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

In the Matter of

KIEWIT INFRASTRUCTURE WEST CO.,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI'I,

Respondent.

In the Matter of

GOODFELLOW BROS., INC.,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI'I,

Respondent

and

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.,

Intervenor

PCX-2011-2

PCX-2011-3

(Consolidated Cases)

FINDINGS OF FACT, CONCLUSIONS OF LAW, and DECISION; EXHIBITS "A"-"B"

Hearing Dates:
May 16, 18, 20, 25, and 26, 2011

Hearing Location:
Office of Administrative Hearings
Department of Commerce and Consumer Affairs
335 Merchant Street, Suite 100
Honolulu, Hawai'i 96813

Senior Hearings Officer:
David H. Karlen

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On April 21, 2011, Petitioner Kiewit Infrastructure West Co. ("Kiewit") filed its Request for Administrative Hearing ("RFAH" or "Request") in this matter, which Request was assigned case number PCX-2011-2. Later on April 21, 2011, Petitioner Goodfellow Bros., Inc. ("GBI") filed its RFAH in this matter, which Request was assigned case number PCX-2012-3. The two matters were consolidated pursuant to the Prehearing Order filed April 29, 2011.

On May 9, 2011, Respondent Department of Transportation, State of Hawaii ("DOT") filed its Motion to Dismiss Petitioner's[sic] Request for Hearing, which motion concerned the Requests of both Kiewit and GBI. As set forth in the Prehearing Order, argument on this Motion was held on May 16, 2011.

At the conclusion of oral argument, the Hearings Officer granted the motion in part and denied the motion in part in an oral ruling. A formal written Order granting the motion in part and denying the motion in part was filed on June 2, 2011. A copy of this Order is attached hereto as Exhibit "A," and fully incorporated by reference herein.

During oral argument of the DOT's Motion to Dismiss on May 16, 2011, the DOT made an oral motion to dismiss portions of the claims of Kiewit and GBI on the ground that there is no jurisdiction to raise those portions of the claims in this proceeding due to the failure to exhaust administrative remedies by first presenting those claims in the protests to the DOT. At the conclusion of argument on this oral motion, the Hearings Officer denied the oral motion without prejudice. A formal written Order denying the oral motion was filed on

May 24, 2011. A copy of this Order is attached hereto as Exhibit "B" and is fully incorporated by reference herein.

The hearing commenced on May 16, 2011 following conclusion of the proceedings on the aforementioned two motions. The hearing continued on May 18, 20, 25, and 26, 2011. All parties filed post-hearing memoranda on May 27, 2011. GBI filed an amended post-hearing memoranda on May 31, 2011.

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 often submitted multiple copies of the same documents as their own respective exhibits. The Findings of Fact, however, may refer to only one exhibit even though the same document may be an exhibit of other parties as well. 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 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 date of the testimony. 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.

1. On December 9, 2009, the DOT issued a Request for Proposals ("RFP") for the state highway project identified as the Interstate Route H-1 PM Contraflow Lane, Phase 2, Vicinity of Radford Drive to Waiawa Interchange, Federal Aid Project No. NH-H1-1(260) and the Interstate Route H-1 Pearl City and Waimalu Viaduct Improvements, Phase 1, Federal-Aid Project No. BR-H1-1(263) ("Project"). The Project was a design-build project, and the RFP was issued as part of a competitive sealed proposal procurement process.

2. The RFP involved a two-step process. The first step determined the three highest qualified contractors to be invited to submit a design and price proposal.

3. The three highest (and only) qualified contractors were HDCC, Kiewit, and GBI.

4. The second step of the procurement, the Design and Price Proposal phase, involved submission of proposals from the three qualified contractors and the evaluation of those proposals by the DOT. The evaluation was based on two major criteria: (a) Design Documentation, and (b) Price.

5. Under the section heading "IV. DESIGN AND PRICE PROPOSAL," the RFP at page TP-39 stated:

> Any variations from the Scope of Improvements or any other section of this RFP, including Alternative Technical Concepts (ATC), shall be identified by the Contractor. Any variations, either perceived or noted by the Contractor shall not necessarily cause a proposal to be considered non-responsive. The Department will assess the variations during the evaluation process and score the proposal accordingly.

6. GBI's interpretation of this clause as applying to only "minor" variations is incorrect. It is not supported by the language of the clause, which does not distinguish between "major" and "minor" variations and no one from the State lead GBI to believe that the clause applied only to minor variations. Kline testimony, TR May 25, page 143, 9-15.

7. Under the sub-heading "C. DESIGN DOCUMENTATION" of heading "IV. DESIGN AND PRICE PROPOSAL" the RFP at pages TP-41 and TP-42 states:

> 1. Design Documentation Requirements
>
> The Design Documentation shall be done in sufficient detail to effectively present to the Department the scope of design and construction that is being priced and shall contain the following:
>
> a. Contractor's proposed Project Incrementation Plan. Except for utility relocation(s), each increment shall result in a completed highway facility that is operational in every aspect typical of any active highway and can be opened for use by the traveling public.
>
> b. Contractor's proposal of technical concepts such as additional traffic crossover, additional highway capacity, safety of the system, and flexibility of the system for future modifications to respond to changes in traffic demand.
>
> . . .
>
> h. Project Schedule—a critical path method schedule showing the sequence of design, permitting and construction work leading to the completion of each increment and the Project. . . This schedule shall include the following milestones with sufficient documentation:
>
> . . .

(2) 50% Design Submittal
(3) 100% Design Submittal

. . .

j. Anticipated Design Exception Requests shall be provided.

k. Detailed description of any deviations from Section 676 "Concrete Deck Repair".

l. Concrete deck sealer and corrosion inhibitor, including manufacturer's recommendations for installation.

Failure to submit any of the above information [referring to "Design Documentation Requirements], or submission of information that is deemed insufficient for evaluation shall not necessarily cause a proposal to be considered non-responsive. The Department will assess the information provided, or lack thereof, during the evaluation process and score the proposal accordingly.

8. The form of Proposal required by the RFP includes the following language at page P-2 of the RFP:

The undersigned bidder further agrees to the following:

1. If this proposal is accepted, it shall execute a contract with the Department to provide all necessary labor, machinery, tools, equipment, apparatus and any other means of construction, to do all the work and to furnish all the materials specified in the contract in the manner and within the time therein prescribed in the contract, and that it shall accept in full payment therefore the sum of the unit and/or lump sum prices as set forth in the attached proposal schedule for the actual quantities of work performed and materials furnished and furnish satisfactory security in accordance with Section 103D-324, Hawaii Revised Statutes, within 10 days after the award of the contract or within such time as the Director of Transportation may allow after the undersigned has received the contract documents for execution, and is fully aware that non-compliance with the aforementioned terms will result in the forfeiture of the full amount of the bid guarantee required under Section 103D-323, Hawaii Revised Statutes.

9. The overall Project initially consisted of two projects combined into one as stated in the RFP's Scope of Improvements: (a) the PM Contraflow Lane improvements; and (b) the redecking improvements for the Pearl City and Waimalu Viaducts.

10. After the RFP was originally issued, the DOT issued seven Addendums to the RFP:

11. Addendum No. 1 was dated January 15, 2010. It contained the following questions and responses on page 4 so that the exchange, originally initiated by one offeror, would be available to all offerors:

> Question: Will you award the project if the bids are over the budgeted $75 million?
>
> Response: The $75 million is based on the Department's Engineering Estimate and is not intended to be the budget limit.
>
> Question: Do you anticipate any right of way acquisition for the project (not for construction purposes)?
>
> Response: No.
>
> Question: The PM Contraflow Land will take away a minimum of one lane in the eastbound direction. Is it DOT's intent to widen the freeway by one lane in the eastbound direction? (since cannot decrease eastbound capacity). If yes, do the approved environmental documents include provisions for widening the freeway?
>
> Response: It is the intent of HDOT to not decrease the eastbound capacity. The eastbound shoulder land will be made available (if required) to accommodate the eastbound traffic during the PM peak period, in which a certain level of widening may occur along the shoulder lane.

HDCC Exhibit 2

12. Addendum No. 1 also modified the third criteria item of the seven criteria items for evaluation of design documentation at page TP-43 of the RFP. No subsequent addenda modified these criteria any further. As stated in Addendum No. 1, the seven criteria are:

> 1. Expediency of total project completion, including design and construction as indicated by the Project incrementation Plan and Schedule submitted as part of the Design Documentation, Section IV.C.1 (h).
>
> 2. All design documentation requirements have been addressed
>
> 3. Design documentation that meets or exceeds the project objectives (Section II) as determined by the Department.
>
> 4. Design documentation that develops a roadway plan with the least negative impact and the greatest positive impact to the existing roadway facilities, including flexibility of the contraflow system to adapt to future traffic demands.
>
> 5. Design documentation that the roadway design improvements provide the least operational and maintenance cost. Operational and maintenance costs shall be provided for a 20 year time frame including all necessary expenditures such as equipment, upgrades, etc.
>
> 6. Documentation, which addresses efficiency of incidence response through contraflow lanes, including contraflow of entire freeway during instances of emergencies.
>
> 7. Traffic management plans that minimize disruption to the vehicular traffic during construction in the Airport to Waikele corridor.

13. Addendum No. 2 is dated March 30, 2010. It changed the proposal submission date to June 9, 2010 and changed the deadline for submission of ATCs to April 29, 2010. HDCC Exhibit 3

14. Addendum No. 3 is dated April 22, 2010. It made the following question and response, among others, available to all offerors:

> Question: What happens if all the design exceptions cannot be obtained?
>
> Response: It will be at the discretion of HDOT to grant the required design exceptions based on the contractor's proposed design. If a design exception is not granted, the contractor will be required o revise the design accordingly to the acceptance of HDOT. Design Exceptions related to project requirements may also be discussed with FHWA at upcoming meetings to address viability.

Addendum No. 3, page 4, part of Kiewit Exhibit 1.

15. Addendum No. 4 is dated May 6, 2010. It made the following changes, among others:

> a. It amended page RFP-1 of the RFP to state that "Estimated project cost is below $90,000,000."
>
> b. It added additional work to the description of the PM Contraflow Lane, Phase 2, portion of the Project. Generally, this additional work pertained to rehabilitation of the eastbound lanes between Waiau Interchange and Kaimakani Street and rehabilitation of the roadway settlement on the eastbound lanes which resulted in the exposed overpass footing near the Halawa Interchange.
>
> c. It changed the due date for proposals to June 30, 2010, the due date for ATCs to June 1, 2010, and the due date for preliminary information to justify any anticipated Design Exceptions to May 26, 2010.
>
> d. It revised the language in the third paragraph on page TP-2 of the RFP to read:

It is the goal of the Department to have both the PM Contraflow Lane, Phase 2 and the Pearl City and Waimalu Viaduct Improvement, Phase 1 to be constructed at a cost below the budgeted amount of $90 million.

HDCC Exhibit 5

16. The $90 million amount was always a goal and never phrased as a price cap. Ho testimony, TR May 20, page 145, lines 9-16.

17. Addendum No. 5 is dated May 18, 2010. HDCC Exhibit 6

18. Addendum No. 6 is dated June 17, 2010. It made the following changes, among others:

> a. It changed the submission date for proposals to July 26, 2010 and changed the submission date for ATCs and Requests for Information (RFIs) to July 1, 2010.
>
> b. It revised the RFP concerning design exceptions to state:
>
> The Contractor shall prepare any Preliminary Design Exceptions required by its design concept and submit to the Department no later than 3:00 p.m., July 1, 2010. The intent of the Design Exceptions at this stage is to review the concept and not be fully approved.
>
> c. It made the following questions and responses available to all offerors:
>
> Question/Clarification Request: Joint between two segments of the bridge needs to be repaired after removal of the barriers. Do we need to project this joint for traffic loading?
>
> Response: Yes, longitudinal joints shall be addressed/protected so that they do not become safety hazard as well as maintenance problem. (Addendum No. 6, page 3).
>
> Question/Clarification Request: Do we need to secure the moveable concrete barrier to the surface if it[sic] used in the stationary reversible lane situation?
>
> Response: Securing the moveable concrete barrier depends on the buffer that will be provided. If the buffer is equal or greater than the deflection, there is no need to secure to the pavement. (Addendum No. 6, page 4).
>
> Question/Clarification Request: Does the 1 foot striped buffer from barrier face to the travel lane apply to moveable concrete

barrier only? If the moveable concrete barriers were used in the stationary system and not secured to the surface, does the 1 foot striped buffer still apply?

Response: The amount of buffer required will coincide with the amount of deflection required for the moveable concrete barrier.(Addendum No. 6, page 4)

Question/Clarification Request: What are the requirements for barrier on H-1?

Response: Temporary and permanent barriers shall meet TL-3 requirements conforming to NHCRP 350 testing at a minimum. (Addendum No. 6, page 5)

Question/Clarification Request: What are requirements for whether TL-3 or TL-4 is used for H1 on grade?

Response: Temporary and permanent barriers shall meet TL-3 requirements conforming to NCHRP 350 testing at a minimum. (Addendum No. 6, page 5)

Question/Clarification Request: What are the barrier requirements for Pearl City Viaduct since deck is thin?

Response: Temporary and permanent barriers shall meet TL-3 requirements conforming to NCHRP 350 testing at a minimum. Bridge deck slab or bridge elements supporting the fixed barriers may be designed to resist the forces imposed by the design force noted in Table A13.2-1... (Addendum No, 6, page 5)

Question/Clarification Request: What are the existing design exceptions for H-1?

Response: Included in this Addendum are the following:

a) Design Exception for H-1 Rehabilitation of the Eastbound Lanes (dated Jan. 2006)
b) Design Exception for H-1 Pearl city and Waimalu Viaduct Improvements, Phase 1 (dated Sept. 2009)

(Addendum No. 6, page 5)

HDCC Exhibit 7

19. Addendum No. 7 is dated July 5, 2010. HDCC Exhibit 8

20. The RFP allowed the three offerors to submit Alternative Technical Concepts ("ATC") to the DOT relating to the preparation of the design documents. TP-39. An ATC was required to be in writing and could be submitted up to 40 calendar days prior to the submittal deadline for all proposals. TP-39. The RFP was later amended to ultimately make the due date for submission of ATCs July 1, 2010. Addendum No. 6, page 1, HDCC Exhibit 3.

21. The RFP originally allowed the DOT to have up to three confidential meetings with an offeror to discuss the offeror's ATC submittals. TP-39. It was subsequently amended to allow up to four confidential meetings. Addendum No. 5, page 1, HDCC Exhibit 6.

22. The purpose of the ATC process was to promote innovation by the proposers and to maintain flexibility of design and construction. An ATC could propose a variation in the RFP's Scope of Improvements. TP-40.

23. The RFP established, at TP-40, the following delineation of what the DOT was looking for in an ATC:

> Proposed ATCs must not have an adverse effect on project quality and objectives as determined by the Department at its sole discretion. Proposed ATCs most likely to receive favorable consideration are those that are consistent with the Departments goals and objective, and more specifically, improve safety, maximize efficiency, incorporate technical innovation while not compromising safety, reduce project schedule, minimize traffic impacts, or otherwise improve the quality of the project or reduce the contract time, thereby benefiting the traveling public.
>
> Proposers must demonstrate that the proposed ATC was either used successfully on a similar project under comparable circumstances of otherwise demonstrate the reliability and efficiency of the proposed ATC. The Department will not consider any change that would require excessive time or cost for review,

evaluation, investigation, or that does not result in increased benefits or savings to the Department.

24. The DOT was allowed to respond to a completed ATC in one of the following ways:

> The ATC is approved; or
>
> The ATC is not approved; or
>
> The ATC is not approved in its present form, but may be approved upon satisfaction, in the Department's sole judgment, of certain identified conditions that must be met or certain clarifications or modifications that must be made; or
>
> The submittal does not qualify as an ATC, but is eligible to be included in the Proposal without an ATC (i.e. concept conforms to the basis scope of improvements and is consistent with other contract requirements).
>
> RFP at page TP- 41.

25. ATCs only apply at the proposal stage. An ATC approved by the DOT could be included as part of an offerors proposal submitted to the DOT. However, the offeror was not required to make the ATC part of its proposal even though the DOT had approved it.

26. Even if a proposer's ATC were approved, it did not necessarily mean that the ATC would not be counted against a proposer because the DOT may determine that it would not be best option in the overall Project context even though it was technically acceptable.

27. The offerors submitted several ATC requests to the DOT. After submittal of an ATC request, the process included discussions, correspondence, and meetings between the offerors and the DOT. Some ATCS were approved and some were not. Some ATCs resulted in the DOT responding to questions that needed to be conveyed to all offerors and were thus included in addenda to the RFP.

28. Except for the responses to questions that were then included in addenda to the RFP, each offeror's ATC submittals and the DOT's responses thereto were kept confidential.

29. Kiewit submitted at ATC clarification request and a formal ATC requesting reduction of lane width at certain points from 11 feet to 10.5 feet. These requests were denied. Kiewit Exhibits 5-B, 5-K, and 5-L.

30. The only one of HDCC's submitted ATCs that was approved by the DOT was ATC No. 3. In that ATC, the left-most off ramp lane at the Halawa off ramp was used to service both inbound through traffic movements and off-ramp traffic movements while the right-most off-ramp lane continued to service exclusive off-ramp traffic movements. This effectively added an additional through lane in this area. The ATC also provided an additional lane from the off ramp to Moanalua Road to the Aiea H-1 on ramp. HDCC Exhibit 11.

31. The Review Committee members did not have the DOT's responses to the ACT requests when they did their scoring., but they had sat in on the ATC meetings and knew which ones were approved or denied. Ho testimony, TR May 20, page 200, line 23, through page 201, line 10.

32. The RFP also provided that anticipated Design Exception Requests were to be included in the design documentation submitted with the proposals. RFP page TP-42

33. A Design Exception Request is a request to create or continue a design feature that does not meet the applicable criteria for standard highway design.

34. Prior to submittal of their proposals, the offerors were to submit preliminary information to justify any anticipated Design Exception Requests by May 26, 2010. The DOT was to respond by June 9, 2010. Addendum No. 4, page 2. HDCC Exhibit 5.

35. The RFP was later amended to require that "any Preliminary Design Exceptions required" by an offeror's design concept be submitted to the DOT by July 1, 2010. Addendum No. 6 at page 1, HDCC Exhibit 7. That addendum also added the following term with respect to Design Exceptions: "The intent of the Design Exceptions at this stage is to review the concept and not be fully approved."

36. While Design Exceptions are discussed before the proposals are finalized, they only apply after the contract is signed.

37. Inclusion of a Design Exception Request in an offeror's proposal does not guarantee that the Design Exception Request will be approved and thus made part of the proposal that is accepted by the DOT. Since this was a federally funded project, acceptance of the Design Exception Request by both the DOT and the Federal Highway Administration ("FHWA") was required. Acceptance of Design Exception Request by both of these agencies was never guaranteed.

38. Formal approval of a Design Exception request does not take place until after the proposals are submitted and a contract is awarded. The successful offeror therefore takes the risk that any Design Exception Request contained in its proposal will not be accepted. If a Design Exception Request is not accepted, the successful offeror is required to revise its design to eliminate all elements of the Design Exception Request.

39. At the time the proposals herein were being prepared, there were already two existing Design Exception Requests that had been approved by both the DOT and the FHWA. Copies of both of them were attached to Addendum No. 6 to the RFP.

40. All three offerors included Design Exception Requests in their respective proposals. Several of the same design exceptions were requested in each of the three proposals. HDCC Exhibits 30, 31, and 32.

41. The RFP requirement of a design speed of 60 miles per hour cannot be met under existing freeway conditions. All offerors needed a design exception with respect to that RFP requirement. Ho testimony, TR May 20, page 163, lines 6-12.

42. If the successful proposer did not obtain the design exception they needed with respect to the 60 miles per hour design speed, it would have to fix its design, at its own cost, to conform to the 60 miles per hour design speed. Ho testimony, TR May 20, page 181, line 23, through page 182, line 6.

43. GBI's final Preliminary Design Exception Report was submitted to the DOT on or after July 1, 2010. It listed five design criteria for which exceptions were requested. In particular, it listed a request for an exception for nonconforming stopping sight distances which occur at seven locations within the Project. To provide the minimum 570 feet of stopping sight distance for those seven locations would involve reconstruction of large sections of the freeway and the bridge deck which GBI "deemed beyond feasible limits established for this project." HDCC Exhibit 30.

44. This GBI final Preliminary Design Exception Report has not been approved by the DOT and/or the FHWA.

45. GBI had earlier submitted a preliminary design exception request that the stopping sight distance be reduced from 570 feet to 287 feet. This request was rejected by the DOT.

46. GBI then submitted an amended preliminary design exception request that the stopping sight distance be reduced from 570 feet to 440 feet. This amended preliminary design exception request was returned by a DOT e-mail on July 15, 2010 with the comment: "We have no further comments on GBI's question." Kline testimony, TR May 25, page 151, line 6, through page 153, line 11; GBI Exhibit 14.

47. GBI claims that its design exception request with respect to the stopping sight distance of 440 feet was approved by the State because it was not specifically rejected in the e-mail of July 15, 2010. Kline testimony, TR May 25, page 154, lines 4-17.

48. Design exception requests were never accepted by the DOT prior to submission of proposals. All offerors took the risk that their design exception requests would be rejected after the proposals were submitted. In addition, Addendum No. 6, issued on June 17, 2010, stated: "The intent of the Design Exceptions at this stage is to review the concept and not be fully approved." This limitation on approval pertains to the DOT, which was the only entity to receive the design exceptions requests prior to submittal of the proposals.

49. None of HDCC's design exception requests have received any negative responses from the DOT. Pascua testimony, TR May 26, page 173, lines 10-22. Under GBI's logic, the lack of a negative response to HDCC's requests would be a positive response, HDCC's requests would be approved as that is construed by GBI, and GBI would have no claim that HDCC's design exception requests amount to a variance from the requirements of the RFP. However, factually, that is not the case.

50. GBI's claim that it had an approved design exception request pertaining to stopping sight distance is unreasonable.

51. Mark Kline, deputy project manager for GBI on this project, testified that Ed Sniffen of the DOT told him at an ATC meeting that the budget for the project was a target and not a cap. Kline testimony, TR May 25, page 114, lines 10-20.

52. Mr. Kline also testified much more vaguely that at this meeting GBI's area manager asked, after the $90 million budget was announced by the DOT, whether the DOT would still award the contract to the best value contractor if that contractor's price was over $90 million and "in so many words" the DOT said "yes" it will find the funds to do that. Kline testimony, TR May 25, page 128, line 23, through page 129, line 25.

53. The Hearings Officer concludes for the following reasons that any implication in Mr. Kline's testimony or argument in any GBI filing that the DOT was bound to accept or would automatically accept the best value proposal if that contractor's price was over the $90 million budget no matter how much over budget is not credible:

a. Mr. Kline's testimony was vague and did not directly quote Mr. Sniffen on a topic very important to GBI since its proposal price was substantially over budget. Saying that Mr. Sniffen said something "in so many words" without saying the words is not credible.

b. Mr. Kline's declaration submitted by GBI in opposition to the DOT's Motion to Dismiss did not say the DOT committed to accept any over-budget proposal by the best value contractor no matter what the price. Instead, the declaration said at the end of paragraph 6 on page 3 that "the DOT explained that the pricing goal was not a hard and fast rule and could be exceeded if the other technical aspects of the proposal met the DOT's objective." (Emphasis supplied) This is not a statement that the pricing goal would always be exceeded for any attractive technical proposal.

c. The RFP at page RFP-4 states: "The State reserves the right to reject any or all proposals and to waive any defects in said proposals for the best interest of the public." Committing to accept a proposal no matter what the price would contradict this provision and/or would be a waiver of the right to reject. Such a change in the RFP would need to be in writing and distributed to all offerors. It would be clearly unreasonable for GBI to rely on an oral statement modifying, or purporting to modify, the terms of the RFP even assuming, which has not been proven, that Mr. Sniffen actually made the statement alleged by GBI.

54. Proposals were submitted on July 26, 2010. See HDCC Exhibit 9; Kiewit Exhibit 4 (HDCC proposal); Kiewit Exhibit 2 (Kiewit proposal); and GBI Exhibit 2; Kiewit Exhibit 3 (GBI proposal).

55. The DOT established a three member Review Committee to evaluate the Design Documentation proposals: Pratt Kinimaka, Emilio Barroga, and Paul Santo. Jamie Ho was an alternate member of that committee. DOT Exhibit 26.

56. In addition, the DOT established an eleven member Technical Advisory Committee to assist the Review Committee in evaluating the proposals. The Technical Advisory Committee was comprised of the following professional DOT employees with a wide range of experience and expertise in various areas relevant to the design and construction work contemplated by the RFP: Benton Ho (no relation to Jamie Ho), Christopher Dacus, Henry Kennedy, Donald Ornellas, Julius Fronda, Curtis Matsuda, Bryan Kimura, Karl Kunishige, JoAnne Nakamura, Herbert Chu, and Robert Shin, with James Fu, Ross Hironaka, Peter Chan and Brandon Hee serving as alternates. In addition, the Technical Advisory Committee was also advised by two FHWA representatives as well as DOT's outside engineering consultant, Chad McDonald of Mitsunaga & Associates.

57. Jamie Ho is the DOT Highways Division construction and maintenance engineer, overseeing statewide construction and maintenance. She also assists the Highways Division contracts engineer. She has been a civil engineer since 1988. She was very involved in this procurement process. Ho testimony. TR May 20, page 7, line 11, page 24 through page 8, line 3; page 8, line 21 through page 9, line 5.

58. Ms. Ho was an alternate member of the evaluation committee. Ho testimony, TR May 20, page 13, lines 6-7.

59. Emilio Barroga was the project manager for the Project during the time the proposals were being evaluated. Upon his retirement, Vincent Llorin took over as Project Manager. Mr. Llorin did not participate as a member of the Review Committee.

60. Ms. Ho explained to the members of the evaluation committee that it was up to them what scores they should give. She cautioned them that they shouldn't be too far apart on their scores, but she did not instruct them to stay close together. If they were far apart, that would mean that there might be something they were missing so that they should focus on that area to see what the source of the discrepancy was. This caution and explanation was only pertinent to their evaluation of one proposal. It was not pertinent to an evaluation between all three proposals. Ho testimony, TR May 20, page 25, lines 8-17; page 14, lines 3-15; page 169, lines10-24.

61. The Review Committee members exercised their independent judgment in scoring the proposals. They did not have to agree with the scores of the other members.

62. During the process of evaluating the proposals, the Review Committee held numerous meetings among themselves and with the Technical Advisory Committee. The

Technical Advisory Committee provided the Review Committee with advice and comments to the proposals that reflected each committee member's area of expertise.

63. The evaluation scores by the three DOT evaluators were the same with respect to every one of the design criteria items.

64. This was done because the evaluators chose to do the selection as a team rather than individually.

65. The three DOT evaluators brought different perspectives to the evaluation process—Mr. Kinimaka for operations, maintenance, and construction, Mr. Santo for design, bridge, and structural elements, and Mr. Barroga from project management. The evaluators thought it best to exchange ideas and come up with a consensus evaluation.

66. The three DOT evaluators decided to do a consensus evaluation on August 23, 2010.

67. The three DOT evaluators believed that this was a better approach because each of the evaluators had their own specialty and, in addition, they were hearing other people's points of view. The process would not have been more objective if they had made individual evaluations.

68. The specific numerical scores on the design criteria were done by group consensus. There were no unique individual written evaluations by members of the Review Committee.

69. The Technical Advisory Committee and the Review Committee had concerns about all of the proposals meeting the RFP requirements. As a result, the technical advisory team and the evaluation committee drafted Question No.1 on DOT Exhibit 25 to be presented

to all offerors at separate interviews on August 17, 2010. The DOT wanted to verify the offerors' intent to meet all of the RFP requirements.

70. The interviews were scheduled in accord with HRS §3-122-53 and page TP-44 of the RFP.

71. Question No. 1 asks: "Your proposal presentation states that you meet and, in some areas, exceed requirements of the RFP. If selected, is it your intention, as part of your proposal, to make the design improvements required during the design development to address any errors, omissions and clarifications presented by the design team to meet requirements of the RFP." DOT Exhibit 25

72. Both the Review Committee and the Technical Advisory committee came up with the questions to ask at the August 17 interviews and both committees were present at the interviews. Ho testimony, TR May 20, page 30, line 12, through page 31, line 6.

73. At their August 17, 2010 interviews, all three offerors answered "yes" to Question No. 1.

74. Based on the statements from the three offerors at the interviews on August 17, 2010, the DOT evaluators considered that any errors or omissions in the proposals regarding meeting the requirements of the Scope of Improvements would be covered by the successful proposer to meet the requirements of the RFP. From that point, the selection was done basically on which proposal had the best concept and what would work best for the State.

75. Because of the above approach, the evaluators felt they did not have to know about all of the errors, discrepancies, or variations between the proposals and the RFP.

76. Criteria Item No. 2 of the Evaluation Scoresheet states "All design documentation requirements have been met." Because the Review Committee was satisfied from the answers to Question No. 1 that all offerors would comply with the requirements of the RFP, the evaluators gave all of the proposals a score of seven on Criteria Item No. 2. This is the maximum number of points for Criteria Item No. 2.

77. The specific numerical scores for each of the six remaining evaluation criteria were determined by first assigning a score to one proposal. Scores for the other proposals were determined by comparing them to the proposal that had already been scored. Thus, the scores were relative to each other rather than being determined by comparison to a stand-alone scoring model. The base scores were from the different offers—no one offer provided the base scores for all six criteria. In determining these scores, the Review Committee relied upon input from the Technical Advisory Committee.

78. The comments from the members of both committees pertaining to the six remaining criteria items were collected on a master spreadsheet. Following the decision to award the same score to all proposals on Criteria Item No. 2, some of the comments on this master spreadsheet pertaining to the six remaining criteria items were crossed out. DOT Exhibit 18a.

79. The comments for each proposal, with the exception of the comments that were crossed out, were than transferred to an individual spreadsheet just for that proposal. DOT Exhibits 19 (HDCC), 20 (GBI), and 21 (Kiewit).

80. The spreadsheet had two other purposes. It identified any conflicts between the written part of the proposals and the plans. This was to help the DOT monitor during construction the situations where there were conflicts between the proposal and the design

requirements of the RFP. It also helped the Review Committee remember the good points and bad points in each offer.

81. The Review Committee also made a few outright mistakes on the evaluation spreadsheet. For example, some comments were placed under Criteria Item No. 4 instead of Criteria Item No. 3. Kiewit appears to assume that an error of one point on Criteria No. 4 is worth a certain percent, i.e., 8%, and that if the comment had been placed on Criteria Item No.3 HDCC would have lost three more points on Criteria No. three, three points being 8% of the maximum 40 points for this criteria. However, the points for all evaluation criteria, except Criteria No. 2, were assigned by means of the previously described baseline that did not appear to be based on percentages.

82. No written explanation of this evaluation and scoring process, including the consensus scoring, the assignment of the same (maximum) score on Criteria Item No. 2 to all proposals, the baseline method of scoring the remaining six criteria items, or the editing of the master spreadsheet to produce the individual proposal spreadsheet was ever placed in the contract file.

83. But for review of documents produced by the DOT on or around May 9, 2011, one week before the commencement of the hearing herein, and the examination of witnesses from the DOT at the hearing, none of the offerors would have known about any of the aforesaid elements of the evaluation and scoring process detailed above.

84. The two FHWA representatives prepared their own evaluation sheets where they made comments and assigned scores for each of the seven criteria items. HDCC Exhibit 38 (Nickelson); HDCC Exhibit 39 (Galicinao).

85. There was no evidence that either Mr. Galicinao or Mr. Nickelson knew about the DOT's consensus scoring, the assignment of the same score on Criteria Item No. 2 to all proposals, the baseline method of scoring the remaining six criteria items, or the editing of the master spreadsheet.

86. Mr. Galicinao's evaluation spreadsheet was available to the DOT Review Committee prior to the time it evaluated the three proposals and may have been considered by that Committee.

87. On Mr. Galicinao's evaluation spreadsheet, there were very few deductions from the maximum points available for any of the criteria items. He assigned HDCC a total score of 127 points (out of a maximum 130 points), and he assigned both Kiewit and GBI a total of 126 points. HDCC Exhibit 39.

88. Mr. Nickelson's evaluation spreadsheets were, on their face, more discerning and particular about the scores assigned to the individual criteria items than Mr. Galicinao's evaluation spreadsheets. He assigned GBI a total score of 113 points, the same total score GBI received from the Review Committee. He assigned Kiewit a total score of 87 points, a score substantially lower than the 104 points Kiewit received from the Review Committee. He assigned HDCC a total score of 101 points, some 15 points lower than the total score of 116 assigned to HDCC by the Review Committee.

89. If the Review Committee had assigned the same scores to the three proposals that Mr. Nickelson had used on his spreadsheet, those scores in combination with the scores based on the prices of the proposals would still have shown HDCC receiving the highest overall score of all the proposals.

90. The DOT evaluators took their responsibilities seriously. The DOT allowed adequate time for its two committees to evaluate the proposals

91. Members of the Review Committee were aware that the design portion of the HDCC proposal contained an assertion that HDCC's "Construction Cost is less than $90 million." At the time the evaluators scored the proposals, however, they were not aware of the actual price submitted in HDCC's proposal, and they were not aware of the prices of the other proposals. Price was not discussed at the evaluation meetings and did not play any role in the evaluations by the members of the evaluation committee.

92. Of a maximum 130 evaluation points for design documentation, HDCC received 116 points, GBI received 113 points, and Kiewit received 104 points. DOT Exhibit 18

93. The second phase of the scoring was the Price Proposal. The Price Score was evaluated in accord with the formula dictated by HAR §3-122-52(d).

94. For the Price Proposal phase, HDCC was given 70 points, Kiewit received 61.4 points, and GBI received 52.6 points. DOT Exhibit 18.

95. Kiewit asserts that if it had been allowed to submit a design with the variations shown in HDCC's proposal, its price would have been lower by slightly more than $12 million. Kiewit Exhibit 24..

96. Despite having HDCC's proposal as well as its total score for design documentation prior to filing their protest letters in November of 2010, neither Kiewit nor GBI produced any credible testimony, expert or otherwise, as to what, from their viewpoint, would have been a reasonable total score for the design documentation portion of any of the three proposals.

97. There were two non-DOT persons who produced scores for the design documentation portion of all of the proposals. Despite all of the alleged problems with the DOT's scores, the DOT scoring is more discerning than Mr. Galicinao's scoring. In addition, despite all of the alleged problems with the DOT's scores, its total score for GBI was exactly the same as Mr. Nickelson's total score for GBI, its total score for HHDC was not significantly different from Mr. Nickelson's total score for HDCC, and its total score for Kiewit was far more generous to Kiewit than Mr. Nickelson's total score for Kiewit. The Hearings Officer concludes that the DOT's total scores for design documentation for GBI, HDCC, and Kiewit were reasonable even though there are alleged problems with the process by which the DOT reached those scores.

98. If HDCC had been assigned by the DOT with the total score for design documentation Mr. Nickelson gave HDCC, i.e., ten points lower than the DOT's score, HDCC would still have received more total points than GBI or Kiewit for the combined design documentation and price scores.

99. The complete results of the evaluations of the three proposals were as follows: HDCC proposed a price of $84,000,000 and received 186.0 total evaluation points; (2) GBI proposed a price of $111,800,000 and received 165.6 total evaluation points; and (3) Kiewit proposed a price of $95,798,260, and received 165.4 total evaluation points. DOT Exhibit 18.

100. On September 1, 2010, the DOT sent HDCC an intent to award letter with a formal letter of award to follow subject to concurrence of the Federal Highways Administration and funding availability. DOT Exhibit 27

101. On September 1, 2010, the DOT sent Kiewit and GBI letters informing them that they were not considered the best value offeror and that an intent to award letter had been sent to another company. DOT Exhibits 28 and 29.

102. On October 28, 2010, DOT sent HDCC a letter stating that HDCC was awarded the contract in the amount of $82,050,000. HDCC's proposal was adjusted downward in accord with the terms and conditions of Section 1501 of the project specifications and with the confirmation that HDCC's project design did not require utility relocation. HDCC Exhibit 24.

103. On November 1, 2010, the award the DOT award to HDCC was posted on-line. GBI Exhibit 1C.

104. There is a signed contract document in place that says there is a binding contract as soon as the money is available.

105. On November 1, 2010, GBI, through its attorney, requested access to all Project records including, but not limited to, documents pertaining to evaluation methodology, scoring, and the evaluation process. GBI Exhibit 1B.

106. The DOT responded to GBI's document request of November 1, 2010, by providing GBI access to some of the Project records on or about November 2, 2010. GBI Exhibit 1H at page 2.

107. By a letter to the DOT from its attorney dated November 17, 2010, GBI repeated its general request for all project documents dated November 1, 2010, and, in addition, specifically requested all ATCs submitted by other offerors as well as Kiewit's bid protest. GBI Exhibit 1H.

108. After Kiewit was informed of the award to HDCC, Kiewit requested a debriefing session with DOT. The debriefing session was held on November 9, 2010.

109. At this debriefing session, Kiewit attempted to discuss its concerns with respect to the alleged variations between the HDCC proposal and the RFP, but the DOT said it was not at liberty to discuss that with Kiewit.

110. At the Kiewit debriefing session, the DOT explained its concern with the zipper system that was one-third of the project. The DOT did not want the zipper because of the maintenance cost and need to move it daily.

111. Prior to submission of Kiewit's protest, the DOT provided Kiewit with a copy of the general summary of the documentation and price scores and a general summary of the breakdown of the design documentation score for each proposal by the scores for each of the seven evaluation criteria. DOT Exhibit 18 (first two pages). In addition, prior to the submission of its protest, Kiewit was provided with a copy of the evaluators' "pros/cons" sheet for Kiewit's proposal. DOT Exhibit 21 Kiewit had this pro/con sheet at the debriefing session. At this time, Kiewit was not provided with the "pros/cons" for any other proposal.

112. In its protest letter of November 16, 2011, Kiewit did not complain about any failure of the DOT to respond at the debriefing session to Kiewit's concerns with respect to HDCC's proposal or any failure of the DOT to provide Kiewit with the pros/cons sheet for HDCC or GBI.

113. After GBI was informed of the award to HDCC, GBI requested a debriefing session with DOT. The debriefing session was held on November 16, 2010.

114. Prior to GBI's debriefing session, the DOT at first provided GBI only with a copy of the summary of the results of the proposals and the "pros/cons" for GBI's proposal.

However, the day before the debriefing session, GBI was provided with copies of the pros/cons sheets for both Kiewit and HDCC. Llorin testimony, TR May 16, page 257, line 24, to page 258, line 6, and page 258, lines 16-19; DOT Exhibit 18 (first two pages); DOT Exhibit 19-21; GBI Exhibit 73, page 67.

115. There was no evidence that Kiewit asked the DOT for any additional documents before it filed its protest letter on November 16, 2010.

116. On November 16, 2010, Kiewit filed a letter with the DOT protesting the award of the contract to HDCC.

117. At the time Kiewit submitted its protest letter, Kiewit knew that the DOT had listed as a "con" for Kiewit's proposal the ITS and CCTV aspect of the project. Prock testimony, TR May 16, page 296, line 22, to page 297, line 1; DOT Exhibit 21.

118. The Kiewit protest letter called into question five specific situations where it claimed the HDCC proposal did not meet mandatory requirements in the Technical Provisions of the RFP:

a. Total laneage currently provided during AM and PM peak conditions was not to be reduced. HDCC Plan Sheets Nos. 40, 41, 59, 60, 61, and 62 were alleged to fail to meet the requirements at TP -7, para II.C.2.a.2)a), which provides in part: "The barriers for AM and PM contraflow lanes shall be installed to isolate AM and PM Contraflow lane(s) from the rest of the travel way, permanently with a fixed barrier system or when in use with a movable system, such that the total laneage currently provided during AM and PM peak conditions is not reduced (including currently used shoulder lanes."

b. Mandatory minimum lane widths were not maintained. HDCC Plan Sheets Nos. 10, 13, and 22 were alleged to fail to meet the requirements at TP-8, para II.C.2.a.2)a), which provides in part: Minimum width of travel lanes shall be 11 feet...Minimum of 1 foot striped buffer from barrier face to the travel lanes shall be provided.

c. Minimum number of operational travel lanes during work hours were not maintained. The HDCC proposal at Section 7, pps. 6-7 is alleged to show only one lane of traffic n the out bound direction during Construction Phase 2 and only one lane of traffic in the outbound direction during Construction Phase 4 and this is alleged to fail to meet the requirements at TP-12, Para. II.C.2.j. which provides: "A minimum of two inbound and two outbound travel lanes must be operational during work hours, excluding requirements noted during AM Zipper deployment.". .

d. The required buffer width for moveable, unsecured barrier was not maintained. HDCC Plan Sheets are alleged to violate the technical provisions as clarified by Addendum No. 6.

e. Disallowed openings in barrier runs are used. HDCC's Plan Sheets Nos. 42, 56, 60, and 61 are alleged to use cones or removable delineators to separate oncoming freeway traffic in violations of the provisions at TP-7, para II.C.2.a.2)a) that provide in part: The barriers for AM and PM Contraflow lanes shall be installed to isolate AM and PM Contraflow lanes from the rest of the travel way.

f. In connection with the issue of the 11 foot lane width requirement and one foot buffer requirement in Kiewit's protest letter. Kiewit asserted that the DOT had insisted that these widths were mandatory requirements when the DOT responded to Kiewit's earlier ATC.

g. Kiewit also asserted that HDCC received a higher score than Kiewit for Criterion No. 3 (Design documentation that meets or exceeds the project objectives as determined by the Department) such that the scoring of that criterion was "completely illogical" given that HDCC's proposal failed to comply with the aforesaid allegedly mandatory elements of the RFP while Kiewit's proposal did comply.

119. Kiewit did not allege in its protest letter that HDCC's proposal failed to meet any mandatory 60 mph speed limit requirement in the RFP.

120. Kiewit's proposal did not meet design requirements of a design speed of 60 miles per hour in every case. Prock testimony, TR May16, page 300, line 19, to page 301, line 5.

121. HDCC's plan sheets 40 and 41 illustrate HDCC's proposal near the Waiawa interchange crossover. HDCC's concept was to use one inbound lane as a contra-flow outbound lane during afternoon operations. At the same time, the existing inbound shoulder lane would be activated to provide an additional inbound lane. The existing inbound shoulder lane is not currently used during the afternoon periods. Kiewit is incorrect in claiming that HDCC's proposed PM operations shown on plan sheets 40 and 41 show a reduction in the total inbound lanes from five to four in variation of the requirements in the RFP.

122. With respect to HDCC Plan Sheets Nos. 59, 60, 61, and 62, HDCC's plans were to have the existing off ramp lane at the Halawa off ramp reconfigured to service both inbound through traffic movements and off-ramp movements. Presently existing conditions are four in-bound through lanes and two off-ramp lanes. HDCC's proposal reconfigures the left-most off ramp lane to service both inbound through traffic and off-ramp traffic. The right-most off-ramp lane continues to exclusively service off-ramp traffic.

123. During afternoon contra-flow operations, the left-most inbound lane would be used as the outbound contra-flow lane. Loss of this inbound through traffic. In addition, the inbound shoulder lane in this area, not currently being used in afternoon operations, would be activated during afternoon operations.

124. HDCC's plans in this respect were approved in HDCC's ATC No. 3.

125. Kiewit is incorrect in claiming that HDCC's proposal shows a reduction in laneage from six lanes to 5 as a variation to the requirements in the RFP.

126. As a result of the DOT interview with HDCC on August 17, 2010, HDCC submitted, on August 19, 2010, revised plates 2 and 4. HDCC Exhibit 17. HDCC's traffic control plans on plan sheets nos. 170 to 186 show the required number of operational lanes being maintained during working hours. TP Section IV.C.4 on page TP-44 of the RFP, Interview with Contractors, allows the contractor who obtains the award to incorporate into its design any clarifications presented in this interview

127. The clarifications provided in this interview can be incorporated into HDCC's design. Kiewit may be correct in claiming that the HDCC proposal initially showed an inadequate number of lanes during Construction Phases 2 and 4. However, HDCC was able under the terms of the RFP to clarify its proposal in this regard and thereafter its proposal did not on vary from the requirements of the RFP with respect to the minimum number of operational travel lanes required during work hours.

128. The typical median section at overpass detail on HDCC's Plan Sheet No. 22 does not clearly state that the travel lanes would be a minimum of 13 feet. HDCC did actual field measurements that demonstrated that the required width of the traffic lanes can be achieved. While Kiewit may be correct in its criticism of HDCC Plan Sheet No. 22, HDCC can build its project with the required lane width.

129. HDDC Plan Sheets showing a "Typical Section" or a "Typical Median Section at Overpass: were based on reference sheets supplied by DOT and reflect information on those sheets. Actual field measurements by HDCC were taken to ensure that the HDCC plan was workable, buildable, functional, and meets the requirements of the RFP. Kiewit is

incorrect in claiming that HDCC's Plan Sheets Nos. 10 and 13 show a complete failure to met the lane width and buffer width requirements of the RFP. However, the testimony showed that there may be some instances where the buffer width may not be sufficient without further design efforts.

130. HDCC's use of delineators in some selected locations in the Project to mark off the contraflow lane from the immediately adjacent travel lane and oncoming traffic in that travel lane is a variation from the RFP's requirement of a continuous barrier between these two lanes.

131. Kiewit prepared a list of alleged cost savings Kiewit would have been able to achieve if it had submitted its proposal with the same variations as contained in HDCC's proposal. The total estimate of the estimate was $12,030,240. The estimate was prepared under the direction, supervision, and control of Mr. Ben Prock, Kiewit area manager for Hawaii. Prock testimony, TR May 16, page 290, lines 9-23; Kiewit Exhibit 24.

132. GBI did not prepare any list of alleged cost savings GBI would have been able to achieve it had submitted its proposal with the same variations as contained in HDCC's proposal. GBI's claim that the amount would be very large was not supported by any evidence that would establish with any degree of reliability what that amount would be.

133. On November 23, 2010, GBI, through its attorney, filed a letter with the DOT protesting the award of the contract to HDCC.

134. The GBI protest letter called into question several aspects of HDCC's proposal:

a. HDCC allegedly failed to meet the minimum lane width requirement of 11 feet and the minimum 1 foot buffer requirement. While stating that violation occurred at

"numerous locations in the construction area," GBI only referred to HDCC Plan Sheet No. 22.

b. HDCC's proposal used unsafe discontinuous barriers, e.g., removable delineators, to separate lanes of oncoming traffic. HDCC Plan Sheets Nos. 22, 42, 56, 60, and 61 are alleged to be evidence of this claim.

c. HDCC's proposal is impermissibly based upon a minimum design speed of 50 mph instead of the required 60 mph minimum design speed. GBI points to Section 2.7 of HDCC's proposal as evidence supporting its claim.

d. HDCC's proposal reduces capacity during both peak and off-peak periods Section 4 of HDCC's proposal is alleged to be evidence supporting this claim

e. An aggregation of alleged safety concerns is the basis of another allegation against HDCC's proposal. GBI asserts that HDCC created unsafe conditions because:

i. No plastic delineators to warn drivers of upcoming bridge pier hazard; Section 6 of the HDCC proposal is cited by GBI here.

ii. Use of a shoulder lane as a general purpose lane when it is not continuous but instead abruptly cuts off at off-ramp locations. HDCC Plan Sheets Nos. 48-52, 54-55, 57-59, and 62-65 are cited by GBI here.

iii. Less than 11 foot wide lanes at overcrossing.

iv. Less than 1 foot buffer between lanes and barriers at overrossings;

v. Discontinuous barriers separating Contraflow lanes and overcrossings;

vi. Routing same-direction traffic around both sides of overcrossing piers;

vii. Single-lane construction at Mahiko Pedestrian Overpass

viii. Highest potential for barrier deflection due to unpinned TL3 barrier use;

ix. Conversion of dedicated H-201 inbound off-ramp lane to a shared through-lane.

No portion of HDCC's proposal and no HDCC plan sheets are cited in support of Items e(iii) through e(ix) above.

f. In connection with item a above, GBI also alleged that HDCC was allowed to use lane widths less than 11 feet while GBI's submitted ATC requesting deviations in land width specifications was denied by the DOT.

135. The Findings of Fact set forth above with regard to the claims of variations in Kiewit's protest letter apply equally to Items a, b, d, and most of e in GBI's protest letter.

136. GBI's claim regarding the 60 mph design speed limit is exclusive to GBI's protest.

137. On December 6, 2010, HDCC filed a letter with the DOT responding to the Kiewit letter of protest. DOT Exhibit 12.

138. On December 7, 2010, HDCC filed a letter with the DOT responding to the GBI letter of protest. DOT Exhibit 13

139. On December 21, 2010, GBI, through its attorney, filed a letter with the DOT claiming that Kiewit should not be awarded the subject contract should the protests against the award to HDCC be successful. DOT Exhibit 24.

140. On January 5, 2010, Kiewit filed a letter with the DOT responding to the challenge in GBI's letter of December 21, 2010. DOT Exhibit 15.

141. On April 15, 2011, the DOT issued a letter denying the protests of both Kiewit and GBI and affirming the award to HDCC. DOT Exhibit 16

142. On April 21, 2011, Kiewit filed its RFAH with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, challenging the decision in the DOT's letter of April 15, 2011.

143. On May 9, 2011, Kiewit filed its Hearing Memorandum in this matter. In addition to the issues raised in its protest letter of November 16, 2010, Kiewit's Memorandum raised the following new issues:

a. DOT's three evaluators gave identical scores to each offeror for all seven design documentation criteria while failing to document each individual evaluator's explanation, in violation of HAR §3-122-52 (c). Kiewit Hearing Memorandum at pages 17-18.

b. Kiewit's score was lowered for (a) failing to include an item not called for by the RFP, namely additional ITS or CCTV components; and (b) including a design concept approved according to a timely submitted ATC. Kiewit Hearing Memorandum at pages 17, 29-30.

c. HDCC's proposal contains variations of mandatory design requirements that the DOT rejected when Kiewit timely submitted those variations as ATCs. Kiewit Hearing Memorandum at pages 24-28. At page 25 of its Hearing Memorandum, Kiewit asserts that it timely submitted ATCs concerning "several of these concepts" referring to the five design issues enumerated in its protest letter and repeated at page 24 of its Hearing Memorandum. However, Kiewit's protest letter brought up only once the subject of improper design variations in the face of DOT rejection of the same variation in Kiewit's ATC proposal. That was in connection with the issue of the eleven foot lane width and one foot buffer zone (Kiewit's "Non-Responsive Issue No. 2). All other allegations concerning rejection of Kiewit's ATCs are new and were not previously raised in its protest letter.

144. Also on April 21, 2011, GBI filed its RFAH with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, challenging the decision in the DOT's letter of April 15, 2011.

III. CONCLUSIONS OF LAW

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

A. JURISDICTION

2. The discussion of jurisdiction in this section of the Conclusions of Law is concerned solely with claims by Kiewit and GBI that were raised prior to the start of testimony at the hearing on May 16, 2011. All of the claims discussed herein are one for which the DOT's prehearing Motion to Dismiss was denied in the Order filed June 2, 2011. To the extent that Kiewit's and/or GBI's post-hearing memoranda raise additional claims, the jurisdictional issues related to those claims will be discussed in a later portion of these Conclusions of Law.

3. Under the Procurement Code, HRS Chapter 103D, the hearings examiner has the jurisdiction to consider and decide the protests of Kiewit and GBI. 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 governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.[1]

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

> The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules,

[1] This hearing involves Section 103D-701.

> and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

In other words, the hearings officer can only make a decision about the "determinations" of the chief procurement officer, and the chief procurement officer can only make "determinations" about complaints brought before that officer. The statute literally leaves no room for the hearings officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer. [2]

5. The situation here is analogous to the contract controversies that were the subject of Koga Engineering & Construction, Inc., v. State of Hawaii, 122 Haw. 60, 222 P.3d 979 (2010). The contractor there brought a claim for additional compensation due to allegedly defective contract plans. After the contractor exhausted its administrative remedies on this claim, it filed suit. After suit was filed, an additional dispute arose between the contractor and the State regarding the contract retainage. The contractor added an additional claim to the lawsuit concerning the retainage without first filing an appropriate administrative claim on this additional issue. Even though the retainage claim pertained to the same contract that was involved in the claim for additional compensation on account of allegedly defective plans, the Hawaii Supreme Court eventually held that there was no jurisdiction to consider the retainage claim in the lawsuit. Jurisdiction was lacking over the retainage claim because of the failure to exhaust administrative remedies for that particular claim.

6. Similarly, in this proceeding, absent some factor that excuses the inclusion of any claim in the original procurement protests of Kiewit and GBI, claims protesting the award of the contract to HDCC cannot be brought here if they were not included in the

[2] It should be noted that HRS §103D-704 provides that this is Kiewit's and GBI's exclusive remedy.

original protests. There would be no jurisdiction to consider these "new" claims because of the failure to exhaust administrative remedies.

7. The question of lack of jurisdiction can be raised at any time in these proceedings. If not raised by the parties, it can be raised by the hearings officer *sua sponte*, as jurisdiction cannot be conferred by the stipulation, agreement, or waiver of the parties. Captain Andy's Sailing, Inc. v. Department of Natural Resources, 113 Haw. 184, 193-194, 150 P.3d 833, 842-843 (2006); Koga Engineering & Construction, Inc., v. State of Hawaii, supra, 122 Haw. at 84, 222 P.3d at 1003.

8. Kiewit and GBI were entitled to notice and an adequate time in which to prepare arguments against the DOT's position on jurisdiction. Koga Engineering & Construction, Inc. v. State of Hawaii, supra.

9. In this case, Kiewit and GBI were given notice of the DOT's position on lack of jurisdiction as to specific claims or arguments of Kiewit and GBI by means of the DOT's oral motion to dismiss for lack of jurisdiction that was argued on May 16, 2011. TR May 16, page 63, line 15, through page 66, line 17. Since Kiewit and GBI should, at the very least, have known the general law on jurisdiction, this itemization by the DOT on May 16, 2011 was sufficient notice to Kiewit and GBI of the specific jurisdictional issues, and Kiewit and GBI had ample opportunity in the hearing on that day as well as in the hearings of May 18, May 25, and May 26, 2011, to attempt to counter DOT's claims of lack of jurisdiction. See also Order denying the DOT's oral motion, filed May 24, 2011, Exhibit "B" hereto.

1. Kiewit's Pre-Hearing Memorandum Filed May 9, 2011

10. Pursuant to the terms of the Pre-Hearing Order, Kiewit filed its Pre-Hearing Memorandum on May 9, 2011. This Pre-Hearing Memorandum raised several issues that were not raised in Kiewit's protest letter of November 16, 2010.

a. The three evaluators gave identical scores to each offeror

11. The first new issue is Kiewit's claim that DOT's three evaluators gave identical scores to each offeror for all seven design documentation criteria and that this method of evaluation is prohibited by HAR §3-122-52(c).[3] This contention appears to be connected to a more general contention that the DOT failed to document each individual evaluator's explanation of their ranking determination. Kiewit Pre-Hearing Memorandum, pages 17 and 18. The DOT gave "fair warning" that this claim would be subject to a jurisdictional challenge. TR May 16, page 63, lines 15-19.

12. Prior to filing its RFAH, Kiewit had no information that should have put it on notice that the three DOT evaluators gave identical scores to each offeror for all seven design documentation criteria. The documents provided by DOT to Kiewit before Kiewit's protest letter of November 16, 2010 was filed do not provide sufficient information to give Kiewit such notice. However, Kiewit did receive its own pros/cons sheet, DOT Exhibit 21, prior to the time it filed its protest letter, so it knew or should have known that it had not received any pros/cons sheets for either HDCC or GBI. Further, it should have known that its own pros/cons sheet was not, on its face, a written explanation of each evaluation committee member's ranking determination for Kiewit, much less for HDCC and/or GBI.

[3] Kiewit misidentifies this provision as HRS §3-122-52(c)

13. HAR §3-122-52(c)(2) provides in relevant part that: "The written ranking evaluations or explanations shall be available for public inspection after the award of the contract is posted." In addition, HAR §3-122-58 provides for the contracting file to be available to the public (except for some proprietary documents of an offeror). However, nothing in these regulations requires that the evaluators' documentation that is the subject of this part of Kiewit's claim be voluntarily made available to Kiewit, or the public, in the absence of a request for such documentation.

14. In light of the limited documentation provided by the DOT to Kiewit, as noted above, Kiewit knew or should have known that written explanations of the ranking determinations by each member of the evaluation committee had not been provided. There is no evidence, however, that Kiewit complained about this or that Kiewit made any requests for documentation that included documents referred to in HAR §3-122-52(c).

15. Kiewit' failure to bring up this issue in its protest letter of November 16, 2010, can therefore not be excused. If there had been a request, Kiewit would have either received the documentation or it would have had an additional claim in its protest letter that the documentation had not been made available despite the request. Even without making a request, Kiewit knew it had not been provided with the documentation and could have made that an issue in its protest letter. The Hearings Officer concludes under these circumstances that this issue in Kiewit's Hearing Memorandum must be dismissed for lack of jurisdiction.

b. HDCC gained an advantage because its offer contained concepts that were also contained in ATC's that had been submitted by Kiewit but rejected by the DOT

16. Kiewit claims it followed the rules by submitting ATC's to propose several concepts that varied the project design requirements, but these ATC's were rejected.

According to Kiewit, HDCC, on the other hand, was allowed to submit the same or similar concepts varying the project design requirements but never submitted an ATC concerning these requirements. See Kiewit Pre-Hearing Memorandum at pages 24-29. The DOT gave "fair warning" that this claim would be subject to a jurisdictional challenge. TR May 16, page 64, lines 7-17. Kiewit also received an additional detailed "fair warning" from the Hearings Officer regarding all claims based on the ATCs except for the one specific challenge on that basis in the Kiewit protest letter. TR May 16, page 81, line 22 through page 82, line 19.

17. At the time it filed its protest letter, the HDCC proposal was available to Kiewit, and Kiewit was able to make detailed allegations about the alleged shortcomings of the HDCC proposal in its protest letter. At the same time, Kiewit also had available its own ATCs and the DOT's responses to those ATCs. Kiewit was therefore able, before filing its protest letter, to compare its proposal to HDCC's proposal and to determine where HDCC's proposal contained elements that had been allegedly included in a Kiewit ATC that had been rejected by the DOT.

18. Kiewit did not need to have copies of HDCC's ATCs before asserting this claim. Since Kiewit knew before November 16, 2010 that the HDCC proposal contained several elements allegedly proposed in Kiewit's ATCs and rejected by the DOT, there were three possibilities:

i. HDCC had proposed the elements in question in its own ATCs that had been accepted by the DOT; or

ii. HDCC had proposed the elements in question in its own ATCs that had been rejected by the DOT; or

iii. HDCC had not proposed any ATCs on the elements in question.

Based upon what was available to Kiewit on November 16, 2010, it made no difference which of these possibilities, singly or in combination, had occurred. No matter what had occurred, or not occurred, with respect to HDCC's ATCs, the documents available to Kiewit gave Kiewit the basis to claim that Kiewit was being treated unfairly because HDCC's offer had been accepted while the same concepts used by HDCC were rejected by the DOT when Kiewit proposed them in its own ATC's.

19. HDCC correctly notes in its closing brief at page 12 that the only mention of a DOT response to a Kiewit ATC proposal in Kiewit's protest letter was one pertaining to the 11 foot lane width requirement and the one-foot buffer requirement in the RFP.

20. All other claims by Kiewit that HDCC gained an advantage because it was allowed to submit variations on design requirements when Kiewit's ATCs requesting variations were denied by the DOT must therefore be dismissed for lack of jurisdiction.

c. The evaluation of Kiewit's proposal considers evaluation criteria not set forth in the RFP

21. At page 29 of its Pre-Hearing Memorandum, Kiewit asserts that the DOT's evaluation of its proposal illegally considered evaluation criteria not contained in the RFP. Two specific allegations are made. First, Kiewit received a "con" factor for not including additional ITS or CCTV components in its proposal when additional ITS or CTV components were not included as an evaluation factor. Second, Kiewit received a "con" factor for its proposal concerning a shoulder lane on the Pearl City viaduct when it had a DOT-approved ATC allowing use of that shoulder line. The DOT gave "fair warning" that this claim would be subject to a jurisdictional challenge. TR May 16, page 64, lines 18-21

22. The DOT provided Kiewit with Kiewit's own "pro/con" spreadsheet prior to the filing of Kiewit's protest letter of November 16, 2010. It had its own DOT-approved

ATC at that time as well. Nothing in this claim depends upon documents provided later by the DOT, so there was no reason Kiewit could not have raised this claim in its protest letter.

23. Kiewit's claim that the evaluation of its proposal illegally considered evaluation criteria not set forth in the RFP, as presented at page 28-29 of Kiewit's Pre-Hearing Memorandum, must therefore be dismissed for lack of jurisdiction.

2. GBI's RFAH filed May 21, 2011

a. Written explanations of the ranking determinations of each member of the evaluation committee were not placed in the procurement file.

24. According to GBI, the evaluation process violated the Procurement Code because required written explanations were not placed in the procurement file and made available for public inspection. This is alleged to violate HAR §3-122-52(c). GBI RFAH at page 20. The DOT gave "fair warning" that this claim would be subject to a jurisdictional challenge. TR May 16, page 65, lines 21, through page 66, line1.

25. The administrative regulation in question requires that the members of the evaluation committee explain their ranking determination in writing "which shall be placed in the procurement file." See also HAR §3-122-58, making the file available for public inspection upon posting of award. The evidence shows that GBI made two written requests for documents prior to the deadline for submission of its protest letter. It appears that the DOT first gave GBI its own pros/cons spreadsheet and then later produced to GBI the individual pros/cons descriptions for HDCC and Kiewit. See, e.g. GBI Exhibit 5. The DOT claims that these are individual spreadsheets are part of the "written ranking explanation by the Review committee members to support the scores given to the various proposals." DOT Closing Brief at page 20.

26. Based upon this statement by the DOT, GBI's claimed violation of HAR §3-122-52(c) would be moot because the documents were produced to GBI. The issue would then become whether this document adequately, in isolation or in connection with other information, supports the scores given to the proposals. This is an issue subsumed in GBI's scoring claim for which it has exhausted its administrative remedies.

27. If, on the other hand, GBI continues to contend that this documentation does not satisfy the requirements of the administrative regulation, and this alleged violation in and of itself is grounds for upholding GBI's protest, then that claim is dismissed for failure to exhaust administrative remedies. GBI had the all the proposers' pros/cons spreadsheets prior to filing its protest letter but received no other documents in response to its request, but it still failed to bring up the claim of no individual written evaluations in its protest letter.

2. The solicitation must be ruled invalid because it is fatally defective as vague, ambiguous and misleading

28. At page 22 of its RFAH, GBI claims the solicitation is so vague, ambiguous and misleading as to be inherently defective, unfair and subject to differing bidder interpretations. This is part of its argument that the DOT's decision does not provide a defensible rationale for rejection of GBI's protest. In other words, GBI alleges that if the allegedly indefensible rationale asserted by the DOT is accepted, then the solicitation should be ruled invalid for the reasons stated. The DOT gave "fair warning" that this claim would be subject to a jurisdictional challenge. TR May 16, page 66, lines 2-5.

29. Viewed in isolation, a claim that the solicitation should be ruled invalid on the grounds that it is vague, ambiguous, and misleading is a claim where GBI failed to exhaust its administrative remedies. Further, the DOT correctly points out at page 21 of its closing brief that such a claim is untimely because, under HRS §103D-701(a), it had to be submitted

prior to the date set for receipt of offers. Thus, viewed in isolation, this claim is dismissed for lack of jurisdiction.

30. On the other hand, this claim can be viewed as merely a rhetorical extension of GBI's primary claim that the DOT's interpretation of the RFP and how the offers could be evaluated is incorrect—argumentatively speaking, according to GBI, the DOT's interpretation is so incorrect that, if accepted, it would make the solicitation inherently defective. As such, this is not an independent claim and may be considered, for whatever weight it may carry, in connection with any remaining arguments GBI can assert in this case.

B. GENERAL CONSIDERATIONS APPLICABLE TO THESE PROCUREMENT PROTESTS

31. Kiewit and GBI have 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).

32. Each protestor must raise its own claims and prevail on its own claims in order to obtain relief herein. There have been claims that one protestor can rely upon and/or incorporate by reference all of the facts and arguments raised by the other protestor. See, e.g., GBI's Amended Post Hearing Memorandum at page 11, n.1. This would be allowable only with respect to the facts. However, since each protestor must satisfy the jurisdictional requirement of exhaustion of its administrative remedies, one protestor cannot rely on the claim of another protestor unless it has itself exhausted its own administrative remedies with respect to that claim.

33. 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 State taking

into consideration price and the evaluation criteria in the request for proposals....Other criteria may not be used in the evaluation.

34. 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."

C. KIEWIT'S PROCUREMENT PROTEST

Kiewit's claims will be discussed in the order they were presented in Kiewit's Post-Hearing Memorandum filed May 27, 2011.

1. DOT's Proposed Award to HDCC Violates HAR 3-122-52(c) and HRS 103D-303(g) because the contract file does not contain the required written explanations of the award. Kiewit Post-Hearing Memorandum at pages 5-9.

35. There are two parts to this claim: (1)there were no explanations of each individual evaluation committee member's ranking determination in the contract file, in violation of HAR 3-122-52(c); and (2) the contract file does not contain the basis on which the award is made, in violation of HRS 103D-303(g). Kiewit asserts that the decision that the score sheets showing that each member of the evaluation committee gave each offeror the same score for each evaluation criterion based on a collective rationale and the compiled "pro/con" chart or chart do not qualify as the required written explanations for the scoring of the design documentation portion of the RFP. Kiewit Post-Hearing Memorandum, pages 5 through 9.

36. As stated above in the above Conclusions of Law regarding jurisdiction, the claim of violations of HAR 3-122-52(c) must be dismissed for lack of jurisdiction. To the extent the claim concerning an absence in the contract file of the basis of the award is new and not subsumed under the claim regarding individual determinations, it must also be

dismissed for lack of jurisdiction on the same basis as the dismissal of the claim pertaining to individual determinations.

37. The substance of Kiewit's argument in this section of its memorandum goes beyond the alleged procedural violations. It is also a challenge to the consensus scoring utilized by the Review Committee. Kiewit could not have possibly known of this scoring method until testimony about it occurred at the hearing. The Hearings Officer agrees with Kiewit that it can raise this claim in these proceedings.

38. Consensus scoring of the technical factors of design-build proposals is a recognized practice in at least one large branch of the federal government. Bean Stuyvesant, LLC v. United States, 48 Fed. Cl. 303, 325 (Ct. Fed. Claims 2000) (citing Army procurement regulation allowing consensus scoring but prohibiting averaging). Evaluators may meet to discuss the relative strengths and weaknesses of a proposal, as such discussions can operate to correct mistakes or misperceptions in individual evaluations. Id. at 326. Where, as here, the RFP covers a wide range of technical matters, consensus scoring would be desirable, if not preferable, because individual evaluators would not be expected to have extensive experience and insight/expertise on all the technical matters.

39. In addition, Hawaii law does not prohibit consensus scoring of this RFP. In the abstract, it is a reasonable method of evaluating design-build proposals. The regulation Kiewit relies upon, HAR §3-122-52(c), states in relevant part that each member of the evaluation committee shall provide a written explanation of their ranking determination for placement in the procurement file. Nothing in this regulation requires all evaluators to create purely individual evaluations, and nothing in this regulation prohibits all evaluators from making a consensus evaluation. Requiring each evaluator to explain in writing their own

evaluation does not preclude a written consensus evaluation. That consensus evaluation serves as the written explanation for each individual evaluator.

40. Kiewit appears to argue that the regulation requires an independent evaluation by each member of the evaluation committee. However, each individual member of the committee can independently come to the conclusion that the consensus score is appropriate. (Averaging, in contrast, would not be an independent evaluation.)

41. Accordingly, although Kiewit has been excused from exhausting its administrative remedies with respect to its claim on consensus scoring, that claim would be without merit.

42. Kiewit is complaining that the documentation in the file does not effectively explain the actual basis of the award because it is not complete. It does not, for example, explain that the evaluators chose to utilize consensus scoring, it does not explain the role of the August 17, 2010 meetings with the offerors, and it does not explain how variations from the RFP requirements were scored.

43. This aspect of Kiewit's claim goes to the adequacy of the explanation in the file. There is nothing in the relevant statute or regulation regarding the required quality of the written materials that are supposed to be there. Assuming for the sake of argument that there is jurisdiction to consider this claim, and assuming, at a minimum, that the written materials should be sufficient to allow disappointed offerors and/or the general public to trace and thereby understand the general course of the evaluators' thinking without taking their deposition or calling them as witnesses at a procurement protest hearing, the written materials relied upon by the DOT as satisfying the requirements here are clearly inadequate How this factors in to the overall evaluation of Kiewit's protest will be discussed below..

44. Kiewit also argues at page 6 of its Post-Hearing Memorandum that the evaluation sheets from FHWA personnel provided the DOT with a model of how to score the proposals. Those sheets are Kiewit's Exhibits 33 and 34. Except for the fact that Mr. Galicinao of the FHWA did not prepare his sheets within a group consensus situation, there is no significant difference between his sheets and the DOT's evaluation sheets in terms of referencing items in the proposals. Assuming for the purposes of argument that there is jurisdiction to consider the claim that the evaluator's spreadsheets are not adequate explanations, the use of Mr. Galicinao's spreadsheet as the prime example of an adequate explanation compels the conclusion that this aspect of Kiewit's claim must be dismissed.

45. Moreover, at the *de novo* hearing held herein, Kiewit (and GBI) were afforded more than ample opportunity to examine the evaluators and other related DOT employees, often at great length and in great detail, so that the full basis of the award was made public. Kiewit (and GBI) now have more information about the basis of the award than they could expect to obtain from a minimally adequate written explanation in the file. For this reason, even if there is jurisdiction to hear this claim, any purely procedural violations of HAR 3-122-52(c) and HRS 103D-303(g) were ultimately, in themselves, not prejudicial.

2. The award was based on criteria not contained in the RFP and therefore violates HAR §3-122-57(a) and HRS §103D-30(g). Kiewit Post-Hearing Memorandum at pages 9-11.

46. Kiewit argues here that the wrong criteria were used to evaluate the award. The evaluation was based on "concepts" in the HDCC proposal and did not take into consideration the alleged failure of HDCC's proposal to meet the required design criteria contained in the RFP. Set forth in the manner Kiewit asserts at pages 9-11 of Kiewit's Post-Hearing Memorandum, this could be considered a new claim not raised prior to the hearing in

either Kiewit's protest letter or its Hearing Memorandum. However, Kiewit's protest letter does call into question whether or not the DOT's scoring of Criteria Item No. 3, the major criteria item in terms of points, calling it "completely illogical," which challenges the scoring on that important criteria as being arbitrary and capricious. In addition the Hearings Officer agrees with Kiewit that it was not possible for Kiewit to have raised this claim in its protest in the form that it is raised here because the documents Kiewit had or could have had prior to its protest letter would not have provided sufficient information such that Kiewit could have known how the evaluation process was carried out in this allegedly improper manner. Accordingly, the Hearings Officer finds that there is jurisdiction to consider this portion of Kiewit's claim.

47. One of the purposes of a design-build RFP is to find out how different parties would approach a basic problem, e.g., what concepts they would use to provide the best possible contraflow lane. The RFP specifically sought presentation of an offeror's concepts in that regard, as it states at TP-41 with reference to design documentation requirements;

> 1. Design Documentation Requirements
>
> The Design Documentation shall be done in sufficient detail to effectively present to the Department the scope of design and construction that is being priced and shall contain the following:
>
> . . .
>
> b. Contractor's proposal of technical concepts such as additional traffic crossover, additional highway capacity, safety of the system, and flexibility of the system for future modifications to respond to changes in traffic demand. (Emphasis supplied)

48. Insofar as this claim may assert that the evaluators could not take into account "concepts" over and above the required criteria in the RFP, Kiewit's claim is without merit.

49. However, the Hearings Officer partially agrees with Kiewit's claim regarding the DOT's evaluation, or lack thereof, of the variations from the scope of improvements in all of the proposals. Variations from what Kiewit, and GBI, have labeled the "shall" requirements in the Project's scope of improvements were allowed in the proposals under consideration herein. While those variations are allowed by the terms of the RFP, the RFP also instructs how to evaluate those variations. At page TP-39 of the RFP, the variations clause states:

> Any variations from the Scope of Improvements or any other section of this RFP, including Alternative Technical Concepts (ATC), shall be identified by the Contractor. Any variations, either perceived or noted by the Contractor shall not necessarily cause a proposal to be considered non-responsive. The Department will assess the variations during the evaluation process and score the proposal accordingly. (Emphasis supplied)

50. The evidence established that the DOT did not assess the variations. Initially, it found that there were variations in all of the proposals. Whether or not that is accurate is not the point here—the relevant part is that the DOT believed that such was the case. The DOT then proceeded to ignore, not assess, the variations after it received the oral assurances from the offerors at the August 17, 2010 meetings.

51. After the assessment, the DOT was supposed to "score the proposal accordingly." The common sense meaning of this term is that the scores would take into account the variations. Further, Criterion No. 3 ("Design documentation which meets or exceeds the project objectives as determined by the Department.") provides for scoring lower if there is a variation that does not met project objectives (as opposed to disqualifying a proposal with variations).

52. The Hearings Officer rejects the assertion in Kiewit's Post-Hearing Memorandum at page 11 that the scoring here allows HDCC to improperly avoid building to the "shall" standards. That assertion has been previously rejected in the Order Granting in Part and Denying in Part the DOT's Motion to Dismiss, filed June 2, 2011. In addition to the authorities cited therein, see also Banknote Corporation of America, Inc., v. United States, 56 Fed Cl. 377, 382 (2003). A mandatory minimum requirement must be clearly identified so that offerors are given "fair warning" that their proposal must meet the requirement in order to be eligible for evaluation or that failure to comply with the requirement will lead to outright rejection of the proposal. There was no such language here—to the contrary, the RFP stated that variations from the "shall" requirements would be considered and would not be grounds for automatic rejection.

53. However, the Hearings Officer does conclude that the DOT's method of scoring did not comply with the scoring, i.e., evaluation, criteria in the RFP. This was not due to any disqualifying factor in HDCC's proposal, i.e., its "responsiveness." It was due instead to the DOT ignoring its own criteria. On its face, this violates HAR 3-122-57(a), which requires that the DOT's decision take into account "the evaluation criteria" in the RFP. The regulation does not say "some of the evaluation criteria." While the Findings of Fact establish that there were not as many variations as Kiewit has claimed, there were still some variations that should have been scored "accordingly." The DOT failed to do this.

3. The award to HDCC violates HAR §3-122-97 and HRS §103D-303(f) because HDCC's proposal does not meet the mandatory, material requirements of the RFP. Kiewit's Post-Hearing Memorandum at pages 12-15.

54. This section of Kiewit's argument at pages 12-15 of its Post-Hearing Memorandum is an attempt to reargue the Hearings Office's oral decision partially granting

the DOT's Motion to Dismiss at the hearing on May 16, 2011. This oral decision was subsumed into the Order Granting in Part and Denying in Part Department of Transportation's Motion to Dismiss, filed June 2, 2011.

55. If Kiewit had wanted to move for reconsideration of the oral ruling in this regard, it should have done so prior to the conclusion of the hearing when the DOT and HDCC would have had a chance to respond. The transcript of the ruling on May 16, 2011 was available to Kiewit, so it would have had no problem with filing such a motion earlier. Rearguing the decision in its final brief when the opposing parties do not have an opportunity to respond is inappropriate and any reconsideration of that oral ruling is denied.

56. Further, in attempting to reargue the decision on the DOT's Motion to Dismiss, Kiewit here places its primary reliance on HAR §3-122-197(b)(2)(B). As the Hearings Officer's orders on the DOT motion have pointed out, both Kiewit and GBI have misconstrued the import of this regulation where, as here, the RFP specifically allows variations to be submitted in the proposals and specifically does not make those variations "non-responsive." In addition, there was no waiver by the DOT of any alleged material deficiencies in the HDCC proposal because the terms of the RFP in effect deemed any variations not material at the time the proposals were submitted, and, furthermore, required the successful offeror to meet all requirements in the construction of the Project even if there were variations in its proposal.

57. Kiewit's citation of the design speed limit in a large portion of page 13 of its Post-Hearing Memorandum, with a further mention on page 14, is also inappropriate. Kiewit's protest letter of November 16, 2010 did not claim any problems with HDCC's proposal in connection with the design speed requirements. There was undoubtedly a good

reason for Kiewit to refrain from such a challenge—it probably knew its own proposal might be subject to challenge in that regard, as was subsequently done by GBI. In any event, Kiewit has no standing to challenge the award to HDCC on the basis of alleged variations from the design speed requirements of the RFP.

58. Kiewit's argument that the exhaustion of administrative remedies applies only to factual issues and not legal issues is unconnected to its substantive argument here, is not supported by a sufficient legal analysis, and is incorrect. The point of the jurisdictional provisions is not that a *de novo* determination is made under HRS §103D-709(a). Having the ability to conduct a *de novo* inquiry is only a method of administrative review and that method does not confer any jurisdiction whatsoever. The point, rather, is that the Hearings Officer is limited to deciding whether the "determinations" of the chief procurement officer were appropriate under the standard set forth in HRS §103D-709 (h). "Determinations" is not limited solely to factual claims. If a protester does not bring legal claims to the attention of the chief procurement officer when those legal claims were known or should have been known at the time of the protest, there is no "determination" for the Hearings Officer to review and administrative remedies have not been exhausted with respect to those legal claims.

59. In addition, Kiewit's exhaustion of administrative remedies claim is beside the point because the legal issues it is raising here were already raised before and were then dismissed pursuant to the DOT's Motion to Dismiss.

60. Finally, Kiewit claims at page 15, at the end of this section of its Post-Hearing Memorandum, that it is raising a new issue here, namely "HDCC's promise to modify its Proposal post-award." Until that statement was made, it was not possible to discern that this

was indeed the only "precise question" raised in this section of the memorandum. This is especially the case where the very next separate section of Kiewit's memorandum is very specific and clear about raising this issue, leading to the reasonable conclusion that the issue is not the focus of the section of Kiewit's memorandum presently being discussed.

61. Insofar as the "promise to modify" claim is set forth in the next section of Kiewit's Memorandum, a decision on that claim is reserved until discussion of that section. In all other respects, Kiewit's argument in this section of its memorandum is dismissed.

4. The award to HDCC violates HAR §3-122-97 because the DOT relied on HDCC's oral promise to "modify" its proposal if and when the DOT decides to require HDCC to correct aspects of its proposal that fail to meet mandatory, material requirements of the RFP. Kiewit Post-Hearing Memorandum at pages 15-17.

62. Kiewit asserts at pages 15-16 that the DOT cannot rely on an oral promise to modify the proposal in the future in response to demands in the future. However, there were no "future demands" because the RFP always required ultimate compliance with its requirements. In addition, while the RFP allowed variations in the proposals, the terms of the RFP meant that HDCC was already committed to producing a final product that conformed to the RFP's requirements. The alleged oral promise was only a clarification or reaffirmation of meeting the contract's requirements, Since it was not adding to or revising any terms of the contract, it did not have to be in writing pursuant to HRS §103D-303(f). Similarly, there was no violation of HAR §3-122-53(d)(1) because nothing was actually clarified by the answer to Question No. 1. HDCC, as well as Kiewit and GBI, only reaffirmed their commitment to the terms of the RFP.

63. If this were truly a valid argument, it would also undermine Kiewit's proposal as well. Kiewit had at least one variation in its proposal because of its need for a design

exception related to the 60 mile per hour speed limit requirement. Kiewit's response to Question No. 1, which was the same response HDCC gave, was, under Kiewit's analysis, an oral promise with the same problems that Kiewit asserts are connected to HDCC's offer.

64. In addition, Kiewit has failed to exhaust its administrative remedies. At the time of its protest letter, it had HDCC's proposal with all of its alleged variations. It had answered Question No. 1 with a "yes" and should have known HDCC had done the same Kiewit admits this at the bottom of page 16 of its Post-Hearing Memorandum. Therefore, it should have raised this issue in its protest letter of November 16, 2011.

65. The real point of this section of Kiewit's Memorandum is that the answer to Question No. 1 was used to justify an unannounced change in how the valuation criteria were determined. This unwritten change, the assignment of perfect scores on Criteria No. 2, has already been discussed, and this new section of Kiewit's argument does not add anything new on this subject.

66. For all of the above reasons, Kiewit's claims as set forth at pages 15 through 17 of its Post-Hearing Memorandum are dismissed except for any claim connected to challenging the change in the scoring process ultimately utilized with respect to Criteria Item No. 2.

5. The DOT's argument on available funds is not a basis to deny the protest

67. In the letter of April 15, 2011 denying the Kiewit and GBI protests, the DOT asserted that HDCC's proposal was most advantageous to the State because the other two proposals were outside the limits of available funding. In its Motion to Dismiss, filed May 9, 2011, the DOT asserted something more at page 27, namely that the RFP explicitly stated that the Project cost was to be below $90,000,000. This was asserted as a basis for

dismissing the Kiewit and GBI protests. This portion of the DOT's Motion was denied in the Order Granting in Part and Denying in Part the Department of Transportation's Motion to Dismiss, filed June 2, 2011.

68. The DOT makes a different argument at pages 34-36 of its Closing Brief. The argument now is that if HDCC cannot be awarded the contract, neither Kiewit nor GBI can be awarded the contract because their proposed prices exceed the budget limit.

This is not an argument for dismissal of the protests. Instead, it is an argument that certain relief, i.e., award of the contract to one of the protestors, is not available if the protest successfully overturns the contract award to HDCC.

69. Understandably using its Post-Hearing Memorandum at pages 17-18 to reply to the DOT's earlier argument, which has now apparently been abandoned (and which lacked merit as originally stated), Kiewit does not comment on the DOT's new argument. However, there is no prejudice to Kiewit here because the DOT's new argument is one that will not result in dismissal of Kiewit's protest.

6. The evaluation of Kiewit's proposal considers two specific evaluation criteria that were set forth in the RFP

70. This claim was contained in Kiewit's Pre-Hearing Memorandum but not discussed in its Post-Hearing Memorandum. The Hearings Officer has previously ruled that this claim should be dismissed for lack of jurisdiction.

71. Assuming, however, for purposes of argument only that the claim is not dismissed, the Hearing Officer makes additional Conclusions of Law on this issue.

72. The stated objectives of the RFP include integration of the PM contraflow with the existing AM contraflow system. The existing AM contraflow system has existing ITS/CCTV systems. While the RFP did not specifically require ITS or CTV components,

such components were not prohibited. Further, Criteria No. 3 allowed the evaluators to score proposals based upon the proposals providing more than the minimum requirements stated in the RFP. It states: "Project documentation, which meets or exceeds the project objectives as determined by the Department." (Emphasis supplied)

73. Both HDCC and GBI specifically included ITS/CCTV systems as part of their proposals. Kiewit has no basis to claim that the award to HDCC should be overturned because of the Evaluation Committee's "con" for Kiewit because Kiewit did not have an ITS/CCTV component in its proposal.

74. In connection with this issue, Kiewit also claims it was scored lower because of a design concept in its proposal that had been specifically approved in its ATC 8-R1. Approval of an ATC, however, did not necessarily mean that the approved concept was desirable or that the ATC did not have any negative aspects attached to it. The Review Committee could properly consider the merits and demerits of an approved ATC and properly score Kiewit lower because of that approved ATC.

75. Accordingly, if there were jurisdiction to consider either portion of this claim by Kiewit, the claim would be dismissed.

7. DOT's Response to Kiewit's ATC Regarding Lane Width

76. In Kiewit's protest letter of November 16, 2011, at page 2, Kiewit complained that HDCC's proposal did not meet the mandatory design requirements for lane width and buffer width. In contrast, according to this claim, Kiewit's ATC seeking to utilize the same lane width, or one very similar to that used by HDCC, but the request for this in Kiewit's ATC was rejected by the DOT. While not explicitly stated on page 2 of the protest letter, in connection with a section of the protest letter on pages 5 and 6 Kiewit appears to be arguing

that HDCC was unfairly given preferred treatment on this design requirement, and that such treatment was prejudicial to Kiewit. Alternatively Kiewit may appear to be arguing that it relied to its detriment on the ATC process and designed to the Project's requirements after its ATC was rejected while HDCC's proposal had the same variation that was proposed in Kiewit's rejected ATC.

77. This claim is not referred to in Kiewit's Post-Hearing Memorandum. However, there was no requirement that the Post-Hearing Memorandum cover all claims previously raised, so there has been no waiver of this claim by Kiewit. Furthermore, Kiewit exhausted it administrative remedies on this claim.

78. Since Kiewit's ATC on this particular design requirement was rejected, the original design requirement was still in place.

79. If HDCC was not required to meet this design requirement while Kiewit was held to that requirement, that would lead to problems with the fairness of the procurement. This is Kiewit's fundamental premise behind its claim. However, this premise is not accurate. As more fully explained in the Order Granting in Part and Denying in Part the Department of Transportation's Motion to Dismiss, filed June 2, 2011, HDCC was not allowed to meet a less strict design requirement. HDCC still has to meet the same design requirement Kiewit is held to even though there may be variations in HDCC's proposal from that requirement.

80. Accordingly, there was no unfair advantage to HDCC in this situation, and Kiewit's claim in its protest letter of November 16, 2010 based upon the DOT's response to one of Kiewit's ATCs regarding lane width and buffer width is without merit and is dismissed.

8. The scoring of Criteria Item No. 3 was completely illogical

81. This claim was raised in Kiewit's protest letter of November 16, 2010 and was not dismissed pursuant to the DOT's pre-hearing motion. It may not be specifically referenced in the same terms in Kiewit's post hearing memorandum, but, again, there is no requirement that the post-hearing memorandum repeat all claims previously made. There has been no waiver of this claim. However, discussion of this claim will be reserved at this point and included with a subsequent discussion of a similar claim in GBI's protest.

9. Kiewit's alleged cost savings and standing to protest the award to HDCC

82. HDCC alleges that Kiewit does not have standing to protest the award to HDCC because the cost savings Kiewit alleges had it been able to submit a proposal on the same basis as HDCC would still not have given the award to Kiewit. In support of this argument, HDCC relies upon the reworking of the overall points to Kiewit if Kiewit's price had been reduced by the $12,030,204 alleged in Kiewit's Exhibit 24. See Exhibit A to HDCC's Closing Brief filed May 27, 2011. Kiewit's legal argument is incorrect. HRS §103D-709 does not require a protestor to show that it would have obtained the award in order to have standing to protest the award to another. Should Kiewit's protest be successful, it would have to show it should have received the award in order to obtain entitlement to bid preparation costs. HRS §103D-701(g). However, that showing is only necessary in that one instance and is not necessary to give Kiewit standing to protest the award.

83. In order to have standing to protest the award to HDCC, Kiewit, and GBI, 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 RFAH with the Office of Administrative Hearings ("OAH") after agency denial of its protest, exhaust its

administrative remedies with respect to the claims raised in the RFAH, and post the appropriate bond.

84. A further condition on standing to make a procurement protest is that the matter at issue be of a certain monetary value. Act 175 of the 2009 Legislature took effect on July 1, 2009, and imposed certain conditions on bid protests that are applicable herein (and that that remain in effect until June 30, 2011). One of those conditions, HRS §103D-709(d), states:

> 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:
>
> (1) For contracts with an estimated value of less than $1,000,000, the protest concerns a matter that is greater than $10,000; or
>
> (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 supplied)

In this case, pursuant to HRS 103d-709(j), "estimated value of the contract" means the amount of HDCC's proposal.

85. While Kiewit's Exhibit 24 comes up with a figure slightly greater than $12 million, the Hearings Officer concludes that it has no persuasive value. It was introduced without any attempt to explain how that figure, or any of the component figures, were determined. The exhibit itself provides no information in that regard. What, if anything, Mr. Prock did in its preparation is unknown, and what "direction, supervision, and control" he asserted in its preparation is also unknown. The fact that it was admitted into evidence without objection and the fact that no other party cross-examined Mr. Prock about it or

introduced conflicting evidence does not require the Hearings Officer to conclude that the claims therein have been established.[4] Kiewit had the burden of persuasion and the burden of proof on this issue, and it did not meet those burdens.

86. Further, Kiewit's Exhibit 24 assumes that all of the variations in HDCC's proposal that are alleged in Kiewit's protest letter of November 16, 2010 have been proven. The Findings of Fact herein, however, demonstrate that not all of those alleged variations have turned out to actually be variations. There is no way to tell from Kiewit's Exhibit 24 which components pertain to the alleged variations that Kiewit proved or failed to prove. Accordingly, even if Kiewit's Exhibit 24 is accurate from an overall point of view, there was no proof of its accuracy insofar as the actual variations found in the evidence herein are concerned.

87. Finally, the fundamental premise behind Kiewit's Exhibit 24 is fundamentally flawed. Kiewit assumes that HDCC was allowed to submit a proposed design meeting lesser standards than required by the RFP. That assumption was incorrect because HDCC submitted a proposed design with variations, but the variations were allowed by the RFP. Kiewit could have submitted a proposed design with the identical variations submitted by HDCC.. If it had submitted a proposal like HDCC's, its price might have actually been lower than HDCC's price if Kiewit's Exhibit 24 is to be believed. However, while it chose not to submit such a lower priced proposal, it was not prevented from doing so by anything in the RFP.

88. It is not up to Kiewit, HDCC, GBI, the DOT, or the Hearings Officer to conduct and decide the protests herein based upon personal policy considerations. Public

[4] Parenthetically, it would be unreasonable to assume that Kiewit would itself pay a claimant over $12 million

policy considerations are established by the Legislature. In 2009, it could have decided to eliminate procurement protests altogether. See Alakai'i Na Keiki v. Hamamoto, ___ Haw. ___, ___P.3d ___ (Haw. Ct. App. May 24, 2011)(The DOE is the final arbiter of procurement protests for RFPs governed by HRS Chapter 103F, and no judicial review is allowed). Instead, the Legislature has decided that as a matter of public policy it would put serious limitations on procurement protests under HRS Chapter 103D for a certain period of time. .Those limitations preclude successful protests where, as here, procedural violations in the award evaluation process have occurred but there is no proof that violations concern matters greater than ten percent of HDCC's proposal.

89. Accordingly, in addition to all the other rulings in the Findings of Fact above, Kiewit has failed to prove that it has standing to bring this procurement protest.

D. GBI'S PROCUREMENT PROTEST

GBI's claims will be discussed in the order they are presented in GBI's Amended Post Hearing Memorandum, filed May 31, 2011.

1. The Hearings Officer Has Jurisdiction to Consider All Issues Presented by GBI. GBI Amended Post Hearing Memorandum, pages 20-22

90. The Order Granting in Part and Denying in Part the DOT's Motion to Dismiss, filed June 2, 2011, sets forth the GBI claims in its protest letter of November 23, 2010, and its RFAH of April 21, 2010 that survived the DOT's Motion but does not discuss any jurisdictional impediments to hearing any of those surviving claims. In the preceding JURISDICTION section of these Conclusions of Law, the Hearings Officer concluded that the there was no jurisdiction to hear two of GBI's claims.

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based on Exhibit 24 without any explanation or backup documentation.

2. HDCC's Proposal Did Not Conform to Mandatory/Material Requirements of the RFP. GBI's Amended Post Hearing Memorandum, pages 22-29

91. In this part of its Amended Post Hearing Memorandum, GBI attempts to reargue issues raised in the DOT's Motion to Dismiss, filed May 9, 2011, and the Order Granting in Part and Denying in Part the DOT's Motion to Dismiss, filed June 2, 2011. This attempt is not successful, as GBI has not presented anything to justify a change in that Order. Furthermore, it is not appropriate to argue, and in essence make a motion, for reconsideration in a post-hearing memorandum without prior notice to the DOT or HDCC when they have no opportunity to file a reply brief because no further briefing has been allowed.

92. Mixed in with this argument are claims that the scoring of HDCC's proposal was faulty because HDCC's evaluation did not properly take into account the variations in HDCC's proposal from the ultimate requirements of the RFP. This issue will be discussed in the next section of these Conclusions of Law.

3. DOT Failed to Account For HDCC's Failure to Meet Mandatory and Material Requirements in the RFP in its Evaluation. GBI's Amended Post Hearing Memorandum, pages 29-40

93. In the first part of this section of its Amended Post Hearing Memorandum, pages 29-34, GBI argues that DOT did not appropriately evaluate the variations in HDCC's proposal. Instead, after the oral assurances received from all three offerors at the interviews on August 17, 2010, the DOT gave every proposal a perfect score on Criteria Item No. 2 on the basis that all offerors were bound to meet the requirements of the RFP even if there were variations from those requirements in their proposals.

94. Without repeating the analysis contained in earlier Conclusions of Law in connection with Kiewit's procurement protest, and thus in summary, the Hearings Officer has already ruled that this procedure did not follow the RFP mandate to score the variations "accordingly" and that the DOT thereby violated HAR §3-122-57(a). This same ruling applies with respect to GBI's protest.

95. It should be noted that any offeror who was awarded the contract would have had to comply with mandatory requirements of the RFP even if Question No. 1 had not been asked and answered "yes" at the interviews of August 17, 2010. There was no oral promise that negated written submittals because any variations in the written submittals could not give the offeror the ability to vary the mandatory requirements of the RFP. The Hearings Officer does not consider the oral question and answer as a modification of either the RFP or any of the proposals. Further, if the DOT had scored Criteria No. 2 in the manner that it ultimately did in the absence of any oral question and answer session, the DOT would still have violated HAR §3-122-57(a).

96. In the second part of this section of its Amended Post Hearing Memorandum, pages 34-38, GBI calls into question additional aspects of the scoresheets. GBI called into question the validity of the scoring process in its protest letter of November 23, 2010, and the DOT's Motion to Dismiss those claims was denied. In addition, the Hearings Officer agrees with GBI's assertion that the details of the claimed errors in the scoring process could not have been known at the time of GBI's protest letter. The Hearings Officer agrees with GBI that there is jurisdiction to consider the claims in this section of GBI's Post Hearing Memorandum.

97. In this part, GBI gets into the specifics of the scoresheets. Its first contention is that the scoresheets failed to take into account whether the offers met or failed to meet the 60 miles per hour design speed requirement. The problem with the depth of GBI's argument here is that none of the offerors met the 60 mile per hour design speed requirement. All of the proposals required a design exception in order to meet this requirement. Contrary to GBI's position, GBI did not have an approved design exception at the time it submitted its offer. HDCC and Kiewit may have had to do more design work if their design exception requests were too broad and they eventually would receive an exception only for sight stopping distance, but the extent of that additional design work was never established in the evidence. It should also be noted that neither Mr. Galicinao nor Mr. Nickelson of the FHWA did not list failure to meet the 60 miles per hour speed limit requirement as a problem in their scoresheets. HDCC Exhibits 38 and 39..

98. In view of these factors, GBI failed to establish the magnitude of any scoring change that would have occurred if the scoresheets had listed a failure to meet the 60 mile per hour speed limit.

99. The Hearings Officer therefore concludes that the final scoresheets' failure to mention the 60 miles per hour speed limit requirement is a specific example of their failure to score variations "accordingly" as required by the terms of the RFP. In and of itself, such failure may also be an example of arbitrary and capricious scoring. The same conclusions would hold true for other variations in HDCC's proposal (even though Kiewit and GBI failed to prove there were as many variations as they originally alleged). These conclusions apply to both GBI's procurement protest and Kiewit's procurement protest.

100. However, both protestors failed to prove that any such problems with the DOT's evaluation of HDCC's proposal significantly or materially affected the results of the scoring process.

101. The second assertion on this subject made by GBI at page 35 of its Post Hearing Memorandum is that the evidence "hints" at favoritism and bias because of the failure to score downward when a Review Committee member had actual knowledge that one variation in HDCC's proposal was the failure to meet the design speed requirement.

102. The Hearings Officer does not find any actual bias or favoritism in the record. Mistakes, even if there is more than one, do not establish bias or favoritism. Further, GBI does not itself even assert that the evidence demonstrates bias or favoritism. GBI has the burden to prove such an assertion by the preponderance of the evidence, and the statement in its memo that the evidence only "hints" at bias or favoritism is an admission by GBI that it has failed to meet its burden of proof on this claim. Accordingly, this claim will be dismissed.

103. GBI then makes a lengthy assertion regarding Mr. Santo's positive view of flexibility in the proposals. It first asserts at page 36 that flexibility is not a "shall" requirement in the RFP. This is incorrect. While the concept of flexibility may not be as discretely defined as the concept of an 11 foot wide lane, flexibility is nevertheless a required part of the design. GBI has to admit that flexibility is listed as a scoring item in Criteria Item No. 4. It is also a mandatory item. Under the sub-heading "C. DESIGN DOCUMENTATION" of heading "IV. DESIGN AND PRICE PROPOSAL" the RFP at pages TP-41 and TP-42 states:

1. Design Documentation Requirements

The Design Documentation shall be done in sufficient detail to effectively present to the Department the scope of design and construction that is being priced and shall contain the following:

a. Contractor's proposed Project Incrementation Plan. Except for utility relocation(s), each increment shall result in a completed highway facility that is operational in every aspect typical of any active highway and can be opened for use by the traveling public.

b. Contractor's proposal of technical concepts such as additional traffic crossover, additional highway capacity, safety of the system, and flexibility of the system for future modifications to respond to changes in traffic demand. ...

(Emphasis supplied). GBI's argument that Mr. Santo should not have considered flexibility to be important and that his attention to it "makes no sense at all" is without merit.

104. GBI here is reduced to arguing that while flexibility is mentioned in Criteria No. 4, there was a possibility that Criteria No. 3 was combined in consideration with Criteria No. 4, but, at the same time, it admits that its "con" for flexibility was indeed scored under Criteria No. 4, so that argument is meritless. Furthermore, despite this "con," GBI ended up with the highest score among all offers for Criteria No. 4. Since GBI does not advocate that its score be reduced to take this alleged error into account, its argument here again has no merit.

105. GBI then goes back to the design speed requirement of 60 miles per hour in pages 38 through 40 of this section of its Amended Post Hearing Memorandum. This is repetitious of earlier claims regarding the scoring of this variation that have already been decided.

4. DOT Denial of GBI's Protest Based on Price/Funding Issues. GBI Post Hearing Memorandum at pages 40-44

106. The Conclusions of Law with respect to this issue as applied to Kiewit's procurement protest held, in summary, that the DOT has waived the argument Kiewit is defending against in its post hearing memoranda, that the DOT's argument as phrased in its Motion to Dismiss would in any event be meritless, and that Kiewit's procurement protest will not be dismissed based on any funding issues. Those Conclusions of Law hold equally for GBI's procurement protest.

5. The Overall Scoring of HDCC's Proposal

107. GBI's protest letter of November 23, 2010, raised several issues concerning the rationality of the scoring of HDCC's proposal in light of the numerous variations from RFP requirements GBI alleged to be in HDCC's proposal. While some of those alleged variations were not proven at the hearing, there are still some variations in HDCC's proposal as discussed in the Findings of Fact. In addition, GBI has additional complaints about the rationality of the scoring process and the justification for HDCC's score on the design documentation portion of its proposal. Those claims about the scoring process remain at issue in this hearing even if they were not specifically argued in any detail in GBI's Post Hearing Memorandum.

108. Kiewit also has claims regarding the scoring process that remain in this case. Although they are not exactly the same as GBI's (for example, Kiewit is quite vehement in its objection to consensus scoring), the Hearings Officer believes that it is appropriate to discuss those claims (previously reserved in an earlier Conclusion of Law) in connection with similar claims by GBI.

109. Despite having HDCC's proposal as well as its total score for design documentation prior to filing their protest letters in November of 2010, neither Kiewit nor GBI have produced any credible testimony, expert or otherwise, as to what, from their viewpoint, would have been a reasonable total score for the design documentation portion of any of the three proposals. Thus, both Kiewit and GBI have failed to meet their burden of proof to demonstrate that the DOT's total scores for the design document portion of any proposal was arbitrary, capricious, and/or clearly erroneous.

110. On the other hand, there were two non-DOT persons who produced scores for the design documentation portion of all of the proposals. Despite all of the alleged problems with the DOT's scores, the DOT scoring is more discerning than Mr. Galicinao's scoring. In addition, despite all of the alleged problems with the DOT's scores, its total score for GBI was exactly the same as Mr. Nickelson's total score for GBI, its total score for HHDC was not significantly different from Mr. Nickelson's total score for HDCC, and its total score for Kiewit was far more generous to Kiewit than Mr. Nickelson's total score for Kiewit. The Hearings Officer concludes that the DOT's total scores for design documentation for GBI, HDCC, and Kiewit were reasonable even though there are alleged problems with the process by which the DOT reached those scores.

111. If HDCC had been assigned by the DOT with the total score for design documentation Mr. Nickelson gave HDCC, i.e., ten points lower than the DOT's score, HDCC would still have received more total points than GBI or Kiewit for the combined design documentation and price scores.

112. The evaluation process here was not irrational even though some aspects violated the terms of the RFP. The primary concern, therefore, in reviewing the evaluation

process is to determine whether the final scores reasonably reflect the actual merits of the proposal even though there may be disagreements over some of the individual components of the final scores. In this regard, it is not the role of the Hearings Examiner, or the protestors, to interject their personal evaluations into the review of those scores. In view of the complete absence of evidence from either protestor as to what the total scores should have been if the entire evaluation process had been conducted correctly, and in view of the evidence regarding a disinterested FHWA observer's opinion of the total scores, the Hearings Officer cannot conclude that the total scores for the proposal herein were ultimately arbitrary, capricious, or clearly erroneous.

6. GBI's Standing to Protest the Award to HDCC

113. While Kiewit made an attempt to quantify its claim concerned a matter equal to no less than ten percent of HDCC' proposal price, it was ultimately unsuccessful in that regard. GBI, in contrast, did not make any such attempt.

114. GBI did assert that HDCC's proposal would have been much higher if its proposal did not have any variations from the RFP requirements. While the statute does not define the "matter" that must be greater than ten percent of HDCC's proposal, it is not reasonable to believe that the "matter" would involve an increase in lowest proposal price. In passing Act 175, the Legislature was not intending to encourage procurement protests, much less those that were based on an increase in the lowest price. Thus, besides being unquantified, this assertion does not establish standing for GBI.

115. GBI also asserts that its proposal would have been much lower if its proposal had contained variations to the RFP requirements as HDCC's proposal alleged did. This

could be a "matter" as required by HRS §103D-709(d), but at the end of the hearing this assertion had never been credibly quantified in the evidence.

116. Accordingly, the Hearings Officer concludes that GBI has not proven that it has standing to bring this procurement protest.

D. ADDITIONAL CONSIDERATIONS

117. Errata in the Order Granting in Part and Denying in Part the DOT's Motion to Dismiss, filed June 2, 2011, are hereby corrected as follows:

> 1. References to TP-43 as Exhibit "F" on page 7 and on page 8 n.5, should be changed to references to Exhibit "E."
>
> 2. The reference to GBI Exhibits 23-25 on page 12 n.7 should be a reference to GBI Exhibits 23-25 and 63.

118. Since the contract has already been awarded to HDCC, the remedies provision of HRS 103D-707 applies. That statute provides no authority for the Hearings Officer to award the contract to any other offeror even if one or both of the protests herein had been upheld..

119. GBI erroneously argues that since the contract herein has not been executed, HDCC's offer, and Kiewit's offer as well, should be rejected and the contract awarded to GBI. The award has been made to HDCC even if its execution and performance have been stayed and there is currently no funding. Cf. HRS 103D-309, entitled "Contract not binding unless funds available." This statute applies to contracts that have already been "awarded."

120. Kiewit's Supplemental Citations filed on June 3, 2011, were untimely and contained several arguments. It went far beyond the scope of what was allowed pursuant to the Hearings Officer's statements at the close of the hearing on May 26, 2011. Nevertheless,

the arguments contained in Kiewit's filing on June 3, 2011 were considered by the Hearings Officer (although their iteration in the June 3, 2011 filing is not specifically cited herein).

IV. DECISION

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

a. There is no jurisdiction in this proceeding to hear certain claims of the Petitioners, as more fully enumerated in the foregoing, due to their failure to exhaust administrative remedies, and those claims are dismissed.

b. The Petitioners have failed to prove by a preponderance of the evidence that their protests concern a matter equal to no less than ten percent of the estimated value of the HDCC's proposal, that therefore they do not have standing to bring these protests, and that the protests are therefore dismissed.

c. In the alternative, should Petitioners have standing to pursue these procurement protests for claims that have not been dismissed for lack of jurisdiction, that Petitioners have failed to prove by a preponderance of the evidence that Respondent's denials of those Petitioners' procurement protests were improper and not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation. Accordingly, Respondent's denials of Petitioners' procurement protests are affirmed.

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

e. The cash or protest bond of both Petitioners shall be deposited into the general fund.

DATED: Honolulu, Hawai`i, JUN - 6 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 HAWAI'I

In the Matter of

KIEWIT INFRASTRUCTURE WEST CO.,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI'I,

Respondent.

In the Matter of

GOODFELLOW BROS., INC.,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI'I,

Respondent

and

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.,

Intervenor

PCX-2011-2

PCX-2011-3

(Consolidated Cases)

ORDER GRANTING IN PART AND DENYING IN PART DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS PETITIONERS' REQUEST FOR HEARING FILED APRIL 21, 2011

Hearing Date:
May 16, 2011

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

Senior Hearings Officer:
David H. Karlen

EXHIBIT "A"

ORDER GRANTING IN PART AND DENYING IN PART DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS PETITIONERS' REQUEST FOR HEARING FILED APRIL 21, 2011

I. INTRODUCTION

On April 21, 2011, Petitioner Kiewit Infrastructure West Co. ("Kiewit") filed its Request for Administrative Hearing ("RFAH" or "Request") in this matter, which Request was assigned case number PCX-2011-2. Later on April 21, 2011, Petitioner Goodfellow Bros., Inc. ("GBI") filed its RFAH in this matter, which Request was assigned case number PCX-2012-3. The two matters were consolidated pursuant to the Prehearing Order filed April 29, 2011.

On May 9, 2011, Respondent Department of Transportation, State of Hawaii ("DOT") filed its Motion to Dismiss Petitioner's[sic] Request for Hearing, which motion concerned the Requests of both Kiewit and GBI. As set forth in the Prehearing Order, argument on this Motion was held on May 16, 2011.

At the conclusion of oral argument, the hearings officer granted the motion in part and denied the motion in part in an oral ruling. This Order, based on the record as of the conclusion of oral argument on May 16, 2011, more fully sets forth that ruling and stands as the formal order granting in part and denying in part the DOT's motion.

II. THE CONCEPT OF RESPONSIVENESS DOES NOT GOVERN PROTESTS OF THE AWARD TO HAWAIIAN DREDGING

A. THE DOT'S MOTION IS CONSIDERED AS ONE FOR SUMMARY JUDGMENT

The heart of the DOT's Motion is its assertion that Kiewit's and GBI's protests are limited in scope. According to the DOT, these protests are purely claims that HDCC's offer was "nonresponsive."

Motions in this proceeding are governed by HAR §3-126-51. Without specifically using the term, the procedure contemplated therein is parallel to a motion for summary judgment under Rule 56, Hawaii Rules of Civil Procedure. Thus, while the DOT's motion is entitled a "Motion to Dismiss," it depends in part upon documents and a declaration that are not part of the record in this proceeding (which at the time of the motion consisted solely of the two RFAHs). Accordingly, the "Motion to Dismiss" will be reviewed as if it were a motion for summary judgment. Cf. Rule 12(b), Hawaii Rules of Civil Procedure (If matters outside the pleadings are presented in support of a motion to dismiss, the motion is considered as if it were one for summary judgment.) Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter law. See, e.g., Kau Agribusiness Co., Inc. v. Heirs or Assigns of Ahulau, 105 Haw. 182, 187, 95 P.3d 613, 618 (2004).

B. A RESPONSIVENESS REQUIREMENT DOES NOT APPLY TO PROCUREMENT THROUGH COMPETITIVE SEALED PROPOSALS

The DOT first asserts that proposals for this design-build project were solicited through a competitive sealed proposal process rather than a competitive sealed bidding process. This is not disputed by Kiewit or GBI.

Procurement through competitive sealed proposals is initially governed by HRS §103D-303. which provides in relevant part:

> (g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made. (Emphasis supplied.)

The DOT also relies upon an administrative regulation, HAR §3-122-57(a), which states in relevant part:

> The award shall be issued in writing to the responsible offeror whose proposal is determined in writing to provide the best value to the State taking into consideration price and the evaluation criteria in the request for proposals...Other criteria may not be used in the evaluation.

The DOT further argues that, in contrast, the statute and administrative regulation pertinent to procurement by competitive sealed bids specifically use the word "responsive," a word that is conspicuously absent from the statute and regulation cited above pertinent to procurement by competitive sealed proposals.[1]

The Procurement Code defines a "responsible bidder or offeror" in HRS §103D-104 as "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." (Kiewit and GBI concede HDCC is a responsible bidder.) On the other hand, in HRS §103D-104 the Procurement Code defines a "responsive bidder" as "a person who has submitted a bid which conforms in all material respects to the invitation for bids." It is important to note that the Procurement Code has no definition for "responsive offeror," thus reinforcing the conclusion that the concept of "responsive" or "responsiveness" has no governing role in the statutes governing competitive sealed proposals.[2]

The Hearings Officer agrees that the term "responsive" was deliberately omitted by the Legislature from the standard for determining the award in this procurement as set out in

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[1] For procurement by competitive sealed bids, the DOT refers to HRS §103D-302(h) and HAR §3-122-33(a), both of which use the term "responsive" as well as the term "responsible."

[2] The Hearings Officer notes that HAR §3-120-2 contains a definition of "Responsive bidder or offeror." However, the parties to this proceeding have not relied upon this part of the regulations. Further, while the term might have previously been used in other regulations, the word "responsive" was deleted from HAR §3-122-57 so that the term is not used in any operative regulation pertinent to this proceeding.

HRS §103D-303(g). The factors set forth in HRS §103D-303(g) are the exclusive factors to be considered ("No other factors or criteria shall be used in the evaluation") and "responsive" or "responsiveness" are pointedly not included as one of the recognized exclusive factors.

This statement, however, does not conclude the analysis. One of the evaluation factors specifically mandated in the evaluation of competitive sealed proposals by HRS §103D-303(g) is "the evaluation factors set forth in the request for proposals." Consistent with that statute, HAR §3-122-57(a) also says that "the evaluation criteria in the request for proposals" should be taken into account.

Kiewit and GBI rely heavily in their arguments on HAR §3-122-97(b)(2)(B), which they allege requires disqualification or rejection of proposals on responsiveness grounds when it establishes the following test:

> (B) The proposal, after any opportunity has passed for modification or clarification, fails to meet the announced requirements of the agency in some material respect.

However, this portion of the regulation does not establish any new standard of responsiveness for competitive sealed proposals.

This administrative regulation must be read and interpreted in context with the governing statute, namely HRS §103D-303(g). That statute could not be more clear when it concludes: "No other factors or criteria shall be used in the evaluation." Thus, the factor set forth in HAR §3-122-97(b)(2)(B) cannot be an additional criteria or factor—its scope is limited to one of an administrative interpretation of one of the factors specifically allowed by HRS §103D-303(g). An administrative agency does not have the authority to enact a regulation that enlarges, alters, or restricts the provisions of a statute being administered. Puana v. Sunn, 69 Haw. 87, 89, 737 P.2d 867-869-70 (1987). HAR §3-197-(b)(2)(B) cannot

be used, as Kiewit and GBI appear to try to use it, as a means of bringing "responsiveness" back into existence through the "back door" as a general independent factor in the evaluation of competitive sealed proposals.

There are only two allowable factors or criteria in evaluating a competitive sealed proposal under the terms of HRS §103D-303(g), price and the evaluation factors in the RFP. Since, as determined later in this Order, there was no mandated price or price limit in this RFP, HAR §3-197-(b)(2)(B) can in the present case only refer to "the evaluation factors set forth in the request for proposal."

C. THE EVALUATION FACTORS IN THE RFP DO NOT REQUIRE THE OFFER TO BE RESPONSIVE AS ASSERTED BY KIEWIT AND GBI

The first relevant provision of the RFP is found at TP-39 (see DOT Ex. "C"):

> Any variations from the Scope of Improvements or any other section of this RFP, including Alternative Technical Concepts (ATC), shall be identified by the Contractor. Any variations, either perceived or noted by the Contractor shall not necessarily cause a proposal to be considered non-responsive. The Department will assess the variations during the evaluation process and score the proposal accordingly.

Whether deliberately or through poor draftsmanship, this provision introduces the word responsiveness back into the picture. In doing so, however, it also says that non-responsiveness is not an automatic disqualification. The DOT is clearly and specifically allowed to assess variations and score a proposal that includes elements that might otherwise be termed non-responsive. Variations allow the proposal to be "scored accordingly' and do not require disqualification of the proposal. As Kiewit admits at page 4 of its Memorandum in Opposition, this gives the DOT the discretion to consider proposals that would otherwise be necessarily non-responsive, and thus disqualified, under the traditional usage of the

responsiveness concept, and that the true issue is whether the DOT abused its discretion when scoring an HDCC proposal that contained alleged variations from RFP requirements.

Furthermore, this provision on TP-39 provides for two kinds of variations from the Scope of Improvements. First are those identified by the proposing contractor, i.e., those "noted" by the Contractor. Second are those "perceived," which term refers to perceptions by the DOT even if not "noted" by the Contractor.[3]

There is a similarly clear statement on page TP-42 of the RFP, DOT Exhibit "M":

> Failure to submit any of the above information, or submission of information that is deemed insufficient for evaluation shall not necessarily cause a proposal to be considered non-responsive. The Department will assess the information provided, or lack thereof, during the evaluation process and score the proposal accordingly.

This statement concludes a lengthy section listing "Design Documentation Requirements" that begins on page TP-41. DOT Exhibit "L."

In addition, on the very next page, TP-43 (DOT Exhibit "F"), are the seven criteria that are the "Evaluation Criteria for Design Documentation." These criteria for evaluating "design documentation" certainly incorporate the requirements for design documentation on the previous two pages, including the above-quoted statement on TP-42.

Kiewit also points out that the term "unresponsive" is used on page TP-40 of the RFP.[4] The term is used there in connection with the late submission of Alternative Technical Proposals ("ATC's") related only to Specification Section 676 "Concrete Deck Repair," but again it is used solely in a discretionary sense: a late submittal "will not be considered and may result in an unresponsive proposal." (Emphasis supplied) Accordingly, even though the

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[3] If the provision on TP-39 referred only to variations identified by the Contractor, the sentence should refer to variations "perceived and noted" or just use the word "noted" without a reference to "perceived."

DOT does not discuss TP-40 in its Memorandum, the provision on TP-40 is totally consistent with the DOT's position.

The Hearings Officer is in agreement with the analysis of the DOT that the initial offers submitted by HDCC, Kiewit, and GBI did not have to demonstrate "responsiveness" to the Scope of Improvements, including any "shall" provisions in that Scope of Improvements. Variations in the proposal from any such "shall" provision can be considered in the scoring of the proposals.[5]

Further, the Hearings Officer does not see anything in the RFP that would allow an offeror to increase its price in order to modify the variations in its offer from the Scope of Improvements. Variations may be considered in the scoring, but that does not allow a responsible offeror to avoid its obligations under the scope of work.

In this regard, Kiewit argues at page 6 of its Memorandum in Opposition that HDCC takes the opposite position on page 1 of its letter of December 6, 2010, DOT Exhibit "P." However, Kiewit takes that statement out of context because it refers to "Design Exceptions" and "Alternate Technical Concepts" (which are clearly referenced in the RFP) and is not a claim that HDCC can therefore ignore the Scope of Improvements. Kiewit then admits at the bottom of page 6 of its Memorandum that HDCC's letter at pages 2-3 references HDCC's commitment at a meeting on August 17, 2010 to meet all requirements of the RFP, a commitment made during the offer evaluation process and before award. While argument at the hearing on this Motion included a fair amount of evidence regarding the meetings with all

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[4] None of the parties supplied a copy of TP-40 with their memoranda responding to the DOT's motion. It can be found as part of Exhibit 1A to GBI's RFAH.

[5] In that regard, Evaluation Criteria #3 on TP-43, DOT Exhibit "F," is formulated as "Design documentation, which meets or exceeds the project objectives as determined by the Department." This allows proposals that do not initially meet the project objectives to be scored, rather than be automatically disqualified.

offerors on that date which cannot be considered with respect to this motion to dismiss, the evidence from DOT's Exhibit "P" to its Motion is a statement that HDCC recognized its obligation to meet the Project requirements irrespective of the scoring of its proposal.

In addition, Kiewit has in the past interpreted the RFP similarly to the interpretation stated herein. During the DOT's review of the Kiewit and GBI protests of the award to HDCC, GBI also claimed that Kiewit's proposal was nonresponsive. One basis for that claim was GBI's assertion that Kiewit's proposal violated the RFP's requirement of a minimum design speed of 60 mph. Kiewit admitted that its offer did not meet that standard in every location. Currently, some locations on the freeway allow for speeds of only 45 mph to 55 mph, and Kiewit admitted that "Kiewit's preliminary design efforts were to enable speeds that are the same or higher than the existing speeds for the locations listed." Kiewit letter of January 5, 2010, referenced on page 2 of its RFAH and attached as Exhibit B to its RFAH, at page 2 (Emphasis supplied). On the same page of that letter, Kiewit claimed the problem with its proposal was only a "minor design exception" that could be acknowledged later because its design "was only partially advanced for pricing purposes." (Emphasis supplied) However, Kiewit has pointed to nothing in the RFP that guarantees any design exception will be allowed after a contract is signed. What Kiewit was really saying there is that variations from required elements of the scope of work do not automatically make a proposal non-responsive.[6]

In that regard, the decision in Matter of: Medlin Construction Group, 2000 CPD ¶199 (Comp. Gen. 2000), is instructive. There, the RFP contemplated conceptual drawings with

[6] Since Kiewit advanced this argument to defend itself against GBI's claim of nonresponsiveness on the 60 mph speed limit issue, Kiewit could not very well claim that the HDCC proposal was nonresponsive on this issue. It is significant that Kiewit recognized this prior to GBI's letter challenging Kiewit's offer--Kiewit's earlier protest letter against HDCC's offer does not fault HDCC on the 60 mph speed limit issue.

post-award submittals of 45% and 100% complete design drawings. Here, the design documentation was to be done "in sufficient detail to effectively present to the Department the scope of design and construction that is being priced," with 50% and 100% design submittals to come after the award. TP-41 and TP-42, DOT Exhibits "L" and "M." While more than conceptual, they could be, in Kiewit's words, only "preliminary design efforts" and "only partially advanced." There, as here, the RFP did not require fully developed drawings demonstrating compliance with each of the RFP's requirements. There, as here, any non-compliance of the offer with the RFP requirements did not relieve the offeror of the responsibility of complying with those requirements. The offer there was considered acceptable under the terms of the RFP, and the HDCC offer here is similarly acceptable under the terms of the RFP.

A contrasting situation can be found in Sayer v. Minnesota Dept. of Transportation, 790 N.W. 2d 151 (Minn. 2010). There, the terms of the design-build RFP required rejection of nonresponsive proposals. There are no equivalent terms in the RFP at issue here.

Some of the parties herein have, perhaps for rhetorical purposes, taken what could be termed a "doomsday" approach. This argument, which can be summarized as "under the DOT's position, there could never be a challenge to any proposal in response to an RFP," may be an argument the DOT would actually like to see adopted. The Hearings Officer's analysis herein, however, does not adopt any such argument.

The ruling herein rejects the "responsiveness" claims of Kiewit and GBI as not supported by the law or the language of the RFP. A challenge to the award to HDCC can be made, but it must be made under the terms of HAR §3-122-57, entitled "Award of Contract":

> (a) The award shall be issued in writing to the responsible offeror whose proposal is determined in writing to provide the best

> value to the State taking into consideration price and the evaluation criteria in the request for proposals and posted pursuant to section 103D-701, HRS, for five working days. Other criteria may not be used in the evaluation. The contract file shall include the basis for selecting the successful offeror.
>
> . . .
>
> (b) The determinations required by this section shall be final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law. (Emphasis supplied)

This is the standard that will govern further proceedings herein, but non-responsiveness as automatically being contrary to law, as asserted by Kiewit and GBI, does not meet the standard for challenging the award to HDCC..

III. PRIOR PROCUREMENT PROTEST CASES ARE NOT DETERMINATIVE OF THE ISSUES IN DOT'S MOTION

GBI's reliance on two prior procurement decisions by a hearings officer of the Office of Administrative Hearings as being determinative of the outcome in this situation is misplaced. Neither of the cases, Hawaiian Dredging Construction Company v. DOT, PCH 2009-1 ("HDCC 1"), and Hawaiian Dredging Construction Company v. DOT, PCH 2009-9 ("HDCC 2"), can be used in that manner.

It should be first noted that GBI failed to establish that the relevant terms of the RFP in those two prior cases are the same as the terms in the RFP presently under consideration or that the legal issues raised and decided in those two prior cases, and their appeals, were the same as the legal issues pertinent herein. Such an identity is a necessary basis for this argument in GBI's Memorandum in Opposition, but GBI never demonstrates that such is the case. While the DOT asserted at oral argument that the terms of the two RFP's differ in important respects, the DOT also did not establish this proposition with any evidence. That

omission by the DOT, however, does not excuse GBI from first establishing that its assertion of an identity of RFP terms and/or legal issues in the cases is factually correct.[7]

Even assuming, however, solely for the purposes of argument, that the terms of the two RFP's are identical in all relevant respects, and that issues raised in the prior hearings and prior appeals are identical to the issues raised in this hearing, GBI's argument must still fail for several reasons.

First, the undersigned Hearings Officer is not bound by the decision of another hearings officer on what is here essentially an issue of law. The undersigned Hearings Officer is obligated to perform his own legal review and analysis, and his legal conclusions cannot be dictated by an earlier decision in another matter.

Second, the undersigned Hearings Officer is not bound by the ruling of the Circuit Court on the appeal of the HDCC 1 matter.[8] Unpublished decisions of the Circuit Court do not have precedential import. Chun v. Board of Trustees of the Employees' Retirement System of the State of Hawaii, 92 Haw. 439, 992 P.2d 127 (2000). Furthermore, with all due respect to Judge Nishimura of the Circuit Court, if the issue in this case is completely indistinguishable from the issue in HDCC 1 or HDCC 2, the undersigned would respectfully disagree with the prior Circuit Court decisions and suggest that, on any appeal of this matter, those prior decisions be reconsidered and that a different outcome be reached in this case.

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[7] There was no request to take judicial notice of Office of Administrative Hearings' files which, in any event, normally do not contain briefs or memoranda filed in Circuit Court on appeals of hearings officers' decisions. GBI did list three memoranda associated with HDCC 1 as Exhibits 23-25 for the hearing but did not mention them in connection with the Motion. Moreover, a review of those exhibits does not reveal any identity between the RFP terms or the arguments in HDCC 1 and the RFP terms or the arguments in this proceeding.

[8] GBI did not supply a copy of the Circuit Court's ruling in HDCC 2, having erroneously supplied a second copy of the court's ruling in HDCC 1 as its Exhibit "5." In any event, the undersigned's opinion regarding HDCC 2 would be the same as it is with respect to HDCC 1.

Third, the doctrine of judicial estoppel does not apply to prevent the DOT from asserting the positions set forth in the DOT's Motion to Dismiss. The doctrine is inapplicable here, at the very least, because it only applies to proceedings in the same case. See Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 219, 664 P.2d 745, 751 (1983). ("This preclusion estops a party from assuming inconsistent positions in the course of the same judicial proceeding.") Further, from the record provided here, it appears that the DOT is not "blowing hot and cold" on the law. In HDCC 1, the DOT allegedly took the same position it takes here, and it allegedly continued to take that position on the appeal of HDCC 1. It is alleged to have taken a different position in HDCC 2, which involved the offeror that successfully challenged GBI's otherwise winning offer in HDCC 1, only because it felt compelled to do so in light of the hearings officer's decision in HDCC 1. GBI Exhibit 3 at ¶11.

On the other hand, it is GBI that appears to be blowing hot and cold on this argument. In HDCC 1, its position was allied with that of the DOT, and it presumably maintained that position on the appeal of HDCC 1. That appeal was still pending, with GBI still aligned with the DOT, when GBI filed the protest herein. Now, after the appeal of HDCC 1 is apparently over, it is GBI that may be switching positions to one that is the opposite of the DOT's position GBI formerly endorsed.

For all of these reasons, GBI's arguments based upon HDCC 1 and HDCC 2 at pages 9 through 13 of its Memorandum in opposition are not sufficient to defeat the DOT's Motion to Dismiss.

IV. THE KIEWIT AND GBI PROTESTS RAISE MORE THAN JUST THE RESPONSIVENESS ISSUE

At page 15 of its Motion, the DOT asserts that neither Kiewit nor GBI had challenged any particular score or evaluation criteria in association with HDCC's proposal and that the sole basis of their protests is the nonresponsiveness of HDCC's offer. As set forth in more detail below, the Hearings Officer finds this assertion by the DOT is not completely descriptive of the claims in this case.

A. Kiewit's RFAH and its Protest Letter of November 16, 2010

Kiewit's RFAH was filed on April 21, 2011. It is a two page letter that incorporates by reference Kiewit's protest letter of November 16, 2010, and does not raise any arguments not already made in that protest letter. Kiewit's protest letter of November 16, 2010 is attached as Exhibit "G" to the DOT's Motion.

The "Introduction" in Kiewit's letter can be termed a "pure" responsiveness argument. It is limited to a comparison of HDCC's proposal with what Kiewit alleges are the terms of the RFP and concludes that the DOT should find HDCC's proposal "was nonresponsive in that it materially failed to meet those requirements." This argument is dismissed pursuant to the previous discussion herein.

Kiewit then provides specific examples of where it claims HDCC's proposal fails to meet the allegedly mandatory requirements. All of the arguments on these examples are limited to a comparison of HDCC's proposal to the RFP's technical provisions. This is a classic responsiveness argument that the preceding discussion in this Order demonstrates is not sufficient to withstand the DOT's Motion to Dismiss.

Next, Kiewit argues at page 6 of its protest letter that HDCC's alleged failure to comply with the previously enumerated technical provisions gave it an unfair advantage over

Kiewit in terms of the proposed price for the contract. However, as explained above, since there was no *per se* failure to comply with the RFP's terms, contrary to the responsiveness claim alleged by Kiewit, this argument by Kiewit also fails to survive the DOT's motion to dismiss.

On page 2 of its protest letter, Kiewit makes a claim that HDCC's proposal on lane widths is contrary to what Kiewit was specifically told by the DOT when Kiewit submitted an Alternative Technical Concept ("ATC") on this aspect of the design. In other words, Kiewit complains that HDCC was allowed to do something Kiewit was not permitted to do. The record pertaining to this aspect of the Motion was not sufficient to grant relief to the DOT here. TR page 81, line 20, through page 82, line 5. In addition, this is not a responsiveness issue. The DOT's Motion to Dismiss this claim is denied.

On page 7 of its protest letter, Kiewit asserts that HDCC received a higher score than Kiewit for Criterion 3 (Design documentation) that is illogical because Kiewit's design was better than HDCC's due to the alleged fact that Kiewit designed to the ultimate requirements of the technical provisions while HDCC failed to do so. While not stated with as much precision as may be desired, this could be construed as a claim that illogical scoring on Criterion 3 is one subject of Kiewit's protest. As such, this claim would not be limited to a pure responsiveness issue but could also be construed as a claim that the scoring process was clearly erroneous, arbitrary, capricious, or otherwise contrary to law. For ease of reference, this will be termed "a scoring issue." Giving Kiewit the benefit of the doubt on all reasonable inferences from the evidence presented on this motion, the DOT's Motion to Dismiss on this part of Kiewit's protest is denied. Except for the last two claims, however, the DOT's Motion to Dismiss the claims raised in Kiewit's protest letter is granted.

B. Kiewit's Hearing Memorandum Filed May 9, 2011

Pursuant to the terms of the Pre-Hearing Order, Kiewit filed its Hearing Memorandum on May 9, 2011. This Hearing Memorandum raised several issues that were not been raised in Kiewit's protest letter of November 16, 2010 or its RFAH filed April 21, 2011.

1. Under Heading III.F at pages 13-17, and under Heading IV.F at pages 30-33, Kiewit raises essentially the same nonresponsiveness arguments raised in its RFAH and protest letter. For the reasons stated above, these claims are dismissed pursuant to the DOT's Motion to Dismiss.

2. DOT's three evaluators gave identical scores to each offeror for all seven design documentation criteria, and this method of evaluation is prohibited by HAR §3-122-52(c).[9] Kiewit Hearing Memorandum, pages 17 and 18. This is a type of scoring issue. The DOT's Motion to Dismiss this claim is denied.

3. Kiewit's score was lowered for failing to include an item not called for in the RFP and for including a design concept previously specifically approved by the DOT. Kiewit Hearing Memorandum, pages 17, 29-30. This is a scoring issue. The DOT's Motion to Dismiss this claim is denied.

4. Included within Kiewit's discussion of its responsiveness claim is another claim not covered by the DOT's Motion to Dismiss. Paraphrasing, it appears Kiewit claims it followed the rules by submitting ATCs to propose several concepts that varied the project design requirements, but these ATCs were rejected. According to Kiewit, HDCC, on the other hand, was allowed to submit the same or similar concepts varying the project design

[9] Kiewit misidentifies this provision as HRS §3-122-52(c)

requirements but never obtained an approved ATC concerning these requirements. See, e.g., Kiewit Pre-Hearing Memorandum at pages 25-28. This is a scoring issue. The DOT's Motion to Dismiss this claim is denied.

C. GBI's Protest Letter of November 23, 2010

A copy of GBI's protest letter is attached to the DOT's Motion as Exhibit "H." GBI's claims in its protest letter can be summarized as follows:

1. HDCC's Proposal does not comply with the RFP's requirements concerning width lane requirements, prescribed barrier system requirements, minimum design speed requirements, traffic capacity requirements, and safety requirements. In a couple of instances, the protest letter specifically categorizes these defects as non-responsiveness. The protest letter at page 14, referring to traffic capacity, states: "Because HDCC's Proposal did not meet the requirements of the RFP, its[sic] was non-responsive and should be voided." In addition, the protest letter at page 15, referring to safety requirements, states: "As such, HDCC's proposal was not responsive to the RFP and should be rejected." Summarizing the claims in the beginning, the protest letter states at page 6: "HDCC's failure to meet the requirements of the RFP is fatal to its proposal." Summarizing the claims at the end, the protest letter at page 15 states: "As discussed above, HDCC's proposal fails to comply with the requirements of the RFP and, therefore, should be rejected as being non-responsive."

The DOT's Motion to Dismiss is granted to the extent that GBI's protest letter, and RFAH, claim that HDCC's Proposal does not comply with the RFP requirements and should therefore be rejected as non-responsive.

2. GBI was treated unfairly when the request in its ATC No. 5 to decrease lane width was denied while HDCC was allowed to present an allegedly more blatant deviation

concerning lane widths. GBI protest letter, page 10. This is a scoring issue. The DOT's Motion to Dismiss this claim is denied.

3. The evaluation scoring pertaining to the barrier systems was patently unfair to GBI. GBI protest letter, page 11. This is another scoring issue. The DOT's Motion to Dismiss this claim is denied.

4. The evaluation concerning the 60 mph minimum design speed was unfair and unjustly biased in favor of HDCC. GBI protest letter, pages 12-13. This also is a scoring issue. The DOT's Motion to Dismiss this claim is denied.

5. The evaluation with respect to traffic capacity was improper. GBI protest letter, page 14. This is a further scoring issue claim. The DOT's Motion to Dismiss this claim is denied.

6. The evaluation scoring with respect to safety issues was improper. GBI protest letter, page 15. This is another scoring issue. The DOT's Motion to Dismiss this claim is denied.

D. Additional claims in GBI's RFAH

While much of GBI's RFAH filed April 21, 2011, tracks its protest letter of November 23, 2010, it also includes additional claims:

1. The evaluation process violated the Procurement Code because required written explanations were not placed in the procurement file and made available for public inspection. This is alleged to violate HAR §3-122-52(c). GBI RFAH at page 20. The DOT's Motion to Dismiss this claim is denied.

2. The solicitation is so vague, ambiguous and misleading as to be inherently defective, unfair and subject to differing bidder interpretations. GBI RFAH at page 22.

While there may be some overlap here with the responsiveness claim, the Hearings Officer cannot conclude that this claim is identical to the responsiveness claim. The DOT's Motion to Dismiss this claim is denied.

3. The ATC process was administered in a manner inherently unfair to GBI. GBI RFAH at pages 22-23. This may duplicate part of the claims set forth earlier in the RFAH, but, in any event is not purely a responsiveness issue. The DOT's Motion to Dismiss this claim is denied.

4. The DOT is estopped from arguing that it is in the State's best interest to make an award to HDCC on that basis that its offer was the only one within the amount of allocated funds. GBI RFAH at pages 23-24. This is not a positive claim for relief but, instead, a defense to one of the grounds asserted by the DOT to deny GBI's protest. It will be discussed in more detail in the next section of this Order.

V. THERE WAS NO PRICE LIMITATION ON THE OFFERS

As a separate ground for dismissing the RFAH's of Kiewit and GBI, the DOT's Motion alleged that HDCC's proposal is the only proposal that can be accepted because it is the only proposal that does not exceed the available funding for the project. DOT Motion, pages 27-30. The concluding sentence of the first paragraph of the DOT's argument asserts: "RFP Addendum No. 4 explicitly stated that the Project cost was to be below $90,000,000. See Exhibit "K." Addendum No. 4, however, does not say that.

Addendum No. 4, attached as Exhibit "K" to the DOT's Motion, mentions the Project cost twice. On the first page, it amends the second paragraph on page RFP-1 so that its current version would include this sentence: "Estimated project cost is below $90,000,000." On the second page, it amends the third paragraph of page TP-2 to include this sentence: "It

is the goal of the Department to have both the PM Contraflow Lane, Phase 2 and the Pearl City and Waimalu Viaduct Improvement, Phase 1 to be constructed at a cost below the budgeted amount of $90 million."

Neither of these sentences "explicitly state" the Project cost was to be below $90,000,000. To the contrary, both sentences explicitly refrain from making that statement, and, instead, together state that the goal is to be below $90,000,000. While an offer coming in at a figure greater than the project estimate and project budget runs the risk of nonacceptance due to the unavailability of funds exceeding the budget, Addendum No. 4 does not say such an offer will automatically be unacceptable.

The DOT also relies on the Declaration of Jan Gouveia regarding funds "authorized for use on the Project." GBI counters that it was never informed that its proposal was rejected on the basis of price and was never told the DOT could not possibly enter into a contract with GBI because its price was higher than the Project's "estimate." GBI Memorandum in Opposition, page 14. Use of the word "estimate" by GBI does not completely cover the subject because Addendum No. 4 also refers to a "budget" of $90,000,000. GBI, however, also relies on the Declaration of Mark Kline to the effect that GBI was specifically informed by DOT before GBI's offer was submitted that the pricing goal was not absolute and that a price in excess of $90,000,000 could possibly be accepted if the entire proposal, from an overall technical and cost standpoint, was the most advantageous to the DOT. In contrast, the DOT argued that it was the proposer's risk that "there will be additional funds allocated." TR page 14, lines 19-23. However, the Gouveia Declaration is vague about when the allocation or allotment of funds took place. Further, the DOT's

motion, at page 28, demonstrates that there is a difference between a "budgeted" amount and an "allotted" amount.

The Kline Declaration lacked specificity as to the date of the DOT's alleged statements,[10] and at oral argument GBI's counsel was unable to supply a date. TR page 34, lines 2 through 25. On the other hand, the record available to the Hearings Officer at the time the motion was argued did not establish that these statements either were never made or that they were made at a time when they were irrelevant to the issues connected to the DOT's Motion. TR page 79, lines 19-22.[11]

Considering this portion of the DOT's Motion as one analogous to a motion for summary judgment because of the DOT's reliance on the Declaration of Jan Gouveia, in a summary judgment situation all reasonable factual inferences from the record are made in favor of the nonmoving party, i.e., GBI. On this Motion, the factual inferences are in favor of GBI regarding the alleged conversation. However, there is considerable doubt as to whether GBI could reasonably rely on oral statements as authoritatively interpreting or modifying the terms of the RFP See, e.g., page TP-39 of the RFP which states, in reference to Requests of Information: "No verbal inquiries will be accepted by the Department."

The Hearings Officer concludes, however, that there is no need to consider further any factual or legal issues concerning the conversations. The correct reading of the language in Addendum No. 4 is, as discussed above, contrary to the DOT's reading of that Addendum.

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[10] The declaration of Gregory Peterson also submitted by GBI is non-specific and provides no significant additional information or insight on the issues here.

[11] There may also be additional relevant evidence that Kiewit adverted to in argument but did not actually present in the hearing. However, given the very compressed schedule of the production of documents and the hearing, the Hearings Officer gave Kiewit more time to provide that evidence. TR page 79, line 25, through page 80, line 11.

Accordingly, the DOT's Motion to Dismiss on the basis that GBI's and Kiewit's price proposals exceeded the available funding for the Project, and that HDCC's price proposal was the only that did not exceed the Project's available funding, is denied.

VI. SUMMARY AND CONCLUSION

The DOT's Motion to Dismiss is granted with respect to all claims raised in the Kiewit protest letter of November 16, 2010 (DOT Exhibit G) except for the claim on page 2 of that letter pertaining to the denial of Kiewit's ATC concerning mandatory minimum lane widths and except for the claim on page 7 of that letter concerning alleged illogical scoring. As to those two claims, as explained more fully above, the DOT's Motion to Dismiss is denied.

The DOT's Motion to Dismiss is granted with respect to all claims raised in the Kiewit Hearing Memorandum filed May 9, 2011, because they are essentially the same as the claims in Kiewit's protest letter that have been dismissed, except for the following claims:

1. Identical evaluation scores from all three DOT evaluators. Kiewit Hearing Memorandum, pages 17-18.
2. Kiewit's score was lowered for failing to include an item not called for in the RFP and for including a design concept previously approved by the DOT. Kiewit Hearing Memorandum, pages 17, 29-30.
3. HDCC was allowed to submit design concepts varying from the project design requirements while Kiewit's ATCs requesting the same or similar variances were denied by the DOT. Kiewit Hearing Memorandum, pages 24-29.

As to these last three claims, the DOT's Motion to Dismiss is denied.

The DOT's Motion to Dismiss is granted with respect to all claims raised in GBI's protest letter (DOT Exhibit H) except for the following claims:

1. GBI was treated unfairly when the request in its ATC No. 5 to decrease lane width was denied while HDCC was allowed to present an allegedly more blatant deviation concerning lane widths. GBI protest letter, page 10.

2. The evaluation scoring pertaining to the barrier systems was patently unfair to GBI. GBI protest letter, page 11.

3. The evaluation concerning the 60 mph minimum design speed was unfair and unjustly biased in favor of HDCC. GBI protest letter, pages 12-13.

4. The evaluation with respect to traffic capacity was improper. GBI protest letter, page 14.

5. The evaluation scoring with respect to safety issues was improper. GBI protest letter, page 15.

As to these five claims, the DOT's Motion to Dismiss is denied.

The DOT's Motion to Dismiss is granted with respect to all claims raised in GBI's RFAH filed April 21, 2010 because they are essentially the same as the claims in GBI's protest letter that have been dismissed, except for the following claims:

1. The evaluation process violated the Procurement Code because required written explanations were not placed in the procurement file and made available for public inspection. This is alleged to violate HAR §3-122-52(c). GBI RFAH at page 20.

2. The solicitation is so vague, ambiguous and misleading as to be inherently defective, unfair and subject to differing bidder interpretations. GBI RFAH at page 22.

3. The ATC process was administered in a manner inherently unfair to GBI. GBI RFAH at pages 22-23.

As to these three claims, the DOT's Motion to Dismiss is denied.

In addition, the DOT's Motion to Dismiss on the basis that GBI's and Kiewit's price proposals exceeded the available funding for the Project, and that HDCC's price proposal was the only that did not exceed the Project's available funding, is denied.

DATED: Honolulu, Hawai`i, JUN - 2 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 HAWAI'I

In the Matter of

KIEWIT INFRASTRUCTURE WEST CO.,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI'I,

Respondent.

In the Matter of

GOODFELLOW BROS., INC.,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION, STATE OF HAWAI'I,

Respondent

PCX-2011-2

PCX-2011-3

(Consolidated Cases)

ORDER DENYING WITHOUT PREJUDICE DEPARTMENT OF TRANSPORTATION'S ORAL MOTION FOR PARTIAL DISMISSAL BASED ON LACK OF JURISDICTION

Hearing Date:
May 16, 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

EXHIBIT "B"

ORDER DENYING WITHOUT PREJUDICE DEPARTMENT OF TRANSPORTATION'S ORAL MOTION FOR PARTIAL DISMISSAL BASED ON LACK OF JURISDICTION

On April 21, 2011, Petitioner Kiewit Infrastructure West Co. ("Kiewit") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PCX-2011-2. Later on April 21, 2011, Petitioner Goodfellow Bros., Inc. ("GBI") filed its RFAH in this matter, which Request was assigned case number PCX-2012-3. The two matters were consolidated pursuant to the Prehearing Order dated April 29, 2011.

On May 9, 2011, Respondent Department of Transportation, State of Hawaii ("DOT") filed its Motion to Dismiss Petitioner's Request for Hearing, which motion concerned the requests for hearing of both Kiewit and GBI. As set forth in the Prehearing Order, argument on this Motion was to be held on May 16, 2011.

On May 9, 2011, the DOT also filed its Response to the Requests for Administrative Hearing by Kiewit and GBI. At pages 8-9 of this Response, the DOT argued that GBI could not raise issues at the administrative hearing that were not previously presented to the DOT in GBI's protest letter of November 23, 2010. Despite having had GBI's RFAH in advance of the May 9, 2011 deadline for filing the DOT's Motion to Dismiss, the DOT's argument concerning GBI's alleged inability to raise certain issues at the administrative hearing was not contained in its Motion to Dismiss.

The DOT's Response did not claim that Kiewit had failed to exhaust administrative remedies. Since Kiewit's RFAH, unlike GBI's, solely tracked Kiewit's protest letter, it is understandable that the DOT Response would not make an exhaustion claim against Kiewit.

Kiewit's pre-hearing memorandum was not available to the DOT at the time it prepared its Response or its Motion.

At the beginning of the hearing on May 16, 2011, the DOT presented oral argument on its Motion to Dismiss. During that oral argument, the DOT brought up its claim of failure to exhaust administrative remedies. Pursuant to the order of the Hearings Examiner, this part of the DOT's argument was held in abeyance until after conclusion of the remainder of the oral argument by all parties on the DOT's written motion to dismiss. Transcript of May 16, 2011 hearing ("TR"), page 12, line 12, through page 13, line 8.

In this manner, the DOT motion regarding exhaustion of administrative remedies became a separate oral motion. Before argument commenced on this oral motion, the DOT was asked to specify which claims of Kiewit and/or GBI were the subject of this motion. TR page 59, lines 13-18. The DOT complied with this request when it later presented its oral motion. TR page 63, line 4, through page 66, line 17.

Under the Procurement Code, the hearings examiner has the jurisdiction to consider and decide the protests of Kiewit and GBI. 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 governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.[1]

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

> The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's

[1] This hearing involves Section 103D-701.

> designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

In other words, the hearings officer can only make a decision about the "determinations" of the chief procurement officer, and the chief procurement officer can only make "determinations" about complaints brought before that officer. The statute literally leaves no room for the hearings officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer. [2]

The situation here is analogous to the contract controversies that were the subject of Koga Engineering & Construction, Inc., v. State of Hawaii, 122 Haw. 60, 222 P.3d 979 (2010). The contractor there brought a claim for additional compensation due to allegedly defective contract plans. After the contractor exhausted its administrative remedies on this claim, it filed suit. After suit was filed, an additional dispute arose between the contractor and the State regarding the contract retainage. The contractor added an additional claim to the lawsuit concerning the retainage without first filing an appropriate administrative claim on this additional issue. Even though the retainage claim pertained to the same contract that was involved in the claim for additional compensation on account of allegedly defective plans, the Hawaii Supreme Court eventually held that there was no jurisdiction to consider the retainage claim in the lawsuit. Jurisdiction was lacking over the retainage claim because of the failure to exhaust administrative remedies for that particular claim.

Similarly, in this proceeding, absent some factor that excuses the inclusion of any claim in the original procurement protests of Keiwit and GBI, claims protesting the award of the contract to Intervenor Hawaiian Dredging and Construction Company, Inc., cannot be

brought here if they were not included in the original protests. There would be no jurisdiction to consider these "new" claims because of the failure to exhaust administrative remedies.

The question of lack of jurisdiction can be raised at any time in these proceedings. If not raised by the parties, it can be raised by the hearings officer *sua sponte*, as jurisdiction cannot be conferred by the stipulation, agreement, or waiver of the parties. Captain Andy's Sailing, Inc. v. Department of Natural Resources, 113 Haw. 184, 193-194, 150 P.3d 833, 842-843 (2006); Koga Engineering & Construction, Inc., v. State of Hawaii, supra, 122 Haw. at 84, 222 P.3d at 1003.

Nevertheless, despite the DOT's ability to raise lack of jurisdiction as an issue at any time in these proceedings, Kiewit and GBI are entitled to notice and an adequate time in which to prepare arguments against the DOT's position on jurisdiction. In the Koga Engineering case, for example, the State did not claim lack of jurisdiction until it filed its response to the contractor's application for a writ of certiorari to the Supreme Court following a decision by the Intermediate Court of Appeals. The contractor was given an opportunity to respond to, and file an additional brief regarding, this new clam before the Supreme Court issued a ruling on the jurisdiction issue.

In the present case, as outlined above, Keiwit and GBI were not put on advance notice that the alleged failure to exhaust administrative remedies was going to be part of the DOT's Motion to Dismiss on May 16, 2011. The hearings officer finds that this lack of advance notice to Kiewit and GBI was prejudicial to them for two reasons: (1) They did not have an adequate opportunity to brief and argue against the DOT's motion in general; and (2) they did

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[2] It should be noted that HRS §103D-704 provides that this is Kiewit's and GBI's exclusive remedy.

not have an adequate opportunity to brief and argue that the exhaustion requirement was excused in cases where their claims are based on documents newly produced by the DOT after the RFAH's were filed and thus after the bid protests were denied.

Accordingly, the DOT's oral motion for dismissal of specified claims for failure to exhaust administrative remedies is denied. Because this denial is based solely on procedural grounds, the denial is without prejudice.

The DOT is free to raise jurisdictional issues at the conclusion of the testimony, and the hearings officer is, in any event, required to review the jurisdictional issues as part of the final determination of these matters. Kiewit and GBI did obtain "fair warning" during the hearing on May 16, 2011 as to which specific claims could be subject to a later argument concerning lack of jurisdiction and that the jurisdictional issue will eventually be the subject of a ruling at the conclusion of the case. TR page 76, line 10, through page 77, line 21.

DATED: Honolulu, Hawai`i, MAY 24 2011.

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