDGMENT BASED UPON
ANSALDO'S SUBMISSION OF A
PROHIBITED ALTERNATE OFFER**

Hearing Date:

July 20, 2011

Hearing Location:

Office of Administrative Hearings
Department of Commerce and
Consumer Affairs
335 Merchant Street, Room 100
Honolulu, Hawai'i 96813

Hearings Officer: David H. Karlen

**ORDER: DENYING SUMITOMO CORPORATION OF AMERICA'S MOTION FOR
SUMMARY JUDGMENT BASED UPON ANSALDO'S SUBMISSION OF A
PROHIBITED ALTERNATE OFFER**

I. INTRODUCTION

On June 30, 2011, Petitioner Sumitomo Corporation of America ("Sumitomo") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PCX-2011-5.

EXHIBIT B

On July 7, 2011, Petitioner Sumitomo filed its Motion for Summary Judgment Based Upon Ansaldo's Submission of a Prohibited Alternate Offer.

Oral argument on the above motion was held on July 20, 2011. At the conclusion of oral argument, the Hearings Officer orally denied Sumitomo's Motion. This Order more fully sets forth that ruling and stands as the formal order with respect to the aforesaid motion.

II. FINDINGS OF FACT

1. On April 9, 2009, the City and County of Honolulu ("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 invite qualification proposals for the purpose of determining priority-listed offerors deemed qualified to proceed with RFP Part 2.

2. After collecting and evaluating the responses to RFP Part 1, the City recognized three priority listed offerors: Ansaldo Honolulu JV ("Ansaldo"), Sumitomo, and Bombardier Transportation (Holdings) USA ("Bombardier").

3. On August 17, 2009, RFP Part 2 was issued only to those three offerors. RFP Part 2 proposals were submitted to the City on June 7, 2010.

4. On November 4, 2010, the City issued a request for best and final offers ("BAFO #1").

5. Ansaldo submitted its BAFO #1 to the City on January 18, 2011.

6. On February 9, 2011, the City issued a second request for best and final offers ("BAFO #2").

7. Ansaldo submitted its BAFO #2 on February 24, 2011.

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

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

10. The following paragraph was included in a section entitled "Executive Summary" in Ansaldo's BAFO #1 which applied as well to BAFO #2:

AHJV is therefore in a position to offer to the City (at its discretion and at the same price) the alternative solution of a fully compliant CBTC solution. The issue can be further discussed using subsequent discussion meetings with the City.

11. In its procurement protest letter of April 11, 2011, at page 13, Sumitomo asserted that Ansaldo submitted an unauthorized and non-compliant alternate offer because of the above-quoted language in Ansaldo's Executive Summary.

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.

2. The Executive Summary is specifically excluded from the material that the City stated it would evaluate in response to the RFP. Section 4.1 of the Instructions to Priority Listed Offerors ("ITPLO") issued with the call for BAFO #1 lists the information that would be used to evaluate the proposals and determine the successful offeror. The Executive Summary was not listed or mentioned in Section 4.1.

3. The Executive Summary is instead listed in Section 4.2 of the ITPLO and was required to be placed in a binder or folder separate from the information called for in Section 4.1.

4. The language in question challenged by Sumitomo does not constitute an “offer” and is therefore not a potentially prohibited alternate offer.

IV. DECISION

For the reasons set forth herein, it is hereby ordered that Sumitomo Corporation of America’s Motion for Summary Judgment Based upon Ansaldo’s Submission of a Prohibited Alternate Offer is denied

DATED: Honolulu, Hawai‘i, August 13, 2011.



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



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

In the Matter of

SUMITOMO CORPORATION OF
AMERICA,

Petitioner,

vs.

DIRECTOR, DEPARTMENT OF BUDGET
AND FISCAL SERVICES, CITY AND
COUNTY OF HONOLULU,

Respondent.

and

ANSALDO HONOLULU JV,

Intervenor

PCX – 2011-5

**ORDER: (1) GRANTING ANSALDO'S
MOTION FOR DISMISSAL AND/OR
SUMMARY JUDGMENT WITH
RESPECT TO ARGUMENT "C"; AND
(2) DISMISSING SUMITOMO'S
CLAIM REGARDING EXHIBIT 10
FOR LACK OF JURISDICTION**

Hearing Date:

July 20, 2011

Hearing Location:

Office of Administrative Hearings
Department of Commerce and
Consumer Affairs
335 Merchant Street, Room 100
Honolulu, Hawai'i 96813

Hearings Officer: David H. Karlen

**ORDER: (1) GRANTING ANSALDO'S MOTION FOR DISMISSAL AND/OR
SUMMARY JUDGMENT WITH RESPECT TO ARGUMENT "C"; AND (2)
DISMISSING SUMITOMO'S CLAIM REGARDING EXHIBIT 10 FOR LACK OF
JURISDICTION**

I. INTRODUCTION

On June 30, 2011, Petitioner Sumitomo Corporation of America ("Sumitomo") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PCX-2011-5.

EXHIBIT C

On July 7, 2011, Intervenor Ansaldo Honolulu JV (“Ansaldo”) filed its Motion for Dismissal and/or Summary Judgment. The Motion contained several arguments labeled “A” through “G.” This Order pertains only to Ansaldo’s Argument “C.” In this argument, Ansaldo asserts that “Sumitomo’s Arguments Based Upon Exhibit 10 Must Be Dismissed for Lack of Jurisdiction.”

Oral argument on the above motion was held on July 20, 2011. At the conclusion of oral argument, the Hearings Officer took Ansaldo’s Motion as it pertained to Argument “C” under advisement. By letter dated July 24, 2011, the parties were notified that Ansaldo’s Motion with regard to Argument “C” would be granted. This Order more fully sets forth that ruling and stands as the formal order with respect to Ansaldo’s motion insofar as it concerns Ansaldo’s Argument “C.”.

II. FINDINGS OF FACT

1. On April 9, 2009, the City and County of Honolulu (“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 invite qualification proposals for the purpose of determining priority-listed offerors deemed qualified to proceed with RFP Part 2.

2. After collecting and evaluating the responses to RFP Part 1, the City recognized three priority listed offerors: Ansaldo, Sumitomo, and Bombardier Transportation (Holdings) USA (“Bombardier”).

3. On August 17, 2009, RFP Part 2 was issued only to those three offerors. RFP Part 2 proposals were submitted to the City on June 7, 2010.

4. On November 4, 2010, the City issued a request for best and final offers (“BAFO #1”).
5. Ansaldo submitted its BAFO #1 to the City on January 18, 2011.
6. On February 9, 2011, the City issued a second request for best and final offers (“BAFO #2”).
7. Ansaldo submitted its BAFO #2 on February 24, 2011.
8. On March 14, 2011, the City’s Evaluation Committee recommended that the award be made to Ansaldo.
9. On March 21, 2011, the City awarded the Contract to Ansaldo.
10. In its procurement protest letter of April 11, 2011, at page 7 fn.5, Sumitomo asserted the following:

It is unclear whether the Evaluation Committee’s failure to disqualify Ansaldo was a result of the Evaluation Committee’s failure to properly consider past performance or a result of Ansaldo’s failure to disclose its past performance issues. The City has not yet provided SCOA with unredacted copies of the documents that would have contained Ansaldo’s disclosures, namely Exhibits 7 and 10 to Ansaldo’s response to RFP Part 1. If Ansaldo failed to disclose these issues, then its proposal should also be disqualified for the separate and independent reason that its proposal was nonresponsive. See HAR §3-122-97(b)(2)(B).

11. On May 3, 2011, Sumitomo received from the City the aforementioned Exhibit 10 to Ansaldo’s response to RFP Part 1.
12. The City’s decision denying the Sumitomo protest was issued on June 23, 2011.
13. Between May 3, 2011 and June 22, 2011, Sumitomo had the time and opportunity to supplement its protest letter of April 11, 2011 regarding the previously undisclosed Exhibit 10 to Ansaldo’s response to RFP Part I but failed to do so.

14. As a result, the City's chief procurement officer never made a determination on a claim pertaining to the lack of disclosure on Ansaldo's Exhibit 10.

14. In Sumitomo's RFAH filed June 30, 2011, at page 5 fn. 1, Sumitomo refers to the disclosure of Exhibit 10 on May 3, 2011 and then states:

As a result, SCOA hereby confirms that it is asserting two separate claims related to past performance; first, that the City failed to properly consider and score Ansaldo's past performance; and second, that Ansaldo's proposal was nonresponsive because it failed to disclose Ansaldo's past performance issues.

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.

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

3. 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.

3. With respect to Sumitomo's procurement protest contained in its April 11, 2011 letter, the City's chief procurement officer was not required to assume or speculate as to the basis of a protest.

5. An exception to the requirement that protest claims must be first brought to the attention of the procuring agency's chief procurement decision would exist if Sumitomo

did not know, and reasonably could not be expected to know, the basis of the protest claim at the time the protest was due to be filed. In that situation, however, under HRS §103D-701(a), Sumitomo was required to supplement its protest within five days of the date it received a copy of Ansaldo's Exhibit 10.

6. In footnote 5 on page 7 of its protest letter, Sumitomo asserted a conditional protest regarding the potential nonresponsiveness of Ansaldo's Exhibit 10.

7. Sumitomo had the obligation to bring to the City's attention all protest issues it wanted the City to consider. A conditional protest of a possibly significant issue contained in a footnote to a lengthy discussion of a significantly different issue is not adequate notice that condition in the footnote was later removed or satisfied and that there was in actual fact a separate significant protest issue.

8. Sumitomo reserved the right in its protest letter at pages 25-26 to "supplement or revise" its protest based upon subsequently received documents. The City could therefore reasonably expect Sumitomo to take action if it wanted to pursue a protest based on subsequently produced documents.

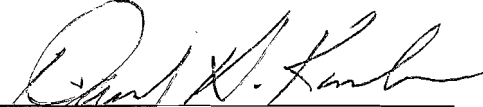
9. Between the time Sumitomo received a copy of Ansaldo's Exhibit 10 and the date the City denied Sumitomo's protest, Sumitomo had more than adequate time in which to supplement its protest, remove the condition and speculation it previously expressed about Ansaldo's Exhibit 10 and clearly bring to the City's attention the factual basis for its challenge to the responsiveness of Ansaldo's Exhibit 10. Its complete failure to do so requires dismissal of Sumitomo's claim regarding the responsiveness of Exhibit 10 due to lack of jurisdiction.

IV. DECISION

For the reasons set forth herein, it is hereby ordered that Ansaldo Honolulu JV's Motion for Dismissal and/or Summary Judgment with respect to Argument "C," Sumitomo's Claim Regarding Exhibit 10, is granted.

It is further ordered that Sumitomo's claim regarding Exhibit 10 is hereby dismissed for lack of jurisdiction.

DATED: Honolulu, Hawai'i, Aug. 13, 2011.



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