



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

In the Matter of)	PCH-2011-15
)	PCH-2011-16
GP ROADWAY SOLUTIONS, INC.,)	[Consolidated]
)	
Petitioner,)	HEARINGS OFFICER’S
)	FINDINGS OF FACT,
vs.)	CONCLUSIONS OF LAW,
)	AND DECISION
GLENN OKIMOTO AS DIRECTOR OF)	
THE DEPARTMENT OF)	
TRANSPORTATION, STATE OF)	
HAWAII,)	
)	
Respondent.)	

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

I. INTRODUCTION

On November 25, 2011, GP Roadway Solutions, Inc. (“Petitioner”), filed requests for administrative review of the Department of Transportation, State of Hawaii’s (“Respondent”) November 18, 2011 decision to deny Petitioner’s February 23, 2011 protest in connection with a project designated as, *Guardrail Repairs at Various Locations, Island of Oahu (No. HWY-OM-2011-35)* (“Guardrail Project”), and another project designated as, *Fencing Repairs at Various Locations (HWY-OM-2011-39)* (“Fencing Project”). Petitioner’s requests for administrative review were made pursuant to Hawaii Revised Statutes (“HRS”) §103D-709 and were designated as PCH-2011-15 (Guardrail Project) and PCH-2011-16

(Fencing Project). Both matters were thereafter set for hearing and Notices of Hearing and Pre-Hearing Conference were duly served on the parties. By agreement of the parties, both matters were consolidated for hearing.

On December 2, 2011, Respondent filed a motion to dismiss Petitioner's requests for hearing and on December 6, 2011, Petitioner filed a motion for summary judgment.

On or about December 9, 2011, the Hearings Officer informed the parties that he was denying Petitioner's motion for summary judgment and granting, in part, Respondent's motion to dismiss "as to Petitioner's claim that the \$6,250.00 security amounts set forth in Section 102.08 of the respective solicitations violate HRS §103D-323(b)."

On December 13 and 15, 2011, these matters came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Cid H. Inouye, Esq. and Kristi L. Arakaki, Esq. appeared for Petitioner; and Stella M.L. Kam, Esq. appeared for Respondent.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit proposed findings of fact and conclusions of law. Accordingly, on January 20, 2012, the parties filed their proposed findings and conclusions.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and decision.

II. FINDINGS OF FACT

1. On or about December 20, 2010 and January 11, 2011, respectively, Respondent issued Notices to Bidders ("IFBs") for the purpose of soliciting bids for the Guardrail and Fencing Projects.

2. The Guardrail Project included guardrail, terminal section and impact attenuator system repairs on the island of Oahu on an "as-needed" basis. The Fencing Project involved fencing repairs on the island of Oahu on an "as-needed" basis.

3. The IFBs divided the island of Oahu into four separate areas and bidders were invited to bid on any or all of the four areas.

4. Section 102.04 of the IFBs, entitled “Estimated Quantities” states, in part that, “[t]he quantities shown in the contract are approximate and are for the comparison of bids only. The actual quantity of work may not correspond with the quantities shown in the contract.”

5. Section 102.05 of the IFBs, entitled “Examination of Contract and Site of Work” states, in part that, “[b]y the act of submitting a bid for the proposed contract, the bidder warrants that: (1) The bidder and its Subcontractors have reviewed the contract documents and found them free from ambiguities and sufficient for the purpose intended . . .”

6. Section 102.06 of the IFBs, entitled “Preparation of Proposal”, directed bidders to submit their bids on forms furnished by Respondent and specify a unit price for each pay item with a quantity given, the products of the respective unit prices and quantities, the lump sum amount, and the total amount of the proposal obtained by adding the amounts of the several items.

7. Section 102.07 of the IFBs, entitled “Irregular Proposals” states, in part that, Respondent may reject a proposal as irregular if “[t]he proposal contains unauthorized additions, conditions, or alternates” and/or if “[t]he proposal contains irregularities that may tend to make the proposal incomplete, indefinite, or ambiguous to its meaning.”

8. Section 102.08 of the IFBs provides in part:

102.08 Proposal Guaranty. In as much as the contract to be executed is a price-term, open end, or requirements contract under which the contract price, or total amount to be paid the Contractor cannot be determined at the time the contract is executed, the proposal guaranty required shall be in the following amounts:

<u>Proposal</u>	<u>Security Amount</u>
A – Area 1	\$6,250.00
B – Area 2	\$6,250.00
C – Area 3	\$6,250.00
D – Area 4	\$6,250.00

* * * *

9. Section 102.08 of the IFBs also states that the proposal guaranty could be in the form of: “(1) A deposit of legal tender; or (2) A valid surety bid bond, underwritten by a company licensed to issue bonds in the State of Hawaii, in the form and composed, substantially, with the same language as provided herewith and signed by both parties; or (3) A certificate of deposit, share certificate, cashier’s check, treasurer’s check, teller’s check, or official check drawn by, or a certified check accepted by and payable on demand to the State by a bank, savings institution, or credit union . . . The above shall be in the amount of \$6,250.00 for each Area.”

10. Section 102.12 of the IFBs, entitled “Disqualification of Bidders” states that Respondent “may disqualify a bidder and reject its proposal” if a bidder submits “an irregular proposal in accordance with Subsection 102.07 – Irregular Proposals.”

11. Section 103.01 of the IFBs provides that the lowest bid would be determined by the sum of all items for comparison of bids:

103.01 Consideration of Proposals. The Department will compare the proposals in terms of the summation of the products of the approximate quantities and the unit bid prices after the Contracts Officer opens and reads the proposals. The Department will make the results immediately available to the public. If a discrepancy occurs between the unit bid price and the bid price, the unit bid price shall govern.

* * * *

12. Section 103.02 of the IFBs provides in part:

103.02 Award of Contract. The award of contract, if it be awarded, will be made within 60 calendar days after the opening of bids, to the lowest responsible bidder whose proposal complies with all the requirements.

* * * *

13. Section 103.05 of the IFBs provides in part:

103.05 Requirement of Contract Bond. At the time of execution of the contract, the successful bidder shall file a

good and sufficient performance bond and a payment bond on the forms furnished by the Department conditioned for the full faith and performance of the contract in accordance with the terms and intent thereof and for the prompt payment to all others for all labor and material furnished by them to the bidder and used in the prosecution of the work provided for in the contract.

* * * *

In as much as the contract to be executed is a price-term, open end, or requirements contract under which the contract price, or total amount to be paid the Contractor cannot be determined at the time the contract is executed, the performance and payment bond amounts required for the work at each Area shall be as follows:

<u>Proposal</u>	<u>Security Amount</u>
A – Area 1	\$125,000.00
B – Area 2	\$125,000.00
C – Area 3	\$125,000.00
D – Area 4	\$125,000.00

* * * *

14. The IFBs required all bidders to submit with their bids, a form letter which stated that, “this proposal is accompanied with a bid security in the amount of \$6,250.00 per Area, in the form checked below.”

15. On January 4, 2011, a pre-bid meeting was held for the Projects. The minutes of meeting included, among other things, the following question and response:

* * * *

Question #7: Is there a bid bond for this project?

Answer: Yes. Refer to Subsection 103.05 of the Special Provisions. It is \$125,000.00 per area.

* * * *

16. Respondent's response to Question #7 in the January 4, 2011 pre-bid meeting minutes mistakenly referred to Subsection 103.05 relating to the required performance and payment bonds rather than to the subsection relating to bid security.

17. On or about January 12, 2011, Respondent issued Addendum No. 2 for the Projects. The addendum included the minutes of the January 4, 2011 pre-bid meeting.

18. Bids for the Guardrail Project were due on or before January 20, 2011. Bids for the Fencing Project were due on or before February 10, 2011. Petitioner submitted bids for both projects prior to the respective deadlines.

19. Petitioner's bids were accompanied by a bid bond in the amount of "**Five Percent (5%) of Bid Amount.**" All of the other bidders submitted bid security in the sum of \$6,250.00 per area as specified in the IFBs.

20. Petitioner's bid bonds were issued by Fidelity and Deposit Company of Maryland as surety and signed by Paul C. Kennedy, its Attorney-in-Fact.

21. Petitioner was determined to be the apparent low bidder for the Guardrail Project and Areas 2 thru 4 of the Fencing Project. Petitioner submitted a total bid amount of \$110,675.00 for each of the four areas in the Guardrail Project, and a total bid amount of \$5,075.00 for each of the four areas in the Fencing Project.

22. On February 15, 2011, Respondent informed Petitioner that Respondent was rejecting Petitioner's bids for both projects as nonresponsive.

23. By letter dated February 23, 2011, Petitioner protested the rejection of its bids. Petitioner's protest stated in part:

* * * *

The DOT's [sic] asserts that the basis for the rejection of GPRSI's bid is an alleged failure to provide bid security at the time of bid submission in the form required by the bid documents. . . . However, GPRSI provided bid security at the time of bid submission in the form of surety bid bonds in amounts equal to five percent of the bid amount for each of the Guardrail and Fencing Projects ("5% Bid Bond"). . . The 5% Bid Bond is the standard type of bid security

required on Hawaii public works projects pursuant to Hawaii Revised Statutes (“HRS”) §103D-323(b)(emphasis in original).

Furthermore, the 5% Bid Bonds provide far greater security to the State than the \$25,000 fixed bonds described in the bid documents . . . Based on historical data for the past two years as shown . . . the average bid amount for guardrail and fencing repairs on Oahu has totaled \$1,537,079.76 (footnote omitted) and \$781,730.73 (footnote omitted), respectively. The minimum bid amount for guardrail and fencing repairs during the aforesaid time period was \$1,070,580.46 and \$691,230.18, respectively. Based on these figures, if GPRSI had been unable to complete its contracts for the Projects and if GPRSI’s 5% Bid Bond had been called in, the bond surety would have been required to pay at least \$53,529.02 and \$34,561.51 for the guardrail and fencing Projects, respectively. These bond amounts exceed the \$25,000 bond amounts required by the fixed bonds described in the bid documents. Thus, under HRS §103D-323(c), the nonconformity of the bid security provided by GPRSI with the bid security provisions described in the bid documents is clearly nonsubstantial and is not a proper basis for rejection of GPRSI’s bids.

* * * *

24. By letter dated February 25, 2011 to Respondent, Petitioner stated in part:

* * * *

GPRSI’s position that it complied with the bid security requirements of the above-listed Projects is further supported by the following argument. An excerpt of the minutes of the Pre-Bid Meeting held on January 4, 2011 for the Guardrail Project is attached hereto as Exhibit “K”. The minutes show that a question was posed regarding whether a bid bond was required for the Project. . . The response to that question by the DOT was that a bid bond was required and “\$125,000 per area,” for each of the four areas, is the amount that should be used for calculating the bond amount. In other words, the DOT projected that the Guardrail Project would cost at least \$125,000, resulting in

required bid security of \$6,250 per area or \$25,000 for the entire Guardrail Project. . . In short, the DOT determined the minimum costs and/or bid amounts for the Projects to be \$125,000 per each of the four areas in each project, and then required a bid amount equal to 5% of this minimum cost/bid amount. Thus, the DOT was effectively requiring submission of a 5% Bid Bond. (emphasis in original).

* * * *

25. By letter dated November 18, 2011, Respondent denied Petitioner's protest:

* * * *

Section 102.08 of both solicitations sets forth the requirements for the bid bonds to be submitted with the bids. Because both projects involve repairs to fencing and guard rails on an "as needed" basis, and the contract or total amount to be paid to the contractor cannot be determined at the time the contract is executed, the DOT required bidders to submit a bid bond for each project in the amount of \$6250 per area, four areas total for the island of Oahu. The form letters GRPSI submitted with its bids (the letters were signed by the President of GPRSI) clearly state in the middle of page P-3: "In accordance with Section 103D-323, Hawaii Revised Statutes, this proposal is accompanied with a bid security in the amount of \$6,250.00 per Area, in the form checked below." However, the surety bid bonds attached to GPRSI's letters and bids state that the bid bond amounts are "in the penal sum of *** **Five Percent (5%) of Bid Amount** *** .

GPRSI's bid bonds, at 5% of GPRSI's bid amount, have a value of only \$213.75 per area for the fencing project and \$5533.75 per area for the guard rail project. The other bidder for the guard rail project and the other bidders for the fencing project submitted bid bonds in the amount of \$6250 per area, as required by the solicitations. GPRSI's bids failed to comply with the bid bond requirements of the solicitations for both projects, and thus, GPRSI's bids for both the fencing and the guard rail projects must be rejected

as nonresponsive under section 3-122-223(c), Hawaii Administrative Rules.

26. On November 25, 2011, Petitioner filed its requests for administrative review of Respondent's November 18, 2011 denial of Petitioner's bid protest.

III. CONCLUSIONS OF LAW

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997). And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f).

Respondent's Motion to Dismiss

The Hearings Officer granted Respondent's Motion to Dismiss as to Petitioner's claim that the \$6,250.00 bid security amounts set forth in Section 102.08 of the IFBs violated HRS §103D-323(b). The dismissal of that claim was based on HRS §103D-701(a). That section provides:

§103D-701. Authority to resolve protested solicitations and awards. (a) Any actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. Except as provided in sections 103D-303 and 103D-304, a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working

days after the posting of award of the contract under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; *provided further that no protest based on the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.*

(Emphasis added).

The foregoing provision requires that protests based on the content of the solicitation be submitted within 5 working days after the protestor knew or should have known of the facts giving rise to its protest but, in any event, *prior to the bid submission deadline. Ludwig Contr., Inc. v. County of Hawaii, PCX-2009-6 (December 21, 2009)(emphasis added)* This Office has previously held that the requirement to file protests based on the content of the solicitation prior to the receipt of offers was designed to provide governmental agencies with the opportunity to correct deficiencies in the bid documents early in the solicitation process in order to “minimize the disruption to procurements and contract performance”. The possibility of having to reject all bids, cancel the solicitation and resolicit may be avoided by requiring the correction of such deficiencies prior to the bid submission date. *Clinical Laboratories of Hawaii v. City & County of Honolulu, Dept. of Budget & Fiscal Services; PCH 2000-8 (October 17, 2000); American Marine Corp. v. DOT, et al., PCH-2005-12 and PCH2006-1 (March 30, 2006); ; Delta Construction v. Dept. of Hawaii Home Lands, et al., PCH-2008-22/PCH-2009-7 (April j9, 2009); Ludwig Contr., Inc. v. County of Hawaii, supra; Paradigm Constr. v. Dept of Hawaiian Home Lands, State of Hawaii, PCH-2009-16 (October 7, 2009).* This presumes that the protestor will have sufficient knowledge of the contents of the bid documents soon after its issuance and provides governmental agencies with the opportunity to correct deficiencies in those documents early in the process in order to minimize disruption to procurements and contract performance. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002); Delta Construction v. Dept. of Hawaii Home Lands, et al., supra; Ludwig Contr., Inc. v. County of Hawaii, supra; Paradigm Constr. v. Dept of*

Hawaiian Home Lands, State of Hawaii, supra. Moreover, strict, rather than substantial compliance with the time constraints set forth in HRS §103D-701(a) is required in order to effectuate the statute's underlying purpose. *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget & Fiscal Services, supra; CR Dispatch Service, Inc. dba Security Armored Car & Courier Service v. DOE, et al., PCH-2007-7 (December 12, 2007); Ludwig Contr., Inc. v. County of Hawaii, supra; Paradigm Constr. v. Dept of Hawaiian Home Lands, State of Hawaii, supra.*

According to the uncontroverted facts, the IFBs were issued on December 20, 2010 and January 11, 2011, respectively. Section 102.08 of the IFBs unequivocally required bidders to provide bid security in the fixed sum of \$6,250.00 per area. In its requests for review, Petitioner asserted, among other claims, that the bid security required by the IFBs violated HRS §103D-323(b)¹ by “failing to require a 5% Bid Bond and instead requesting a fixed amount Bid Bond.” Petitioner’s claim is clearly one based on the content of the solicitation. Nevertheless, Petitioner did not submit any protest until February 23, 2011, well after the issuance of the IFBs and the bid submission deadlines.

Petitioner argues that the issue of whether its protest was timely cannot be asserted here because Respondent failed to include the argument in its November 18, 2011 denial. In *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH-98-6 (December 9, 1998)*, the Hearings Officer held:

Petitioner also contends that Respondent waived its right to assert that Petitioner’s protest was untimely when it failed to include that as a basis for its denial of the protest in its May 10, 1998 letter (footnote omitted). The language of HAR §3-126-3(a)², however, is plain and unambiguous. It clearly requires that a specific time provision be met in the

¹ HRS §103D-323(b) provides that, “[b]id security shall be in an amount equal to at least five per cent of the amount of the bid.”

² Hawaii Administrative Rule §3-126-3(a), prior to the 2004 amendment, provided as follows:

Filing of protest. (a) Protests shall be made in writing to the chief procurement officer or the head of the purchasing agency, and shall be filed in duplicate within five working days after the protestor knows or should have known of the facts leading to the filing of a protest. A protest is considered filed when received by the chief procurement officer or the head of the purchasing agency. Protests filed after the five-day period shall not be considered.

filing of a protest in order to have the protest considered, and expressly prohibits consideration of untimely protests. *This language read in light of the underlying purpose of the Procurement Code, as discussed earlier, leads the Hearings Officer to conclude that the time requirement set forth in HAR §3-126-3(a) is mandatory and therefore not subject to waiver by Respondent. The Hawaii Corporation, dba Pacific Construction Company v. Kim and Dillingham Corporation, 53 Haw. 659 (1972). See generally, Appeal of Kennedy Temporaries, No. 1061 (MSBCA July 20, 1982) (timeliness requirement is substantive in nature and could not be waived).*

(Emphasis added).

The rationale expressed in *GTE Hawaiian Telephone* applies equally here. The timeliness requirements set forth in HRS §103D-701(a) are mandatory and cannot be waived by Respondent.

Alternatively, Petitioner contends that it was not “aggrieved” until it was informed by Respondent on February 15, 2011 that the bid security provision in the IFBs would be used to reject Petitioner’s bid. HRS §103D-701(a) however, makes clear that if Petitioner believed that the bid security requirement in the IFBs was in violation of the Code, it was “aggrieved” and obligated to submit a protest expeditiously and, in any event, prior to the bid submission deadline, rather than wait until the bids were opened and its bids rejected³.

Responsiveness of Petitioner’s Bid

It is Petitioner’s position that its bid bonds were in compliance with the IFBs requirement for bid security in the sum of \$6,250.00 per area. More specifically, Petitioner argues that according to the minutes of the January 4, 2011 pre-bid meeting, \$125,000.00 for each of the four areas “is the amount that should be used for calculating the bond amount.” In other words, according to Petitioner, Respondent “determined the minimum costs and/or bid amounts for the Projects to be \$125,000.00 per each of the four areas . . . and therefore required a bid amount equal to 5% of this minimum cost/bid amount, i.e., \$6,250 per area.”

³ Petitioner also asserted that Respondent failed to submit a proper response, pursuant to Hawaii Administrative Rule §3-126-62, to all of the claims raised in its requests for administrative review. Therefore, according to Petitioner, Respondent has waived its right to object to those claims. The Hearings Officer, however, finds that Respondent’s motion to dismiss provided Petitioner with sufficient notice of its position on the relevant issues and, as such, satisfied the response requirements of the rule.

Petitioner's bonds, however, did not specify 5% of \$125,000.00.00 or even 5% of Respondent's estimated value of the contracts. Instead, the bonds refer to 5% of the "Bid Amount". And while the "bid amount" may be readily discernable in a solicitation involving a lump sum contract, that is not necessarily the case in an indefinite price contract like the ones involved here. Although Petitioner argues that "bid amount" necessarily means Respondent's estimated value of the contract i.e. \$125,000.00, the bid amount could also reasonably refer to the sum of unit bid prices offered by the various bidders and upon which the lowest bidder was determined⁴. In that event, the amount of Petitioner's bonds would be less than the required \$6,250.00 bid security: 5% of \$110,675.00 or \$5,534.00 for the Guardrail Project and 5% of \$5,075.00 or \$254.00 for the Fencing Project. Respondent is not required to engage in telepathy to discern what Petitioner or its surety intended. *See, Southern Food Groups, L.P. v. Dept. of Educ., et.al., 89 Haw. 443 (1999)*. Under these circumstances, the Hearings Officer concludes that Petitioner's bids were, at best, ambiguous and therefore nonresponsive to the IFBs. *See Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998)(an ambiguity in the language of a solicitation is properly interpreted against the party drafting that document)*.

In the alternative, Petitioner argues that even if its bonds did not conform to the bid security requirement in the IFBs, the nonconformity was nonsubstantial and therefore does not affect the responsiveness of its bids. HAR §3-122-223 provides in relevant part:

* * * *

- (c) If a contractor fails to accompany its offer with the bid security when required, the offer shall then be deemed nonresponsive in accordance with the definition of "responsive bidder or offeror" in section 3-120-2, except as provided by subsection (d).
- (d) If an offer does not comply with the security requirements of this subchapter, the offer shall be rejected as nonresponsive, unless the failure to comply is

⁴ Petitioner characterizes this interpretation as absurd, arguing that the legislature could not have intended that bid security be provided in an amount equal to a minimum of 5% of the unit price quoted by bidders in their bids. This argument, however, misses the mark. Notwithstanding the underlying intent of HRS §103D-323(b), the ambiguity in Petitioner's bonds nevertheless provides a reluctant surety with an opportunity to avoid its obligations under the bonds by claiming that those obligations are limited to 5% of the quoted unit prices. On the contrary, it would be absurd to compel Respondent to accept such bonds.

determined by the chief procurement officer, the head of a purchasing agency, or a designee of either officer, to be nonsubstantial where:

- (1) Only one offer is received, and there is not sufficient time to resolicit the contract;
- (2) The amount of the bid security submitted, though less than the amount required by the solicitation, is equal to or greater than the difference in the price stated in the next higher acceptable offer plus an amount to cover reasonable administrative costs and expenses, including the cost of rebidding the project, resulting from the failure of the bonded bidder to enter into a contract for the work bid; or
- (3) The bid security becomes inadequate as a result of the correction of a mistake in the offer or offer modification in accordance with section 3-122-31, if the offeror increases the amount of security to required limits within the time established by the procurement officer.

* * * *

According to the foregoing rule, Respondent was required to reject Petitioner's bids as nonresponsive unless the noncompliance was a nonsubstantial one as defined in HAR §§3-122-223(d)(1), (2) or (3). None of those definitions, however, are applicable here.

Instead, Petitioner contends that its nonconformity was nonsubstantial because its bids, as written, "provide far greater security to the State than the \$25,000 fixed bonds described in the bid documents. According to Petitioner, the minimum cost for the guardrail and fencing projects on Oahu within the past two years have amounted to \$1,070,580.46 (10/1/08-9/30/09) and \$691,230.18 (10/1/09-9/30/10), respectively, and therefore the bond surety would have been required to pay at least \$53,529.02 and \$34,561.51 for those projects. Following this reasoning, Petitioner argues that the only way that its bonds would provide less security than the required \$6,250.00 for each of the four areas, is if the costs for the Guardrail and Fencing Projects amount to less than \$500,000.00. The argument, however, is not only speculative, but more importantly, erroneously assumes that the "Bid Amount" necessarily and unambiguously refers to the total cost of the contracts.

Petitioner also claims that its noncompliance is a minor or an obvious mistake that Respondent should waive or Petitioner should be allowed to correct pursuant to HAR §3-122-31. In that regard, HAR §3-122-31(a) provides that an obvious mistake may be corrected “to the extent it is not contrary to the best interest of the purchasing agency or to the fair treatment of other bidders” while HAR §3-122-31(c) provides that a mistake discovered after bid opening but prior to award may be corrected or waived if the mistake is a minor informality.

In determining whether a mistake is an obvious one, both the mistake *and* the intended bid must be evident on the face of the bid documents. Where the intended bid cannot be determined from the bid documents alone, a mistake is not correctable as an obvious mistake. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-02 (August 7, 2001)*. Here, Petitioner’s intended bid with respect to its bid bonds was anything but obvious or apparent. On the contrary, the bonds offered by Petitioner in the sum of 5% of “Bid Amount” were ambiguous and, as such, cannot be waived or corrected as an obvious mistake or a minor informality. *See generally, Southern Food Groups, supra (correction of a mistake that is neither an arithmetical error nor a minor informality must be in the best interest of the procuring agency. However, questions of the responsiveness of a bid relate to conformity with the invitation and are generally not curable after bid opening)*. Moreover, Respondent correctly points out that waiving the nonconformity or allowing Petitioner to correct its bid bonds under the circumstances presented here would be unfair to the other bidders, all of whom had submitted the required bid security. As the *Southern Food court* held, a correction would not have been in the best interest of the procuring agency inasmuch as it would have been unfair to the other bidders. The specifications furnished were clear and specific, and they were ignored. The protestor cannot realistically be heard to say that it was relying on the minor irregularities clause of HAR §3-122-31). *Southern Food Groups, supra. See also, Jas. W. Glover, Ltd. v. Board of Water Supply, supra (because the discovery of bid mistakes may occur in the period after bid opening when bid prices have been exposed and market conditions may have changed, the rule also reflects a concern with protecting the integrity of*

the competitive bidding system by strictly limiting the ability to make bid corrections). These considerations lead the Hearings Officer to conclude that Respondent's decision not to waive the nonconformity or allow Petitioner to correct its nonconformity was consistent with the applicable laws.

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that Petitioner's requests for administrative review be and are hereby dismissed and that each party bear its own attorney's fees and costs.

Dated at Honolulu, Hawaii: JAN 27 2012



CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs