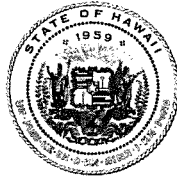


NEIL ABERCROMBIE
GOVERNOR



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March 3, 2014

The Honorable David K. Lassner
Interim President, University of Hawai'i
2444 Dole Street
Bachman Hall
Honolulu, Hawai'i 96822

Attention: Dr. John Morton
Vice President for Community Colleges

Re: Investigation Report

Dear President Lassner:

This report, prepared by the Department of the Attorney General, is of a full and independent investigation conducted by the Attorney General (AG) at the request of the University of Hawai'i, Board of Regents, in response to certain allegations made by Dennis Mitsunaga ("Mitsunaga"), CEO of Mitsunaga & Associates, Inc. ("MAI"), accusing the University of Hawai'i, Office of Capital Improvements ("OCI"), headed by Brian Minaai ("Minaai"), of mismanagement, cronyism, wasting of money, and possible unethical and illegal conduct in connection with the design and construction of a 300 bed dormitory facility at the University of Hawai'i at Hilo ("UHH"), known as the University Village, Phase I ("Project").

The AG formed an investigative team headed by First Deputy Attorney General Russell Suzuki, and which included Deputy Attorneys General Reese Nakamura and Jack A. Rosenzweig and Attorney General Investigator Ryan Yamasaki ("Team"). After conducting an extensive and detailed investigation of Mitsunaga's allegations, the Team concludes that while the management of the Project by the University of Hawai'i ("UH"), and by OCI in particular, was deficient in several key respects, there is no evidence of intent to suggest any criminal behavior by Minaai or other parties involved in this Project, nor is there evidence that any of the actions were for a malicious or improper purpose to

The Honorable David K. Lassner

March 3, 2014

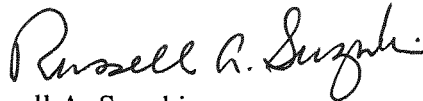
Page 2

suggest any civil or administrative wrongdoing.¹ Many of the allegations made by Mitsunaga focus on decisions that revised his firm's dormitory designs. We conclude that Minaai made or approved most of these revisions and that his actions were motivated by the need to complete the Project on schedule and within budgetary limitations. Such decisions are within the management of university operations over which the University of Hawai'i has exclusive jurisdiction.²

It is important to note that according to the staff at MAI who were involved in the design, Mitsunaga himself had minimal hands-on involvement in MAI's design work and, therefore, some of his allegations are not based on direct information gained through his personal involvement. MAI's work on the Project was delegated by Mitsunaga to others within his firm, primarily to Executive president/CEO Aaron Fujii, Architect Gary Nakatsuka, and Architect Kaiemi Shimabuku. While over the years Mitsunaga had several general discussions with now retired UHH administrator Gerald DeMello regarding the need and concept for more UHH student housing, Mitsunaga's allegations regarding specific matters involving design, construction and budget issues are based on information he obtained from his staff.

Notwithstanding the allegations by Mitsunaga, the Project was completed and opened on time for occupancy for the 2013-2014 school year, per the construction schedule. It is the Department's further understanding that this Project is anticipated to be over budget by approximately \$300,000. It is unclear as to how this budget shortfall will be addressed.

Very truly yours,



Russell A. Suzuki

First Deputy Attorney General

¹ See Medeiros v. Kondo, 55 Haw. 499 (1974) (in an action against a government officer the court found that plaintiff had the burden of adducing clear and convincing proof that the defendant-government official was motivated by malice and not by an otherwise proper purpose).

² Article X, section 6 of the Hawai'i Constitution.

**Department of the Attorney General
Investigative Report**

**University of Hawai'i Hilo University Village Student
Housing Project, Phase 1**

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SCOPE OF REVIEW AND INVESTIGATION METHODOLOGY

The primary purpose of the investigation was to determine if there was evidence to support Mitsunaga's allegations of mismanagement, cronyism, waste, and unethical and illegal conduct by OCI and Minaai in connection with the Project. While the investigation did review whether OCI and Minaai wasted funds on the Project, it did not attempt to determine whether UH received the maximum construction value for the money expended on the Project. Such an inquiry would involve a detailed, audit based report on the factual costs of MAI's conceptual design and the estimates and actual costs of ACK and its subcontractors, and is beyond the scope of this investigation. UH is free to pursue such an investigation and should it choose to undergo such a task, the Department will cooperate.

A full and independent investigation was undertaken by the Department of the Attorney General ("the Department") at the request of the University of Hawai'i ("UH"), through Vice President John Morton. The investigation was limited to the allegations made by MAI concerning Brian Minaai's participation in the design and construction of a 300 bed dormitory facility at the University of Hawai'i Hilo ("UHH") known as the UHH University Village Student Housing Project, Phase 1 ("Project"), which was substantially completed in August 2013.

The task was established as a civil investigation and arrangements were made within the Department to maintain a conflicts wall between the civil investigative team ("Team") and department personnel who would become involved if evidence of criminal conduct was discovered. The investigative team consisted of Deputy Attorneys General Reese Nakamura and Jack Rosenzweig, and Attorney General Investigator Ryan Yamasaki. The Team conducted its investigation with total independence. None of the Team, other than First Deputy Attorney General, Russell Suzuki, had any past or present professional relationship with OCI, MAI, Albert C. Kobayashi, Inc. ("ACK") or any of

the other major participants in the Project.¹ The Team had unfiltered access to UH staff, data, and documents. The UH Office of General Counsel assisted by facilitating such access to the Team.

The investigation included a review of the history of the efforts to expand the housing capacity of the UHH campus and an examination of the financing arrangements established for that purpose, including those for the Project. The Team also examined the UH Interim Procurement Policies (“IPP”), which was approved and adopted by the Board of Regents (“BOR”) in response to Act 82 (2010 Session Laws of Hawaii) that gave UH a certain degree of autonomy from the State Procurement Code and its attendant rules and policies for the procurement of goods, services, and construction.

The Team obtained and reviewed the project files of OCI, MAI, SSFM International, Inc. (“SSFM”), ACK and Rider Levett Bucknall (“RLB”), and conducted interviews with personnel from the following entities:

1. MAI, including Mitsunaga and other executive and design personnel
2. OCI
3. UH Administration
4. Various past and present UHH officials
5. ACK
6. DLR Group
7. SSFM
8. RLB
9. Wesley R. Segawa & Associates, Inc.
10. Palekana
11. State Department of Accounting and General Services, Public Works Division
12. County of Hawaii Building Department and Department of Public Works
13. Wilson Okamoto Corporation
14. Kimura International, Inc.²

All interviewees cooperated fully with the Team and willingly participated in follow-up discussions as the investigation progressed. Minaai and representatives of ACK and RLB were

¹ Mr. Suzuki, during his career in the Department of the Attorney General, provided advice and counsel to the UH prior to the establishment by UH of its own internal office of General Counsel. The AG continues to advise and represent the UH upon request.

² See List of Interviews Conducted for full information of interviews, including dates, locations, and individuals present. Exhibit 1.

accompanied by their respective legal counsel during the interviews. Presence of counsel did not impede the interviews in any substantial way.³ All interviews, except that of Rider,⁴ were electronically voice-recorded and transcribed.

Additionally, the Team was granted access to the email records of the following OCI employees to search for communications indicating a pre-selection of contractors and/or award of UH contracts to friends of Minaai:

Brian Minaai
Maynard Young
Caroll Takahashi (RCUH Employee working for OCI)
Colleen Ueda
Bruce Teramoto
Lauren Lau
Ryan Kurashige
Scott Oshiro

The email data for these employees was captured by the UH Information Technology Services Department (“UH-ITS”) at the request of the UH General Counsel. Data was captured and preserved on off-site servers maintained by Google. The initial data received from UH-ITS for Minaai only went back to June 2011.⁵ Upon request, the Team received, and examined, Minaai’s UH laptop computer and its attached external hard drive; 11.1 GB of email data was recovered (dating back to 2009). The laptop and external hard drive were returned to the UH General Counsel’s Office upon completion of the examination and recovery of email data. A total of approximately 16.95 GB of email data was

³ Upon the insistence of RLB’s legal counsel, no recording was made of the interview with RLB Senior Vice President Mr. Kevin Mitchell. The Team chose to proceed with a non-recorded interview in the interest of time rather than delay and obtain an investigative subpoena permitting recordation over counsel’s objection.

⁴ See note 16, *infra*.

⁵ Jodi Ito, UH Information and Security Officer, stated there was a migration of UH email account data from in-house servers to the off-site servers at Google in 2011. According to Ito, once all the UH email accounts were moved to Google’s servers, the in-house servers were cleaned of data and repurposed. Due to these actions, any email data prior to the 2011 migration (unless locally stored by the end user) was purged and can no longer be found on the in-house servers.

reviewed; other than Minaai, there were no email communications between the contractors involved in the Project and the other UH-OCI employees, other than those directly related to the project itself.

BRIEF RESPONSE

This report, prepared by the Department of the Attorney General (AG), is of a full and independent investigation conducted by the AG at the request of the University of Hawai‘i, Board of Regents (“BOR”) in response to certain allegations made by Dennis Mitsunaga (“Mitsunaga”), President and Owner of Mitsunaga & Associates, Inc. (“MAI”) and Majority Owner of Mitsunaga Construction Incorporated (“MCI”), accusing the University of Hawai‘i, Office of Capital Improvements (“OCI”), headed by Brian Minaai (“Minaai”), of mismanagement, cronyism, wasting money, and possible unethical and illegal conduct in connection with the design and construction of a 300 bed dormitory facility at the University of Hawai‘i at Hilo (“UHH”), known as the University Village, Phase I (“Project”).

The AG formed an investigative team and after conducting an extensive and detailed investigation of Mitsunaga’s allegations, the AG concludes that while the management of the Project by the University of Hawai‘i (“UH”), and by OCI in particular, was deficient in several key respects, there is no evidence of intent to suggest any criminal behavior by Minaai or other parties involved in this Project, nor is there evidence that any of the actions were for a malicious or improper purpose to suggest any civil or administrative wrongdoing.⁶ Many of the allegations made by Mitsunaga focus on decisions that revised his firm’s dormitory designs. We conclude, however, that while Minaai made or approved most of these revisions, his actions were motivated by the need to complete the Project on schedule and within budgetary limitations.

It is important to note that according to the staff at MAI who were involved in the design, Mitsunaga himself had minimal hands-on involvement in MAI’s design work and, therefore, some of his

⁶ See *Medeiros v. Kondo*, 55 Haw. 499 (1974) (in an action against a government officer the court found that plaintiff had the burden of adducing clear and convincing proof that the defendant-government official was motivated by malice and not by an otherwise proper purpose).

allegations are not based on direct information gained through his personal involvement. MAI's work on the Project was delegated by Mitsunaga to others within his firm, primarily to Executive President/CEO Aaron Fujii, Architect Gary Nakatsuka, and Architect Kaiemi Shimabuku. While over the years Mitsunaga had several general discussions with now retired UHH administrator Gerald DeMello regarding the need and concept for more UHH student housing, Mitsunaga's allegations regarding specific matters involving design, construction and budget issues are based on information he obtained from his staff.

Notwithstanding the allegations by Mitsunaga, the Project was completed and opened on time for occupancy for the 2013-2014 school year, per the construction schedule. Based on documents received to date, it is anticipated that the Project will be approximately \$300,000 over budget.

SUMMARIZED PROJECT HISTORY

Time and Budget Constraints. This Project stems from the long standing belief universally held by past and current officials at UHH, that the campus's lack of sufficient student housing is a major impediment to the academic growth and institutional improvement of UHH. In addressing its housing shortage, UHH experienced several failed attempts to acquire existing Hilo housing assets to convert to student housing. UHH proposed building a new dormitory facility for the Hilo campus. Eventually, the UH and other State officials supported the need for UHH to construct its own student housing, and a total of approximately \$32,000,000.00 in bond funds, divided equally between revenue and general obligation bonds, was available for that purpose. The \$16,000,000.00 in revenue bonds originally issued on or about 2009, was to be used to acquire and convert existing apartment complexes for student housing. Note, the revenue bonds (and its carryover annual debt service) were acquired prior to the decision to build the Project.

The dormitory site chosen was an approximately seven acre site within a larger 33 acre undeveloped parcel directly across the main campus entrance on West Kawili Street. In early 2011, Wesley R. Segawa and Associates, Inc. ("Segawa" or "WRSA"), with offices in Hilo and Honolulu, was awarded a contract to undertake the civil engineering and preparation of the site development master plan for the entire 33 acre parcel. The work consisted of planning, grading, utilities, traffic, etc. for that parcel.

Previously, on July 1, 2010, Act 82, Session Laws of Hawaii 2010, took effect and granted UH a two-year exemption from the Hawaii Public Procurement Code (Hawaii Revised Statutes, Chapter 103D, and its attendant rules and policies ("Code")). This exemption allowed UH the autonomy to select and award contracts for its construction projects without complying with the requirements of the Code. During this two-year exemption, the BOR adopted and approved (among other procurement

methods) a construction procurement process known as “design-assist.” Design-assist is not *per se* one of the procurement methods specified in the Code, that is, it does not readily fit under the conventional competitively sealed bid, competitively sealed proposal, professional service, small purchase, or emergency procurement methods. Design-assist may be used if the appropriate chief procurement officer approves a request for exemption from the Code. Accordingly, while the design-assist method is not used by State agencies for its construction projects, it is commonly used in larger, private sector construction projects. Similar to the Code’s professional service procurement method, where contracts for certain types of professional services are to be awarded on the basis of qualifications, the autonomy granted under Act 82 allowed UH to select a construction contractor on the basis of qualifications rather than traditional criteria embodied by the Code’s competitively sealed bid method which requires price to be a major or sole criteria for award. It is important to emphasize that Act 82 only applied to the selection of contractors and did not apply to the selection of design consultants, who remained throughout the Project (and still remain) subject to Hawaii Revised Statutes section 103D-304.

As a result of Act 82, the BOR adopted its Interim Procurement Policy (IPP) that established lines of authority and selection procedures, and provided various checks and balances in carrying out construction projects. Under the IPP, most of the operational control for procurement was the responsibility of OCI, which was overseen by the UH Vice President for Budget and Finance, but subject to various approvals from the UH Office of Procurement and Real Property Management (“OPRPM”).

One of the purported advantages of the design-assist process is the savings of time over the conventional and more commonly used sequential design-bid-build (competitive sealed bid or proposal) procurement method. Under design-bid-build, the procuring agency prepares and issues a solicitation for design services, receives offers, evaluates the offers, selects an offeror and awards a contract, and the

contractor commences work. Once the design is completed and accepted by the agency, the agency prepares and issues a solicitation for construction services based upon that design. The agency receives offers, and selects and awards a contract to the qualified, responsive bidder that submits the lowest bid price. The successful bidder is contractually obligated to build in strict conformity to the approved design, at the contract price, and within the deadline and other requirements set by the contract.

During the course of construction, various matters may arise to delay the completion of the project by incurring additional time and costs. These instances include, but are not limited to, the owner revising plans, the contractor encountering unknown site conditions, the non-availability of specified materials, and the discovery of latent ambiguities in the plans and specifications. Because in conventional design-bid-build, the construction contractor is not part of the development of the design and specifications, change orders are common and can substantially increase the cost of and time for construction even after a contract is awarded at a definite price for a fixed design.

In contrast, under the design-assist method, savings in time are expected by awarding a pre-construction services contract once the design commences but before the construction begins. The pre-construction contractor works alongside the designer and provides input and advice to optimize the design, as the design is being developed, for improved efficiencies and economies in construction. Before the design is complete, a construction contract is awarded and construction begins even though the design is still incomplete. The construction contractor usually is, but not always, the pre-construction contractor.

A major disadvantage of design-assist is that while construction proceeds towards targeted prices and completion times, the construction details and costs are not fixed by contract as they would be with the sequential design-bid-build method. With design-assist, the construction contractor proceeds

without fully detailed project specifications for the entire project since these are being worked on during the early phases of construction. This lack of specificity can have an impact on construction efficiency. For example, if the pre-construction estimates are too low or the project is overdesigned (costing more than the budgeted funds), cost and time reductions may have to be made on the back end of the construction to meet both budget and time constraints.

The funding for this Project added to the urgency to complete the Project sooner rather than later. UH planned to use some \$16,000,000 in revenue bonds (originally intended to acquire existing housing to convert for use as dormitories), and an additional \$16,000,000.00 in general obligation bonds, to finance the construction of the new dormitory facility.

But because the revenue bonds were acquired on or about 2009, the UH began incurring about \$1,200,000 in annual interest debt service on these revenue bonds before the decision was made to construct a new dormitory facility. This annual debt service caused great pressure on UH to have a revenue-producing dormitory in place by August 2013, in time for the 2013-2014 school year. The UH also calculated that in order to maintain affordable dormitory rental rates while meeting the bond debt service, the new facility would need to contain a minimum of 300 revenue producing beds. Minaai concluded that the design-assist procurement process would be the most feasible, and perhaps the only method to get the Project built within the time available.

Design Consultant Selection. OCI followed the IPP to select a design consultant for the Project. For the design consultant and other consultants for the Project, OCI made its selections from a pool of professionals who had responded to an earlier general OCI notice soliciting all types of professional services which UH may need for the fiscal year beginning July 1, 2011. Designers were pre-screened by OCI and invited to submit expressions of interest and to participate in interviews with a selection

committee consisting of OCI personnel (Minaai was not a member). MAI initially was not among the original five pre-screened design consultants invited to participate in the interview process. MAI was subsequently added to the prospective designer list, and had sufficient time before the interview date to assemble a team and submit a package of promotional materials. UH officials have not been able to satisfactorily explain why and how MAI came to be added to the original list of interviewees.

Although not members of the selection committee, UHH officials attended the design consultant interviews. At the conclusion of the interviews, the selection committee members discussed the applicants with the UHH officials, and then selected MAI as the Project designer. One of the attractive features of the MAI presentation was its proposed sub-consultant, the DLR Group (“DLR”), an architectural firm with a national reputation for quality work on educational institutional dormitory projects. The DLR representatives who were present at the interviews made a very favorable impression on the selection committee and the UHH representatives, and positively influenced the selection of MAI as the design contractor.

The MAI-DLR team was selected for the design job in August 2011. DLR began a series of communications with UHH officials and students to determine the features they considered desirable and practical for the dormitory structure. Thereafter, DLR and MAI began drafting the conceptual drawings. It is notable that the planning and design work began and proceeded for over one year without benefit of a contract or even an advance Notice to Proceed (“NTP”). Proceeding without a contract jeopardizes both the UH and the design team: the Project could be cancelled or contract terms not being ultimately agreed upon, and UH could end up with a design for which it had no use and owing the design team compensation for services performed; the design team could end up not being paid and being forced to “front” the money for its expenses. Despite the lack of a contract or notice, the UH representatives made it clear to the design team that its work had to move expeditiously to allow

construction to be completed by August 2013, a period of two years from selection of the designer to the opening of the facility for occupancy.

Ultimately the design contract was not finalized until September 2012. No reasonable explanation has been provided to explain the extended thirteen month delay for a process that routinely should take one to three months. MAI's Aaron Fujii explained he was unable to submit a fee proposal until March 2012, because the go-ahead for the detailed design work was not given by OCI until the conceptual plan was accepted shortly before that date. Fujii stated he couldn't offer a fee proposal until MAI knew what it was to design. Nevertheless, it took an additional six months to finalize the contract. All work being done by the design team was proceeding on the basis that it would be paid as soon as the contract was executed. It is unreasonable for the UH to expect its contractor to proceed enthusiastically and expeditiously without expectation of payment for its services until some unknown time in the future. Despite UH's delay in processing the contract, MAI-DLR continued with the work on a tight schedule that would permit the facility to be designed and built to open on time, provided that the building contractor that was yet to be selected, acted with the same attention to the deadline as the design team.

An additional potential pitfall arose once the design contract was eventually finalized in September 2012. OCI used UH's standard consultant contract form (typically used for design professionals), which contains a boiler plate schedule that sets milestones for the designer's progress based upon time frames proceeding from the NTP date. It is apparent that no one at OCI was paying attention to the boilerplate schedule in the contract because OCI failed to adjust the schedule to account for the one year of work already completed by MAI to meet the critical August 2013 project completion deadline. Based upon the contractual schedule and the NTP dated September 2012, the final design was not to be completed until October 2013, or two months after the critical deadline and the construction contractor's contractual deadline for the completion of the construction and the dormitory opening.

Once the design team's contract was executed and the NTP issued, MAI could have taken advantage of UH by slowing or even temporarily easing its work, so long as it kept on schedule to meet the contract's October 2013 deadline. If the design team took that approach, UH would have had no legal recourse while the clock ticked past the actual critical construction deadline of August 2013. Fortunately, MAI and the other professional services consultants on this Project gave no consideration to slowing down and continued their work on a path to meet the actual versus the contractual deadline.

The unjustified thirteen month delay in finalizing the design contract had an additional substantial consequence. In early 2012, DLR, the specialty planner-designer whose participation played a major role in the original selection of MAI as the design consultant, withdrew from further participation on the project. MAI representatives contend that the "divorce" was caused primarily by a disagreement between it and DLR over the amount of the design fee and how it should be split between the two entities. The local DLR representative explained, however, that a corporate decision was made that it would not continue to indefinitely devote its personnel and resources to the Project without prospect of imminent payment, and such payment could not be made until the UH-MAI contract was finalized at some unknown future date. DLR left the Project after the conceptual plan was accepted, but before detailed design work began.

Pre-Construction Services. The IPP required, and Minaai intended, that there be two separate procurements, one for design services and another for pre-construction and construction services. MAI contends that during its August 2011 presentation to the design consultant selection panel, MAI made clear that MCI, its affiliated construction company, and MAI would be a design and pre-construction services team. MAI claims it only became aware that the pre-construction services contractor would be selected pursuant to a separate pre-construction services/construction services panel process and not as part of the selection of the design consultant process, when MAI noticed the solicitation for pre-

construction and construction services that was posted by UH in November 2011. Regardless, for reasons that could not be explained by MAI's Fujii, MCI did not submit an application for consideration for the pre-construction and construction services contract.

Given the relatively short period in which to complete the Project, there is an unexplained delay between the time of award of the contract for pre-construction services and the issuance of a fully-executed contract to the contractor. After the November 2011 posting of the solicitation for both pre-construction and construction services, Albert C. Kobayashi, Inc. ("ACK") was chosen by an OCI selection committee in January 2012. UH informed ACK that it had been selected and instructed ACK to begin work on the Project, but the Notice of Award of the contract to ACK was not posted on the UH website until March 25, 2012, over two months after the award. Despite the tight deadline for the completion of the design and commencement of construction, OCI apparently gave no priority to finalizing contract terms with ACK. ACK was eventually given an advance NTP on June 15, 2012, and by the end of June 2012 the contract was signed by the parties and funds certified by the Comptroller. The official executed contract, however, was not transmitted by UH to ACK until August 21, 2012. One could not begrudge a contractor for refusing to begin performance until it received the official executed contract, and yet UH was fortunate that this did not happen with ACK.

In mid-January, OCI requested and ACK agreed to begin the intense efforts required to complete the pre-construction estimates. As with the design contract, UH expected, and ACK understood, that all work done by ACK was not going to be paid for until a contract was in place. No one has been able to adequately explain the reason for the extended delays in issuing the NTP and executing and processing the contract.

The first pre-construction task assigned to ACK was to provide an estimated cost of construction based upon a series of conceptual drawings prepared by the designers. The conceptual drawings contained no specifics about construction details, however ACK was directed by OCI to base its estimate on concrete block/masonry units (“CMU”) framing. Such construction method was consistent with the UHH’s Long Range Development Plan (“LRDP”) guidelines adopted in 1996, which advised that concrete materials should be used.⁷ However, no one at OCI was aware of these UHH guidelines. Apparently, no one from UHH informed OCI of the guidelines, nor did anyone at OCI inquire about the possibility of the existence of any LRDP guidelines. As a consequence, no one with decision making authority was aware of the UHH guidelines and so did not consider them when the alternatives to CMU construction were being considered. MAI, however, said it was familiar with the LRDP, but believed that it applied only to the core UHH campus and not to the dormitory. The map of the UHH campus in the LRDP, however, appears to include the dormitory site.⁸

⁷ The Executive Summary section of the 1996 LRDP states that “[t]he purpose of this Long Range Development Plan (LRDP) is to build on past efforts to link planning initiatives with the allocation of resources by systematically integrating the physical planning process with the assessment of the programmatic and institutional goals for the University of Hawai‘i at Hilo (UH-Hilo) campus. In particular, the LRDP serves as a guide to the form and character of the campus, seeking to achieve a safe, efficient, cohesive and pleasant campus environment that is supportive of University programs, goals and overall mission. . . . (emphasis added)

In particular, section 7.7.3 of the LRDP states in pertinent part:

Building materials should be appropriate for the location (rainy climate) and context (pedestrian oriented campus) of the site. Academic architecture should express the enduring quality of education; this can be reinforced through the used of materials with long term durability.

The primary material palette should be concrete. Many of the existing buildings are concrete which establishes the theme for future construction. Concrete may take many different forms including: lightweight concrete panels, case in place, or precast panels.

CMU is only to be used as an exterior wall material when covered with plaster or skim coating. In its natural state, it is considered ill suited for the image of a friendly, inviting campus. . . . (emphasis added).

See Exhibit 1A attached hereto.

⁸ See Exhibit 1A, which contains a map of the “Study Area” that is subject to LRDP. The dormitory site is located across Kawili Street from the rest of the UHH campus and appears to be included in the shaded Study Area and therefore, subject to the LRDP.

On or about January 2012 (prior to ACK's initial cost estimate), OCI instructed ACK that the budget for construction was \$22,689,049.00 plus a contingency of \$2,000,000.00. Despite concerted efforts by the AG's investigation team, no one has been located who can explain how this budget figure was reached, or why more than \$6,000,000.00 of the bond allotment was withheld from the construction budget. ACK completed its estimate by the end of January 2012. Its estimate for CMU construction was \$27,314,915.00.^{9 10} Meetings were held thereafter among OCI, ACK and according to Minaai, members of MAI's design team. MAI has no specific recollection of such meeting, but acknowledges the likelihood of its presence at the meetings.

Because ACK's CMU framed construction exceeded OCI's initial \$22,689,049.00 budget, OCI directed ACK to expeditiously prepare estimates of cost saving alternatives in construction to bring the cost closer to the original budgeted amount. The alternatives provided by ACK in a document titled "Value Engineering and Cost Reduction Log" printed February 6, 2012¹¹ were: (1) tilt-up pre-cast concrete framing, (2) wooden framing with metal siding, and (3) wood framing with wooden siding. According to ACK, converting from concrete framing, flooring and roofing to a wood framing with wood siding structure, yielded the greatest savings in estimated construction costs. The estimated savings were approximately \$3.2 million.¹² OCI agreed with this approach and the Project was constructed with wood framing and wood siding.

⁹ ACK's estimates at this stage are based upon adjusted historical costs from the ACK data bank, not actual cost quotes from subcontractors.

¹⁰ See Exhibit 2A, the first ACK pre-con estimate based upon CMU construction; total estimated cost \$27,314,915.00 (includes contractor's contingency of \$2,155,690.00).

¹¹ See Exhibit 3A attached hereto.

¹² It should be noted that Rider Levett Bucknall, the consultant hired by OCI to evaluate price reasonableness, was not yet engaged in the Project at this time. There was no verification of these ACK estimates. OCI did not request MAI to provide comparable estimates.

MAI's Fujii offers a different version of events. He states that OCI directed commencement of a wood framing/wood siding design in early January, before ACK became involved as the pre-construction services contractor. He questioned why Minaai directed a wood framed structure when a CMU structure would come within the budget. Fujii speculates that Minaai directed ACK to cost out the structure as its first pre-construction task based upon Fujii's comment that CMU was within budget. Fujii is convinced that wood framing was already selected by Minaai, and that the subsequent high estimate for a CMU structure prepared by ACK was intended to provide justification for Minaai's earlier decision. Minaai contends that the decision for a wood framed structure was not made until after ACK made its initial estimate based upon CMU, and provided the less expensive alternatives as requested.

OCI conferred with UHH officials about the construction alternatives. The parties concluded that CMU construction would jeopardize the budget, possibly require a reduction of the estimated 300 bed minimum capacity, and result in a delayed opening of the structure. Reluctantly, particularly on the part of the UHH officials, the decision was made that the wood framing/wood siding option would be the method that would most likely allow a 300 bed dormitory to be completed on time and within budget. It was at this stage (in early February 2012) that OCI directed the design team to continue with a 300 bed, wood framed/wood siding structure.

Design, Cost Estimating, and Cost Commitments. Once the decision to use wood framing/wood siding was made, MAI proceeded with the schematic design. This phase was intended to convert the conceptual rendering into a finite series of drawings more clearly defining the size, shape and materials for the structure. ACK was committed as part of its pre-construction contract to undertake another estimate at the 50% completion point of the schematic design ("SD"). Its estimate, distributed February 28, 2012, came to \$27,079,540.00 including the contractor's contingency of \$2,053,515.00.

The shape of the dormitory was fixed by this time. It consisted of a rectangular “Student Life Center” containing office, lounges, eating areas, laundry facilities and other common areas. Attached to and projecting at right angles from the Student Life Center were three parallel, three- story structures containing the dorm rooms. The finished project maintained a basic “E” shape. At the SD stage, the cost estimates were still very rough as the construction details and materials had not yet been specified, requiring the pre-construction contractor to make a number of assumptions that may or may not be ultimately specified in the final, approved design.

A revised estimate by ACK based upon 50% SD was released on March 28, 2012. The construction price estimate went down to \$26,904,266.00 including an increase in the contingency to \$2,690,427.00.

At this stage, Rider Levett Bucknell (“RLB”) was added to the Project to provide cost reasonableness reviews, pursuant to UH policy. These reviews are to determine whether the estimates made by ACK were reasonable. RLB had a separate contract with UH in the amount of \$56,574.00 to conduct these reviews.¹³

As the Project progressed, construction of the various elements of the Project for a “committed” cost (offered by the construction contractor, again ACK, and based upon subcontractor quotes or prices proposed by ACK for use of its own personnel), could not proceed unless and until RLB endorsed the committed costs as reasonable and acceptable. RLB relied on a combination of bids and estimates it independently obtained from various subcontractors, and its knowledge of historical costs to make its reasonableness determinations. RLB had no duty to contribute to the design process.

¹³ An additional fee of approximately \$13,000 is being considered by OCI, but it is not clear if this amount has been accepted.

In mid-April, 2012, MAI reached the 100% SD milestone. ACK issued its Estimate #3 in late May based upon the 100% SD. By this time, UH and ACK had agreed on a total construction budget of \$28,105,828.00, the amount that eventually appeared in the construction contract.¹⁴ As to Estimate #3, the total estimated construction costs had been raised slightly to \$26,939,630.00, however the contractor's contingency was substantially reduced by approximately \$1,600,000.00, bringing it down to \$1,100,097.00. The difference between the construction budget amount of \$28,105,828.00 and the estimated construction costs was described as an "Owner Contingency" which amounted to \$1,166,198.00 at 100% SD.

It should be noted that ACK's Estimate #3 for the first time included an "allowance" of \$1,200,000.00 for furniture, fixtures and equipment ("FFE") for the facility.¹⁵ FFE is not typically included in a construction budget, but as a separate budget item. Minaai and ACK were originally under the belief UHH had a separate fund for FFE. However, based upon the fact that the complete Project was a furnished residential structure, UHH believed the cost of furnishings was to be included in the construction budget and thus did not have a separate FFE fund. UHH ultimately prevailed in having FFE included in the construction budget, which meant there was that much less available for basic construction costs. Also, by this time the site work plans were of sufficient detail for ACK to solicit bids from subcontractors to undertake the work. Proposals came in from three subcontractors. RLB reviewed the bids for reasonableness and endorsed the retention of Isemoto Contracting at an adjusted price of \$2,652,726.00.

¹⁴ In various documents this amount is referred to a Guarantee Maximum, meaning that UH would promise to pay not more, but possibly less than that sum, for the construction.

¹⁵ An "allowance" is budgeted money set aside to cover the costs of items not specified in detail as project requirements. The owner may or may not direct the contractor to use the allowance amounts.

Contract for Construction Services. Meanwhile, the contract for construction services was under negotiation with ACK. The original solicitation for both preconstruction and construction services, as well as the pre-construction services contract itself, clearly stated that the pre-construction services contractor was not assured of being selected as the construction contractor, and stated such selection was dependant upon the satisfactory performance by the contractor during the pre-construction phase. There is no evidence that OCI evaluated ACK's performance during the pre-construction phase before it committed to contracting with ACK as the construction contractor. This is not to suggest that ACK's performance during the pre-construction phase was deficient; only that an assessment of ACK's pre-construction work should have been done before engaging ACK for the construction phase. The evidence seems to suggest that once ACK was selected for the pre-construction phase, it was assumed by all concerned parties that ACK would undertake the construction as well.

The construction contract originally had a May 25, 2012 execution date inserted on the signature line. But as in the other cases of processing contracts to completion, the finalization and transmittal of the construction services contract took longer than should be expected for a Project on a tight deadline. On June 6, 2012, OCI Facilities Planning and Design Manager, Maynard Young, sent a recommendation to Duff Zwald, head of OPRPM, that ACK be named the contractor on the Project. The completed contract set the construction price at \$28,105,828.00 and a completion date of August 11, 2013. The Comptroller certified available funds on June 29, 2012.¹⁶ However, it took over eleven weeks after such

¹⁶ Act 82, which granted UH an exemption from State procurement laws and regulations, was scheduled for a "sunset" expiration on June 30, 2012. The Procurement Code does not technically recognize the design-assist contract for construction and use of a design-assist contract would probably require approval of a request for exemption from the Code by the chief procurement officer. The Comptroller's certification of funds, a necessary condition for any contract, much less large contracts as here, was granted days before expiration of Act 82. Had the certification not been made, there would have been a significant issue as to whether design-assist procurement and construction contracting could proceed for the Project.

certification before the contract was finalized by the UH, and transmitted to ACK on September 10, 2012.

The effect of the delay was ameliorated by the issuance of an advance NTP effective June 15, 2012. The advance NTP was executed by UH Vice President for Community Colleges, John Morton, designee of Vice President/Chief Financial Officer Howard Todo, upon the recommendations of Minaai and Zwald. The effect of the advance NTP was to authorize ACK to commence construction with assurance that it would be paid for any work completed despite the lack of contract, even if the Project was cancelled before the construction contract was finalized. The question of whether UH, was empowered by law to authorize work without a contract in place is beyond the scope of this investigation.

Construction Begins While the Design and Pre-Construction Work Continue. The drawings for the design development phase (“DD”)¹⁷ were released in June 2012. ACK released its Estimate No. 4 on July 16. The estimated construction cost rose to \$27,860,322.00 and the contractor’s contingency was reduced to \$0. The construction cost estimate rose over the previous 100% SD estimate by \$2 million. An owner’s contingency of \$245,506.00 remained in the budget.

At this stage, ACK had received specific subcontractor and material supplier proposals for various elements of the construction. These were submitted to RLB for review and were ultimately approved.

¹⁷ The design development phase (“DD”) is the second phase of the architects drawing progression, in which the approved schematic plan is developed further into a more specific documentation of the Project. The drawings, however, lack the detail necessary to know exactly what the construction composition and finishes are so that construction may begin. These details are eventually established in the succeeding construction drawing (“CD”) phase.

As the “cost reasonableness” consultant, RLB’s obligation was to undertake an independent analysis of the proposals. If RLB was satisfied that the quoted prices were fair and legitimate, it would confirm the proposed costs and notify OCI of its endorsement. OCI would then give ACK the approval to proceed with the execution of the recommended subcontracts and the ordering of approved materials and equipment. The costs associated with these items would then no longer be just estimates, and would be designated as “committed” costs. As of ACK Estimate No. 4, committed costs totaled \$16,527,512.00.

Released along with the June 2012 ACK estimate was a “Value Engineering and Cost Reduction Log” that presented alternatives to the design, and estimated the cost savings (and occasionally, cost increases) that would result. These value engineering (“VE”) alternatives were then presented to OCI and MAI for consideration.¹⁸

As construction was ready to get underway, and the design, committed costs, and estimates became clearer, weekly meetings were scheduled and attended (in person or by telephone) by OCI (usually Maynard Young), ACK, design team representatives, SSFM International (“SSFM”) which was the dormitory project construction manager for UH, and representatives of UHH (usually Miles Nagata, UHH housing manager). Matters such as progress schedule, budget, design and construction alternatives and any other issues affecting the Project were discussed at these meetings.

The ground breaking ceremony for the Project was held Friday, June 22, 2012, and site work construction activities commenced soon thereafter. Design work continued into the construction drawing (“CD”) phase.

¹⁸ For example, the VE log shows that if the originally designed stainless steel gutters were switched to metal gutters, it would result in an estimated savings of \$113,158.00.

ACK's next estimate was released August 27, 2012, based upon 50% CD.¹⁹ This estimate raised alarms, as the estimated costs increased to \$29,660,978.00, exceeding the budgeted and contractual construction price by \$1,555,150.00.

The "committed" total had risen to over \$20 million, leaving only \$8,324,000.00 uncommitted funds from within which savings and reductions of over \$1.5 million had to be found in order to bring the Project back within the budget. The largest increase in estimated costs were in door frames and hardware (\$520,325.00), FFE allowance and kitchen/computer, lab equipment (\$317,902.00), mass excavation and embankment (\$316,385.00), site improvements (\$327,232.00), and electrical (\$312,200.00). In its accompanying value engineering log, ACK offered several alternatives to reduce the remaining costs. These included reducing landscaping to grass only (\$400,000.00 reduction), deletion of a metal decorative gate (\$259,000.00), deletion of gutters and down spouts (\$276,000.00), substitution of door locks and hardware of lesser quality than what was initially designed (\$300,000.00), and substitution of windows to a different brand and quality (\$270,000.00). After further discussions, decisions were made to achieve cost savings and a revised 50% CD estimate was released on September 13, 2013 showing estimated construction costs at \$28,296,859.00. While this was down considerably from the earlier 50% CD estimate, the amount still exceeded the budget by \$191,000.00. Among the major agreed upon cost reduction changes were the deletion of windows in the dorm room toilet and entry areas, substantial reduction of landscaping, use of lower quality locks and deletion or modification of other security features, and reduction in the number of sidewalks and pathways within the Project area.

¹⁹ This was also labeled "Estimate No. 4," as was the previous 100% estimate. The investigators presume this was a numbering mistake.

Additional meetings were held to identify further cost reductions. Consequently, on September 19, 2012, ACK released a second revision of its 50% CD estimate, and the construction cost estimate was successfully reduced to \$27,953,435.00, approximately \$150,000.00 below the budgeted amount.

Throughout this process, RLB continued its cost reasonableness verification function, and when necessary, requested ACK to reconcile costs that didn't conform to RLB's own independent determinations. In response to RLB's comments and other decisions that were made, on October 26, ACK issued a third revision of its 50% CD estimate. The estimated total construction cost was \$27,943,012.00 of which \$20,956,874.00 were committed costs. The owner's contingency, i.e. the amount left in the budget to cover cost overruns overestimates, additional modifications and other changes, was \$162,816.00.

On November 1, 2012, ACK presented its Estimate No. 6 based upon 100% CD. This final estimate (subject to later revision) pegged the price to complete construction of the Project, based upon completed drawings at \$28,354,814.00, exceeding the budget by about \$250,000.00. It again offered value engineering proposals, including the deletion of items such as benches and bike racks, decorative metal fences and gates, and other exterior finish items that ACK believed could be added later to the Project site when additional funding became available.

Further discussions among the parties resulted in additional modifications and revisions which squeezed down the estimated costs of the finished Project to the budgeted amount of \$28,105,828.00. Construction was completed on schedule and a county building department certificate of occupancy was issued in time for students to begin residency for the 2013-2014 school year.²⁰

²⁰ See Exhibit 4A, attached hereto which is a copy of the Project's Certificate of Occupancy issued by the County of Hawaii.

Conclusion. It is normal to expect that over the course of the numerous discussions of this Project, there would be disagreements among the participants over which items should remain and which items should be deleted or modified from the plans in order to meet budget, schedule and capacity requirements.²¹ No doubt, a certain degree of hard feelings persist because the designers believe the ultimate finished product does not fully represent the vision of the dormitory they had designed for the Hilo campus. The UHH administration is disappointed that it wound up with a stripped down facility, compared to what was initially envisioned.

Most importantly, however, it must be emphasized that the Project's goal was met in this case: a functional, 300 bed facility was built, furnished, and certified for occupancy on time and ready for the 2013-2014 school year. Problems that were encountered during the course of this Project can be attributed for the most part to the inherent flaws of the design-assist process, especially when applied to a project with a tight, limited budget with a short, very difficult schedule for completion. There is little doubt that UH could have handled this Project's planning, procurements, and contracting in a more efficient, rational, coordinated and conscientious manner.

The short time frame and diminished fixed budget resulted in lack of communication and decisions that created dissatisfaction amongst the parties. Nevertheless, Minaai's decision to use the design-assist method was a discretionary decision that he and UH were entitled to make and which appears to have facilitated this Project to open in time for the 2013-2014 school year. Furthermore, based upon our examination and review of our investigation, at this time, we find that there is no

²¹ In his Legislative testimony, Mitsunaga describes various disagreements between his firm and other parties involved in the Project. A number of these disagreements concern technical construction related items, which will be discussed in further detail in the full report.

evidence of corruption, illegalities or unethical conduct on the part of any of the participants in the Project.

SUMMARY OF ALLEGATIONS AND FINDINGS

Mitsunaga's primary allegations were made in his written testimony submitted for a February 14, 2013 hearing on Senate Bill 1383 before the Senate Committee on Higher Education.²² Mitsunaga and MAI submitted subsequent written allegations to the BOR and UHH Chancellor Donald Straney.²³ MAI's Project Manager Gary Nakatsuka separately sent his own letters alleging misconduct to the OCI, SSFM, County of Hawaii, and the AG.²⁴

The specific allegations are listed below, followed by the summary findings of the AG. More comprehensive responses to each allegation are provided further below in this report.

1. Brian Minaai's process for selection of non-bid consultants is highly suspect.

The UH's temporary exemption from the Hawaii Public Procurement Code (Hawaii Revised Statutes (HRS) chapter 103D) ("Code") prompted UH to adopt its own Interim Procurement Procedures ("IPP") which took effect prior to the selection of consultants for this Project. The non-bid consultants for the Project were selected and awarded contracts in accordance with the process required by the IPP, which process was substantially the same as the Code's process for selecting professionals.

UH posted a notice for professional services soliciting statements of qualifications from candidates interested in providing professional services to the UH during the upcoming fiscal year. An evaluation committee reviewed the statements and compiled a list of qualified candidates. When a professional service consultant is required, a selection committee is formed to review and rank the pre-qualified candidates and to make a selection.

²² 2/14/13 Letter from Senator Donovan M. Dela Cruz to UH General Counsel Darolyn Lendio with attached testimony from Mitsunaga. Exhibit 2.

²³ 2/27/13 Letter from Mitsunaga to UH BOR with attached 2/27/13 Letter from Mitsunaga to UHH Chancellor Donald Straney. Exhibit 3.

²⁴ Letters from Gary Nakatsuka to Maynard Young, Robert Yamada, County of Hawaii Dept. of Public Works, and AG. Exhibit 4.

For the selection of this Project's design consultant, OCI formed a selection committee to select and interview design candidates. Representatives of the UHH Administration were also present at the candidate interviews, but their participation was limited to offering comments to the selection committee. Using written criteria, the selection committee independently evaluated and ranked the candidates. The selection committee then ranked the candidates and selected MAI as the Project's design consultant.

The same process was used to select the Project's other "non-bid" consultants (site development, contractor management, price reasonableness). Selection committees were established by OCI for each consultant contract to be awarded. The respective selection committees received a list of those pre-qualified candidates who were determined as qualified for the particular contract. The selection committees would review the candidates, make its selection, and award the contract. Minaai was not a member of the evaluation or any of the selection committees.

No evidence was found to support any allegation that Minaai attempted to, or did, improperly influence the members of the evaluation and selection committees. The only anomaly was in regard to the design consultant selection process, and it benefited MAI. After the original list of five pre-qualified candidates had been made, MAI was added to the list and invited to make a presentation to the selection committee. The AG has been unable to determine how or why MAI was added as the sixth design firm invited to make a presentation to the selection committee.

2. The selection committee consists of Brian's two "Yes Men" and a third member from the department, i.e., Brian controls two of the three committees' members.

Pursuant to the IPP, the selection committees were comprised of OCI personnel and occasionally supplemented with a representative from the user agency. During the selection of the design consultant, several representatives of the UHH administration expressed their preferences for certain candidates

based on the candidates' presentations, but only one of the representatives was a voting member of the selection committee.

No evidence was found to support the claim that Minaai attempted to, or did, influence any of the selection committees.

3. Brian only selects his friends from a pool of hundreds of qualified architects and engineers.

As described above, consultant selections are made from pre-qualified lists of candidates the evaluation committee determines are capable of undertaking any particular project. Minaai delegated to the OCI staff, the responsibility to determine the qualified candidates. The qualified candidates are drawn from a pool of all of the candidates who responded to the UH's general notice for professional services. Aspiring consultants are invited to submit their qualifications if they are interested in undertaking projects for UH. However, one of the criteria for selection is the applicants' history of successfully completing UH projects. This criteria, though one of many, would make it difficult for a consultant with no UH experience to be selected for a major project, and may result in fewer candidates from which to select than may be expected from the size of the pool responding to the general notice.

There were emails of a social nature between Minaai and several of the contractors involved in the Project. However, Minaai had relationships with these contractors prior to the Project (childhood interaction or previous professional contact during his previous employment prior to OCI). There were no emails found that would indicate pre-selection prejudice or preference for a solicitation of bid from his friends. Further, information ascertained through the interviews conducted revealed that Minaai, while present at the presentations by potential design contractors, was not a voting member of any of the selection committees.

4. The selected consultants were very small and not the best qualified for the projects.

The consultants selected for the Project, with the exception of Wesley Segawa and Associates (civil site design work), are among the larger, more prominent firms in the State. Segawa, while small, is based on Hawai'i Island, the site of the Project, had substantial contacts in the community, and had a history of successfully completing projects for UHH.

5. MAI was selected for the Project because of UHH's "strong and insistent endorsement of MAI."

As stated above, while representatives of the UHH administration were allowed to provide input to the selection committee, only one of the representatives was a voting member of the selection committee.

MAI was selected primarily on the strength of its sub-consultant, the DLR Group, a national firm with a favorable track record of planning and designing residential facilities for educational institutions. The DLR representative at the interview made a very favorable impression on the UHH representatives and the selection committee. Unfortunately, the DLR Group withdrew from the Project after planning and conceptual design had been completed, but before detailed architectural plans were begun.

6. If not for UHH's active participation in the selection process . . . Brian would have given the project to his friend.

No evidence has been found to support the allegation that but for the active participation of UHH representatives in the designer selection process, Minaai would have overridden the selection committee's choice and awarded the contract to "a friend" instead of to MAI.

7. Had it not been for the two year exemption on procurement that the legislature gave to UH, Brian's actions against MAI after the selection would have been a criminal violation of the State Procurement Law HRS § 103D-304.

This allegation is misplaced. The exemption authorized by Act 82, Session Laws of Hawaii 2010, did not apply to the procurement of design professionals such as MAI. MAI was selected

pursuant to HRS § 103D-304 and the design-assist method used for the Project is permitted by the Hawaii Public Procurement Code and the applicable Interim Procurement Policies (IPP). MAI's contract required MAI to participate in the design-assist process for this Project. MAI seems to object to the changes made to its design. The design-assist process, together with the time and budget constraints of the Project, required OCI to make subjective determinations as to which aspects of the MAI design needed to be modified or deleted as construction proceeded. Such modifications and deletions to the design are inherent in design-assist projects.

The fact there was a two year UH exemption from the Procurement Code is not applicable to MAI because it is a design professional subject to HRS § 103D-304 and the exemption only applied to contractors. No evidence of potentially criminal conduct by Minaai was found.

8. **After the selection, Brian took the following punitive action against MAI and MCI: Brian directed MAI to replace MAI as the project civil engineer with Wesley Segawa. Segawa's fee to do the civil engineering was \$293,260.**

Segawa and his firm ("WRSA") already had been selected as the site engineering consultant for this Project. WRSA was awarded a contract to provide a civil design (grading, utilities, roadways, etc.) for the 33-acre parcel, which included the 7-acre corner upon which the Project was to be built. Segawa's site work was well underway by the time MAI was selected for the Project design. While MAI had its own civil design section, there was an overlapping of the civil work necessary for the 7-acre dormitory site (under MAI's contract) and the site work Segawa had been doing on the larger 33-acre parcel.

Minaai concluded the time constraints and the potential to eliminate duplication in certain work and costs warranted having the Segawa's firm participate in the Project design as the civil engineering design subcontractor to MAI. There is conflicting evidence as to whether or not Minaai pressured MAI

to use Segawa's firm as MAI's subconsultant as a condition of awarding MAI the overall design contract, or whether Minaai merely urged MAI to use Segawa as MAI's subconsultant.

Ultimately, MAI did in fact subcontract with Segawa. It must be noted that by using Segawa as the civil engineer, MAI relinquished compensable work that it could have performed itself and created resentment toward Minaai. However, Minaai's reasons for having Segawa perform the civil work as an MAI's subcontractor appears to have been based on Segawa's performance of the related site work and not a criminal or unethical action.

9. Using Segawa caused MAI to have to mark-up its price, adding a 10% coordination fee of \$29,326 plus G.E. tax and therefore added to the Project's cost.

Segawa was a subcontractor for MAI. It is standard business practice for a general contractor to add a mark-up percentage to the subcontractor's billings in order to cover costs of oversight and coordination as well as for contractually assuming legal responsibility for the subcontractor's work. Minaai believed, and Segawa confirmed, that the savings in time and costs resulting from Segawa applying its previously acquired knowledge of the 33-acre site to the MAI design would compensate for the mark-up MAI added to the Segawa billings. A determination of the amount of savings, if any, is beyond the scope of this investigation.

10. Brian directed MAI to replace Kimura International with Wilson Okamoto as the Environmental Assessment Consultant.

Neither Kimura International nor Wilson Okamoto worked on the Project. Wilson Okamoto was initially contacted by MAI to perform environmental work, but soon notified OCI that an environmental impact assessment/statement was not needed for the Project. This obviated the need for an environmental assessment consultant and resulted in significant savings on the Project.

11. Brian directed MAI to use Palekana to do the permit processing for \$23,000.

Palekana is a small Oahu firm that specializes in expediting the building permitting process. Due to the time constraints on the Project, Minaai wanted MAI to focus on the design function and not be distracted by permitting duties. Minaai felt Palekana could complete the permitting expeditiously, based on the firm's favorable track record on other UH projects. Minaai told MAI that MAI would be accountable for delays caused in permitting, and urged MAI to retain a firm like Palekana, but did not insist that retention of Palekana or a similar firm was a condition of MAI's continued involvement on the Project. MAI says that they were pressured to use Palekana even though MAI thought Palekana's services were unnecessary. The permitting duties offered by Palekana apparently could have been performed by other parties on the Project such as MAI, ACK, or SSFM.

12. Brian's directive for Palekana was a straight add on to the contract and wasted an additional \$23,000 plus or 10% coordination fee plus G.E. tax.

As described above, Minaai stated that he urged, but did not direct, MAI to subcontract with Palekana to perform the permitting function. MAI claims that they were pressured to use Palekana. If Palekana or another subcontractor were not retained to undertake the permitting function, MAI would have had to do it itself, adding a corresponding amount for the time involved to its fee. It is not known whether the additional MAI fee would have been greater or less than the amount paid to Palekana. However, a final accounting of the amount expended on Palekana by MAI is pending. Since this allegation initially arose, MAI has stated that it did not charge OCI an additional 10% coordination fee.

13. Jeff Nakamura paid the \$32,000 fee to Palekana for the Cancer Research job (Nakamura was charged a total of \$120,000 by Palekana). But the Cancer Research was exempt from permits so why was there a charge?

The matter of permitting for the UH Cancer Research Center is beyond the scope of this investigation so no response or conclusion is included here.

14. Unknown to MAI and MCI, Brian ‘replaced’ MCI as the Design Assist [pre-construction] Consultant with ACK. Brian also named ACK as the contractor.

The procurement solicitation for design services was explicitly limited to design services and did not include the pre-construction services that MAI hoped its affiliated construction company, MCI, would perform. A subsequent and separate procurement solicitation combined the pre-construction services with the construction services, and was done in compliance with the IPP. MCI did not respond to this pre-construction/construction services procurement solicitation and therefore could not be considered for the contract. ACK did respond to the solicitation and was selected by the selection committee based upon established evaluation criteria. Minaai was not a member of the selection committee. Additionally, the investigation has not uncovered any commitment by UH to retain MCI as the pre-construction/construction services contractor. As MCI was never a candidate nor selected or retained for these services, it was never “replaced” as alleged by Mitsunaga.

The pre-construction contract did not automatically designate the pre-construction contractor for the construction job. The contract called for an evaluation of the contractor’s pre-construction function, and if the evaluation was favorable, award of a separate construction services contract would be made. That process was not followed here. ACK began to perform pre-construction services in January 2012 and was issued an advance notice to proceed (“NTP”) for the pre-construction and an advance NTP for construction on June 15, 2012. The actual pre-construction and construction services contracts were not executed until August 2012 and September 2012 respectively. Notwithstanding that authorizing performance prior to contract execution is risky, ACK was selected in compliance with the IPP.

- 15. A UHH administrator wanted MAI because MAI was the only applicant with a contractor (MCI) on its team. MCI also had done and is doing a lot of these apartment/dorm type structures.**

Some UHH personnel felt it was an advantage to have a design consultant with an affiliated construction entity, such as MAI and its affiliate MCI, but it was the strength of MAI's sub-consultant, the DLR Group, that by far was the most influential factor in UHH personnel's support for MAI.

- 16. MAI must draw up whatever the contractor wanted without questioning costs.**

An inherent aspect of the design-assist process is that the designer is often required to revise its preliminary designs while construction is on-going, to keep the project within budget and on schedule. The designer often feels such changes result in a project that is less attractive or desirable.

The investigation revealed instances where the Project's design exceeded requirements, and where the construction costs were under estimated, and thus justifying the need to "value engineer" the design in later construction stages for the Project to stay on budget and on schedule. The need to revise the design to lower costs as construction proceeded was supported by firm subcontractor quotes to ACK for the existing design. Such quotes were reviewed, some occasionally questioned and modified where appropriate, and ultimately recommended for approval to OCI by Rider Levett Bucknall (RLB), the contractor retained to determine whether costs are reasonable. These subcontractor costs became "committed" and were deducted from the remaining Project budget.

If the anticipated costs for work necessary to complete the balance of the Project as designed was estimated as too costly, lower cost alternatives to the design required consideration. These "value engineering" alternatives were proposed by ACK, but discussed and reviewed by the Project team including SSFM, MAI, UHH Personnel and OCI. The ultimate value engineering design modifications were directed by OCI, not ACK. It is understandable that a designer such as MAI would be disappointed and perhaps even resentful of decisions that altered its original plans and designs,

especially after construction was underway, but this is part of the design assist process and which MAI accepted when it agreed to its contract.

17. MAI had no control over the design, cost, or schedules. MAI had to follow the contractor's and Brian's directives. The contractor set the framing system, materials to be used, and the schedules.

Subject to parameters set by its contract, including UH approval, MAI had full control over the original design. MAI was always aware the Project was to be accomplished by the design assist method and that the overriding purpose of the Project was to complete the facility in time to open it to student residents at the start of the Fall 2013 term. Accordingly, OCI established the milestone deadlines for various stages of design.²⁵

In early 2012, MAI completed the conceptual design that did not include details of the construction materials. ACK was retained as the pre-construction services contractor that month, and immediately was directed by OCI to estimate the cost of construction based upon concrete framing. The estimate was more than \$27,000,000, leaving little in the budget for contingencies, cost underestimates, and furniture and fixtures. Minaai then requested ACK estimate the cost of alternative framing methods. Wood framed construction was the least expensive of the alternates evaluated by ACK, saving approximately \$4,000,000 compared to concrete framing.

Minaai realized it would be very difficult to obtain additional funds if construction costs exceeded the budgeted amount, and any uncertainty over funding would jeopardize the important August 2013 completion date. Minaai made an executive decision to direct that the lower cost wood framing method be used and directed MAI to proceed with such a design accordingly. No explanation was provided as to why MAI was not offered the opportunity to provide its own estimates to show that a

²⁵ The contract for design services executed in September 2012, contained boiler plate design phase milestones that would have permitted the design process alone to extend beyond August 2013. MAI officials acknowledged, to their credit, that they never considered adjusting their progress to such inappropriate milestones, and at all times attempted to comply with the deadlines established by OCI for the August 2013 completion.

concrete framed building could be constructed for the budgeted amount with enough left over for contingencies.

In response to the allegation, the schedule was set by Minaai and UHH officials; the framing method and certain materials were decided upon by Minaai after reviewing alternatives presented by ACK.

18. The wood framing system dictated by the contractor will require heavy maintenance due to the rain in Hilo.

An evaluation of the technical merits and deficiencies of a wood framing system compared to alternative framing systems is beyond the scope of this investigation, and so not addressed by this report.

19. After MAI raised cost questions, Brian hired Rider Levett Bucknell as a "shibai." No independent cost verification because Rider worked in collusion with ACK to come up with their estimate.

Rider Levett Bucknell (RLB) is an international consulting engineering firm with extensive experience in reviewing and analyzing costs of construction worldwide. The retention of RLB as a “cost reasonableness” contractor to review the legitimacy of proposed costs before committing to such costs is consistent with the IPP. The retention of such a consultant was intended from the beginning of the Project, and was not done as a “shibai”. The investigation also disclosed various instances where the RLB representative demanded clarifications and modifications from ACK regarding proposed costs and subcontracts prior to making recommendations to Minaai and OCI. However, while no evidence was found to cast any suspicion on RLB’s performance, which appears to have been completed in compliance with its contractual obligations, it appears that MAI was generally not a major contributor to the cost evaluation communications between RLB and ACK. MAI’s general nonparticipation in this process, even as the Project’s architect, appears to have created uncertainty and added tension to MAI’s relations with the other parties.

20. **Constant changes by ACK to increase profit. MAI is still working on changes even though the contract was signed a long time ago. Any savings by MAI changes should be credited back to the State, but we have no way of knowing this is being done.**

The ACK fee was set by contract as a fixed four percent (4%) on direct costs. The construction contract price was set by UH at \$28,105,280 early in the pre-construction phase. It is true that ACK would have realized less profit had it been able to complete the construction for less than the contract price, but in retrospect, completing the construction for less than the contract price does not seem feasible. There were significant and continual efforts during the course of the Project to reduce costs to keep the Project from exceeding the contract price. No evidence was found to support the allegation that construction costs were inflated to increase ACK's profit.

21. **Brian gave the contract to ACK. ACK subcontracted the concrete to Isemoto. All GC work by ACK was subcontracted out. Why didn't Brian just give the contract to Isemoto (and save the State the 12%-15% markup for overhead and profit to ACK (\$3,000,000-\$4,000,000))?**

ACK was chosen by the pre-construction services/construction selection committee based upon established evaluation criteria, which considered ACK's history of satisfactory performance and completion of other UH projects and design-assist projects. For the various elements of the construction, ACK compared its estimated costs of doing the work itself (which in many cases would have required transporting and mobilizing personnel and equipment from Oahu to the job site in Hilo), versus hiring competent subcontractors available on the Hawaii Island with ACK acting as the construction coordinator. In most cases ACK chose the latter option after evaluating savings of time and possibly money.

The investigators did not inquire into whether Isemoto was capable of taking on the entire project at a lesser price than ACK, or even whether Isemoto was interested in doing so, because Isemoto had not responded to the solicitation for pre-construction and construction services, and it would be

speculative whether any savings would have resulted from Isemoto performing all the work required of ACK.

- 22. Notice to Proceed was given on 9/21/11. Executed contract received a year later on 9/19/12. This would not have happened with DAGS (contract issued within 60 days). Hardship on MAI and its subs.**

Although Mitsunaga is technically incorrect, his allegation has merit. The NTP for design services was not issued to MAI until MAI's contract was delivered on September 2012, more than one year after MAI was selected. Minaai orally directed MAI to proceed with the conceptual plans right after MAI was selected in September 2011, and MAI complied. For the one year period until the fully executed contract was delivered and the NTP issued, UH maintained unfair leverage over MAI in that MAI was working and incurring costs and not being paid for its services. UH accounting procedures require a contract or other evidence of encumbrance and obligation to be in place before funds can be expended to MAI. Although MAI could not be paid in a timely manner, it arguably could be paid under the legal theory of *quantum meruit* where MAI is entitled to be paid for the work it does as a result of Minaai's oral instruction to proceed with performance without a written contract. UH is also at a disadvantage and puts itself at risk by instructing MAI to proceed because if the Project is cancelled, it would still have to pay MAI for work completed even if UH cannot benefit from that work.

However, the initial delay in finalizing the design contract can be partially ascribed to MAI for taking time to prepare a detailed fee proposal and its failure to correct computation discrepancies in its proposal. The investigation has been unable to determine why it took UH (through OCI and OPRPM) so long to have a fully executed written contract. The investigation has not found any bad faith or malicious motives attributable to UH for the delay. Regardless, there is no justification for such a delay between award and executed contract. There were similar lengthy delays affecting other contracts on this Project. Such delays are unfair to the contractors who are expected by the OCI to commence

performance shortly after selection and front the costs, without prospect of being paid until the contract is finalized.

23. UH Beach volleyball court completed over a year ago, but we have not received the contract.

The details of the contract for the UH Beach volleyball court are beyond the scope of this investigation, and no further response is warranted.

24. Per February 27, 2013 letter to Chancellor Straney, among other things, Mitsunaga alleges that this was not a design assist project, but rather was "Design Destroy."

As discussed previously, Minaai concluded reasonably and in good faith that design-assist procurement offered the most likely means to complete the Project by August 2013. Other conventional methods such as design-bid and design-build would have required the design plans and specification be completed and approved before construction begins, and would eliminate the time-savings feature of design-assist where design and construction overlap.

25. Approval and enforcement of the specifications.

The design specifications are ultimately approved by OCI. For this Project, UH contracted with SSFM to assure the construction was being completed in conformity with the approved specifications. SSFM's contract required it to provide construction management, oversight and liaison services.

26. Allegations relating to materials and technical means and methods including but not limited to color scheme and spray painting, water intrusion/mold, window substitution, and the roof hatch.

These allegations concern construction details that differed from the design plans. They appear to be the type of differences that routinely arise in construction of a Project of this size with a limited budget. Generally, Minaai was not directly involved in these disputes since many of these disputes between MAI and other parties arose and continued even after Minaai was placed on administrative

leave from his position at OCI. The decisions to modify these aspects of the design are discussed in detail further below in this report.

Chapter 1

University of Hawai‘i – Governance and Administration

UH was established in 1907 as a land-grant institution for the purpose of providing instruction, conducting research, and disseminating knowledge.²⁶ The Hawai‘i Constitution establishes UH as the state university and authorizes the BOR power to formulate policy and exercise control over the university.²⁷ Notwithstanding the legislature’s exclusive jurisdiction to identify laws of statewide concern, the BOR has “exclusive jurisdiction over the internal structure, management, and operation of the university.”²⁸

UH is the only public institute of higher education in Hawai‘i, and its primary mission is “to provide environments in which faculty, staff and students can discover, examine critically, preserve and transmit the knowledge, wisdom, and values that will help ensure the survival of present and future generations with improvement in the quality of life.”²⁹ The founding campus, College of Agriculture and Mechanic Arts, was renamed the College of Hawai‘i in 1912 before becoming the University of Hawai‘i in 1920.³⁰ UH now consists of ten campuses and dozens of educational, training and research centers across the Hawai‘ian Islands.³¹ UH has an enrollment of over 60,000 students and offers 142 different undergraduate majors, 92 master’s degrees and 54 doctoral disciplines.³²

UHH, located on Hawai‘i Island, was established in 1947 as the UH Manoa Hilo program.³³ In 1970 it became the University of Hawai‘i at Hilo.³⁴ UHH currently consists of 775 acres, including a

²⁶ UH BOR Reference Guide, May 2013, p. 1. Exhibit 5.

²⁷ State Constitution, Article X, Secs. 5-6. Exhibit 6.

²⁸ State Constitution, Article X, Sec. 6. Exhibit 6.

²⁹ UH BOR Reference Guide, at pp. 1, 5. Exhibit 5. <http://www.hawaii.edu/about>, Exhibit 7. BOR Policies and Bylaws, Section 4-1,c, Exhibit 8.

³⁰ <http://www.hawaii.edu/about>, Exhibit 7.

³¹ <http://www.hawaii.edu/about>. Exhibit 7. BOR Reference Guide, p. 5-10. Exhibit 5.

³² <http://www.hawaii.edu/about>. Exhibit 7. BOR Reference Guide, p. 33, A-11. Exhibit 5.

³³ <http://hilo.hawaii.edu/prospective/glance.php>. Exhibit 9.

³⁴ <http://hilo.hawaii.edu/prospective/glance.php>. Exhibit 9.

115 acre main campus and the 33 acre University Village plot still under development.³⁵ UHH is a “comprehensive, primarily baccalaureate institution with a regional mission, offering baccalaureate degrees in the liberal arts, agriculture, nursing, and business and selected graduate and professional degrees, including pharmacy.”³⁶ UHH offers 37 undergraduate majors, 8 graduate programs, and 2 doctoral degrees to its approximately 4,172 enrolled students.³⁷

I. Key Leadership Positions and Administrative Areas

A. Board of Regents

The affairs of UH fall under the general management and control of the BOR.³⁸ The BOR, consisting of 15 regents nominated by the Regents Candidate Advisory Counsel, appointed by the governor and confirmed by the legislature, formulates policy and exercises control through its executive officer, the university president.³⁹ The BOR gains its authority to govern the University system through Article X, Section 6 of the Hawai‘i Constitution.⁴⁰

B. President

The President is the chief executive officer of UH and exercises power as delegated by the BOR for the governance, protection, and advancement of UH.⁴¹ All UH faculties are under the direction of the President.⁴² Dr. M.R.C. Greenwood served as UH’s President From 2009 to 2013, and Dr. David Lassner currently serves as the Interim President.⁴³

³⁵ <http://hilo.hawaii.edu/prospective/glance.php>. Exhibit 9.

³⁶ BOR Reference Guide, p. 5. Exhibit 5.

³⁷ BOR Reference Guide, p. 5. Exhibit 5.

³⁸ <http://hawaii.edu/offices/bor/>. Exhibit 10. BOR Reference Guide, pp. 11, A-11. Exhibit 5.

³⁹ <http://hawaii.edu/offices/bor/>. Exhibit 10. BOR Reference Guide, pp. 11, A-11. Exhibit 5.

⁴⁰ BOR Ref. Guide, p. 11. Exhibit 5. Hawaii Const. Art. X, Secs. 5-6. Exhibit 6.

⁴¹ BOR Ref. Guide, p. 16. Exhibit 5. BOR Policies and Bylaws, Section 2-2, Exhibit 11.

⁴² BOR Ref. Guide, p. 16. Exhibit 5. BOR Policies and Bylaws, Section 2-2, Exhibit 11.

⁴³ <http://www.hawaii.edu/about/pastpresidents.html>, Exhibit 12.

C. Vice President for Budget and Finance/Chief Financial Officer

The Vice President for Budget and Finance/Chief Financial Officer (“VP/CFO”) coordinates and directs the offices responsible for budgeting, capital improvements and financial management operations of UH and reports to the President.⁴⁴ Specifically, the VP/CFO is responsible for the acquisition of goods, services, and construction for UH and is authorized to execute contractual documents necessary to achieve these purposes.⁴⁵ The VP/CFO from 2005 to the present is Howard Todo.⁴⁶

Among the administrative offices reporting to the VP/CFO is the Financial Management Office, which includes the Office of Procurement and Real Property Management (“OPRPM”), and the OCI.⁴⁷

1. Office of Procurement and Real Property Management

OPRPM is responsible for the administration of policies and procedures for the acquisition of goods, services, and construction and the processing of any transactions involving real property.⁴⁸ The head of OPRPM is Duff Zwald.⁴⁹

2. Office of Capital Improvements

OCI was established in 2002 to manage major UH capital improvement program (“CIP”) projects, specifically major new construction and renovation projects; historically the responsibility for CIP projects had been that of the State Department of Accounting and General Services (“DAGS”).⁵⁰ OCI also prepares UH’s CIP budgets by coordinating with others in the UH system, the executive

⁴⁴ <http://hawaii.edu/offices/?office=cfo>, Exhibit 13. BOR Ref. Guide, p. 48. Exhibit 5. State of Hawaii, University of Hawaii, Systemwide Administration Organizational Chart (11/18/10 & 7/1/11 Charts), Exhibit 14.

⁴⁵ UH EP E8.105, Sept. 2009, OCI p. 6722. Exhibit 15.

⁴⁶ <http://hawaii.edu/offices/?office=cfo>, Exhibit 13.

⁴⁷ <http://hawaii.edu/offices/?office=cfo>, Exhibit 13. See also State of Hawaii University of Hawaii Systemwide Administration Vice President for Budget and Finance/CFO Position Organization Chart, Chart I, II, II-F, and IV (7/1/10, 11/18/10, 7/1/11, 7/1/2012 Charts); Exhibit 16.

⁴⁸ <http://www.fmo.hawaii.edu/fmo/>. Exhibit 17. <http://www.hawaii.edu/oprpm/>. Exhibit 18.

⁴⁹ UH Directory, <http://www.hawaii.edu/dir/index.php>. Exhibit 19.

⁵⁰ BOR Ref. Guide, p. 39. Exhibit 5.

branch and the legislature.⁵¹ OCI oversees the offices of physical planning, project management-design & construction, and administrative & support services.⁵²

OCI has reported to the VP/CFO since November 18, 2010.⁵³ Prior to November, 2010, the head of OCI reported to the Vice President of Administration.⁵⁴

During the course of the Project: Minaai, as the Associate Vice President for Capital Improvements, headed the OCI.⁵⁵ Other key OCI personnel are: Maynard Young, OCI's Facilities Planning and Design Manager;⁵⁶ Loren Lau and Bruce Teramoto, architects who report to Maynard Young;⁵⁷ and Scott Oshiro, OCI Fiscal Officer who reports to Ryan Kurashige, OCI's Manager of Administration and Support Services.⁵⁸

II. Administrative Controls

The BOR establishes policies, known as BOR Bylaws and Policies that provide the governing framework for UH.⁵⁹ The BOR Bylaws and Policies are implemented and further defined through the UH Systemwide Executive Policies ("EP") and Systemwide Administrative Procedures ("AP"). UH also follows the State of Hawai'i Civil Service Policies and Procedures; has a System Emergency Management Plan; and establishes Administrative Rules.⁶⁰

⁵¹ BOR Ref. Guide, p. 39. Exhibit 5.

⁵² Position Organization Chart, Chart IV (2010). Exhibit 16.

⁵³ State of Hawai'i, UH Systemwide Administration Chart, 7/1/10; Updated Chart 11/18/10, Chart 7/1/11, and Chart 7/1/2012. Exhibit 14. July 1, 2013 Howard Todo Interview.

⁵⁴ 7/1/10 Systemwide Organizational Chart. Exhibit 14. July 1, 2013 Howard Todo Interview.

⁵⁵ <http://www.hawaii.edu/offices/?office=oci>. Exhibit 20. After the allegations against Minaai were made, UH removed Minaai from his position as Associate VP for Capital Improvements. Minaai was placed on leave with pay while the investigation was conducted. While the investigation continued, around August 14, 2013, Minaai was returned to service as staff support to VP/CFO Todo with strict limitations so as not to influence the investigation. 8/14/12 Letter from Attorney General David Louie to President Greenwood concerning Brian Minaai's return to work. Exhibit 22.

⁵⁶ UH Directory, <http://www.hawaii.edu/dir/index.php>. Exhibits 22, 23, 24, 25, and 26. Maynard Young has over 30 years experience in the public and private sectors. Minaai did not question Young as to Young's ability to handle a project using the design assist method. 9/9/13 Minaai Interview.

⁵⁷ 5/17/13 Maynard Young Interview; 5/16/12 Loren Lau Interview, 5/16/13 Bruce Teramoto Interview.

⁵⁸ 5/16/12 Scott Oshiro Interview.

⁵⁹ BOR Ref. Guide, p. 12. Exhibit 5.

⁶⁰ <http://www.hawaii.edu/apis/>. Exhibit 27. BOR Ref. Guide, p. 12. Exhibit 5.

A. Policies and Procedures

“Administrative policies and procedures establish the framework for carrying out university operations.”⁶¹ EPs are used to facilitate the implementation of the BOR Bylaws and Policies by providing policy guidelines and procedures, while APs provide procedural guidance, particularly for business, finance, and personnel actions.⁶²

EP E8.105 delegates the authority to execute contract documents for the procurement of goods, services, and construction on behalf of UH to the VP/CFO.⁶³ On September 9, 2009, VP/CFO Todo in turn delegated his authority to “execute all contracts and perform all duties relating to the procurement of goods, services, and construction, consistent with applicable law and Board of Regents policies, in amounts not exceeding \$1,000,000” to the Director of Procurement and Real Property Management, Duff Zwald.⁶⁴

B. Interim Procurement Policies

In anticipation of the approval of House Bill 347 during the 2010 legislative session, which bill would exempt UH from complying with the requirements of State procurement law, the BOR approved UH’s IPP in June, 2010; the IPP took effect July 1, 2010.⁶⁵ Revisions to the IPP were unanimously approved by the BOR on September 16, 2010.⁶⁶ The goal of the IPP was viewed as to reduce delays inherent in the State Procurement Code and instead develop a procurement selection procedure that was based on “qualified lists”.⁶⁷

⁶¹ BOR Ref. Guide, p. 17. Exhibit 5.

⁶² BOR Ref. Guide, p. 17. Exhibit 5.

⁶³ BOR Executive Policy E8.105, Sept. 2009. Exhibit 15.

⁶⁴ 9/1/09 Memorandum from Howard Todo to Administrator Russell W. Miyake, OCI p. 6723. Exhibit 28.

⁶⁵ BOR Board Meeting Minutes for 6/28/10 and 9/16/10. Exhibits 29 and 30. UH 2012 Report to the Legislature. Exhibit 31. Todo July 1, 2013 Interview. 7/22/13 Duff Zwald Interview. House Bill 347 was signed into law as Act 82 and took effect on July 1, 2010. Act 82, SLH 2010. Exhibit 32.

⁶⁶ BOR Board Meeting Minutes for 9/16/10. Exhibit 30

⁶⁷ July 1, 2013 Howard Todo Interview.

The IPP laid out the process for UH to acquire goods, services, and construction during its temporary exemption from the State Procurement Code.⁶⁸ Consistent with Act 82, the IPP established that the UH's procurement of goods, services, and construction was not subject to HRS §103D, except for §§ 103D-110 (education and training), 103D-304 (as to design professional services), 103D-324 (performance and payment bonds), 103D-707 (remedies after award), and 103D-1002 (Hawaii product preference).⁶⁹ The IPP remained in effect until Act 82's sunset on June 30, 2012.⁷⁰

⁶⁸ IPP A8.200 ¶ 1. Exhibit 33.

⁶⁹ IPP A8.200 ¶ 5. Exhibit 33.

⁷⁰ Act 82. Exhibit 32.

Chapter 2

Additional Allegations

In addition to Dennis Mitsunaga's claims, other MAI employees made additional allegations of inappropriate actions occurring during the Project.

On April 30, 2013, Gary Nakatsuka, a Project Manager at MAI, sent a letter to Maynard Young insisting that the entry window in each unit, as per the permit drawings, be reinstated.⁷¹ Allegedly, Minaai decided to remove the three corridor windows from each unit based on construction cost savings.⁷² Although the Building Department approved the removal of the windows, Nakatsuka argues the entry window should be installed in order to "provide the necessary natural light and ventilation to an otherwise dark, hot, humid and unbearable space".⁷³ Additionally, Nakatsuka complains that the wrong windows were installed throughout the Project and MAI had not received documentation that the windows used met the 105 mph hurricane wind load code requirement necessary to obtain a certificate of occupancy from the Building Department.⁷⁴

Additional allegations were raised in a May 16, 2013 letter from Nakatsuka to Robert Yamada, Construction Manager with SSFM.⁷⁵ Nakatsuka complained that the general contractor was allowed to install unapproved, lesser grade marlin windows, use spray painting, overprice for the installation of floor tiles, continue and complete the painting of three floors of exterior corridor ceilings after the Student Housing Director questioned the quality of the finish, delete the perimeter security fence and access control gates from the project, and not require a submittal of moisture tests after heavy rainfall occurred during early construction.⁷⁶

⁷¹ 4/30/13 Letter from Nakatsuka to Maynard Young, p. 1. Exhibit 34.

⁷² 4/30/13 Letter from Nakatsuka to Maynard Young, p. 1. Exhibit 34.

⁷³ 4/30/13 Letter from Nakatsuka to Maynard Young, p. 2. Exhibit 34.

⁷⁴ 4/30/13 Letter from Nakatsuka to Maynard Young, p. 2. Exhibit 34.

⁷⁵ 5/16/13 Letter from Nakatsuka, MAI, to Yamada, SSFM. Exhibit 35.

⁷⁶ 5/16/13 Letter from Nakatsuka, MAI, to Yamada, SSFM. Exhibit 35.

Nakatsuka later, on August 27, 2013, wrote a letter to the County of Hawai‘i, Department of Public Works.⁷⁷ This letter stated that MAI had not accepted the windows ACK had purchased and installed for the Project.⁷⁸ The letter explained that MAI rejected the windows because they did not match the project specifications, as they were lesser-grade Marlin Commercial Windows instead of the Marlin Heavy Commercial Windows, and ACK had not provided test reports showing the windows conformed with wind load requirements and the 105 mph wind speed criteria.⁷⁹ Nakatsuka also stated that calculations by a local structural engineering firm were not a substitute for the lack of manufacturer’s documentation or for test reports from an independent laboratory certifying the required performance specifications.⁸⁰ As a result, MAI refused to accept or assume responsibility or liability for the Marlin Commercial Windows.⁸¹

Gary Nakatsuka wrote a final letter to Attorney General David Louie alleging OCI took intentional and fraudulent actions in installing inferior and lesser-grade windows, which do not comply with the International Building Code, without the approval and over the objections of MAI.⁸² Nakatsuka additionally claims that OCI made fraudulent misrepresentations to the County of Hawai‘i by applying for and obtaining Certificates of Occupancy.⁸³ The Department responded to these allegations requesting more details from MAI to assist in the investigation.⁸⁴ Neither MAI nor its attorney responded to the request for more information on its allegations of fraud.

⁷⁷ 8/27/13 Letter from Nakatsuka to Dept of Public Works, County of Hawai‘i. Exhibit 36.

⁷⁸ 8/27/13 Letter from Nakatsuka to Dept of Public Works, County of Hawai‘i. Exhibit 36.

⁷⁹ 8/27/13 Letter from Nakatsuka to Dept of Public Works, County of Hawai‘i. Exhibit 36.

⁸⁰ 8/27/13 Letter from Nakatsuka to Dept of Public Works, County of Hawai‘i. Exhibit 36.

⁸¹ 8/27/13 Letter from Nakatsuka to Dept of Public Works, County of Hawai‘i. Exhibit 36.

⁸² 12/16/13 Letter from Gary Nakatsuka to AG Louie sent through MAI’s attorney Sheri J. Tanaka. Exhibit 37.

⁸³ 12/16/13 Letter from Gary Nakatsuka to AG Louie. Exhibit 37.

⁸⁴ 12/26/13 Letter from Russell A. Suzuki, First Deputy Attorney General to Sheri J. Tanaka. Exhibit 38.

Chapter 3

Brian Minaai

At the center of the allegations by Mitsunaga, MAI, and its employees, is Brian Minaai, who in his capacity as Associate Vice President for Capital Improvements, was in charge of OCI and responsible for much of the Project.

Minaai's Background⁸⁵

Minaai attended UH and received a Bachelor of Arts in Economics. He also received a Graduate Certificate in Urban Planning, a Master of Arts in Economics, and a Masters in Business Administration specializing in Real Estate and Finance. Minaai also attended Executive Finance and Management Courses at the University of Chicago Graduate School of Business.

Minaai was responsible for corporate development strategies for hotels and residential and commercial properties as a Project Manager for Blackfield Hawai'i from 1979 to 1981. In 1981, Minaai became the Chief Clerk and Budget Chief for the Hawai'i State Senate Ways and Means Committee. Thereafter, Minaai was a Senior Project Manager for West Beach Estates-Ko Olina Resort from 1983-1989. He then became the Vice President, Project Management for Haseko Hawai'i from 1989-1996. From 1996-1997, Minaai was again the Chief Clerk of the Hawai'i State Senate Ways and Means Committee. Minaai was then the Director and Deputy Director of the State of Hawaii's Department of Transportation for five years before becoming a Senior Project Director with the Kobayashi Group for three years. From 2005-2008, Minaai was the Senior Development Director for Marriott Vacation Club International. In 2008, Minaai became the Associate VP for Capital Improvements at UH.

Minaai's Removal from Position with OCI and Return to Work

After Mitsunaga's allegations were made during the Legislative Session, UH placed Minaai on temporary leave on February 18, 2013.⁸⁶ Minaai remained on leave with pay for eight months until

⁸⁵ Brian Minaai CV. Exhibit 39.

August 31, 2013, when then President Greenwood authorized Minaai to return to work in a position with no real or perceived influence or interference with the investigation.⁸⁷

Minaai's Response to the Allegations⁸⁸

The Team interviewed Minaai on more than one occasion, during which he generally denied the claims made against him. He specifically denied selecting or awarding any contracts for the Projects to any "friends." While Minaai does not deny his friendships or history with a number of contractors and consultants on the Project, he denied he personally selected friends to work on this or on any other project.

Responding to the allegation that he participated in the improper selection of firms, Minaai stated he had no involvement with many of the selections.⁸⁹ Minaai stated it was up to the selection committees to evaluate and rank the firms, which are then sent to Maynard Young for negotiations, before a final agreement is sent to OPRPM.⁹⁰ Minaai stated Maynard Young was in charge of the firms selections for the Project including coordinating the rankings, negotiating with the firms, and sending the final agreements to OPRPM.⁹¹

Regarding the single civil engineering contract for the entire 33 acres University Village site, Minaai denied coercing the selection committee into choosing Segawa's firm, WRSA, and denied that he spoke to Segawa before WRSA was selected.⁹² He also denied pressuring MAI into relinquishing its own civil engineering work and giving that work (which is covered under MAI's contract) to Segawa.⁹³

Regarding the design services contract, Minaai initially agreed that during the selection of the design services contractor, he had discussed his impressions of the various firms with others during the

⁸⁶ 9/24/13 Minaai Interview.

⁸⁷ 8/14/12 Letter from AG to President Greenwood. Exhibit 21.

⁸⁸ Minaai Interviews.

⁸⁹ 9/9/13 Minaai Interview.

⁹⁰ 9/9/13 Minaai Interview.

⁹¹ 9/9/13 Brian Minaai Interview; 9/24/13 Brian Minaai Interview; 11/5/13 Maynard Young Interview;

⁹² 9/24/13 Brian Minaai Interview.

⁹³ 9/24/13 Brian Minaai Interview.

firms' presentations.⁹⁴ However, in a subsequent interview he stated that he did not participate in the discussion nor got involved in the evaluation or selection.⁹⁵ Minaai denied giving any direction to the selection committee or expressing any preference for a certain firm.⁹⁶ He also denied that as the head of OCI he had veto power over the selection committee's selection.⁹⁷ Minaai further denied any claim that MAI's contract was conditioned on the use of any specific subcontractor.⁹⁸ Maynard Young confirmed Minaai had no involvement in negotiating MAI's contract.⁹⁹

Minaai denies RLB was merely rubber stamping ACK's estimates.¹⁰⁰ Instead, RLB was preparing its own cost estimates to determine if the solicited costs were reasonable or not.¹⁰¹

As to Mitsunaga's other allegations, Minaai stated he is "out of the loop" and "hands off" once a project is approved.¹⁰² Minaai stated he works with the BOR and UH's Executive Team, and that OPRPM and its head, Duff Zwald, are responsible for reviewing OCI's contracts.¹⁰³ Minaai also stated that any problems first go to Maynard Young for resolution before coming to him.¹⁰⁴

⁹⁴ 9/9/13 Minaai Interview.

⁹⁵ 9/10/13 Minaai Interview, 9/24/13 Brian Minaai Interview; see also 11/5/13 Maynard Young Interview.

⁹⁶ 9/9/13 Minaai Interview; 9/10/13 Minaai Interview.

⁹⁷ 9/9/13 Brian Minaai Interview.

⁹⁸ 9/9/13 Minaai Interview; 9/10/13 Minaai Interview.

⁹⁹ 11/5/13 Minaai Interview.

¹⁰⁰ 9/10/13 Minaai Interview.

¹⁰¹ 9/10/13 Minaai Interview.

¹⁰² 9/9/13 Minaai Interview.

¹⁰³ 9/9/13 Minaai Interview.

¹⁰⁴ 9/9/13 Minaai Interview.

Chapter 4

Funding of Project; Selection of Procurement Method

I. Funding

Beginning in the 1990's, UHH sought to expand its campus and began searching for opportunities to acquire new housing facilities.¹⁰⁵ However, UHH's several attempts at expanding its housing had been unsuccessful.¹⁰⁶

At the February 20, 2009 BOR meeting, the BOR authorized the issuance and sale of \$100,000,000 Series 2009A Revenue Bonds, along with a Supplemental Resolution describing which UH projects the Revenue Bonds were to cover.¹⁰⁷ The Supplemental Resolution provided \$20,000,000 would be allocated to acquire apartment complexes for UHH student housing.¹⁰⁸ In a June 8, 2009 memorandum to then Governor Linda Lingle, Minaai requested the release of the Revenue Bonds, including the \$20,000,000 allocated for converting existing apartment complexes to UHH student housing.¹⁰⁹ In that memorandum UHH also stated it had identified existing apartment complexes for possible acquisition and renovation for student housing.¹¹⁰

In a January 29, 2010 memorandum to Howard H. Kerr, Chairperson for the BOR, VP/CFO Howard Todo and Rose Tseng, then Chancellor of UHH, requested \$3,000,000 of the Revenue Bond Proceeds to be reallocated for a College of Pharmacy project.¹¹¹ The memorandum also requested an Amendment to the Supplemental Resolution covering the 2009 Revenue Bonds allowing the remaining

¹⁰⁵ 5/22/13 Miles Nagata, UHH Housing Manager, Interview; Gerald DeMello Interview.

¹⁰⁶ 5/22/13 Miles Nagata Interview; Luoluo Hong Interview, pp. 2-4.

¹⁰⁷ 1/29/10 Memorandum from Howard Todo to Howard H. Karr, Chairperson for BOR, via President Greenwood. Exhibit 40

¹⁰⁸ 1/29/10 Memorandum from Howard Todo to Howard H. Karr. Exhibit 40. See also 5/22/13 Miles Nagata Interview.

¹⁰⁹ 6/8/09 Memorandum from Minaai to Governor Lingle requesting release of revenue bonds, OCI pp.7259-7264. Exhibit 41. See also 9/9/13 Brian Minaai Interview, explaining funds were needed from both the Revenue and General Obligation Bonds.

¹¹⁰ 6/8/09 Memorandum from Minaai to Governor Lingle, OCI p.7261. Exhibit 41.

¹¹¹ 6/8/09 Memorandum from Minaai to Governor Lingle, OCI p.7261. Exhibit 41.

\$17,000,000 to be used for “(a) the design and construction of new or renovated student housing facilities and (b) the acquisition of land and/or facilities that can be converted to or used for student housing purposes primarily for the benefit of the UH Hilo campus.”¹¹² On February 18, 2010, the BOR unanimously approved these requests.¹¹³

Additionally, in 2011, the Hawai‘i Legislature appropriated \$16,000,000 in General Obligation (“G.O.”) Bonds for the development of student housing at UHH.¹¹⁴ On November 10, 2011, Minaai requested Governor Neil Abercrombie release the \$16,000,000 to finance the construction costs for the Project.¹¹⁵ Minaai’s request stated UHH’s enrollment had grown 17% in the last five years, resulting in over 350 students on the waiting list for housing.¹¹⁶ He further stated that sole reliance on the private sector in building new residence halls would result in rental costs higher than most students would be able to afford.¹¹⁷ The \$16,000,000 in G.O. Bonds allotted \$15,840,000 towards construction and roughly 1%, \$160,000, for works of art.¹¹⁸

A General Obligation Bond Fund Appropriations Questionnaire dated November 11, 2010, noted that the Project was being funded by \$16,000,000 in G.O. Bonds and \$15,475,000 in other State of Hawaii and county funds for a total of \$31,475,000.¹¹⁹ However, a Budget Breakdown updated on October 5, 2011, shows \$15,585,586 available from the 2009A Revenue Bonds, and \$16,000,000 from the General Bonds, for a total of \$31,585,586 in available funds.¹²⁰ Yet, in a February 14, 2012 email to

¹¹² 6/8/09 Memorandum from Minaai to Governor Lingle, OCI p.7261. Exhibit 41. 12/3/13 Email from Howard Todo to John Morton. Exhibit 42.

¹¹³ 2/18/10 BOR minutes, pp. 13-15. Exhibit 43.

¹¹⁴ 11/10/11 Memorandum from Minaai to Governor Abercrombie referring to Act 164, Part IV, § 36(G)(93) SLH 2011; OCI pp. 7283-7284. Exhibit 44.

¹¹⁵ 11/10/11 Memorandum, OCI pp. 7283-7284. Exhibit 44. 9/9/13 Brian Minaai Interview.

¹¹⁶ Capital Project Information and Justification Sheet attached to 11/10/11 Memorandum, OCI p. 7285. Exhibit 44.

¹¹⁷ Project Information and Justification Sheet attached to 11/10/11 Memorandum, OCI p. 7285. Exhibit 44.

¹¹⁸ 12/22/11 Allotment Advice signed by Governor Abercrombie, OCI pp. 6815-6816. Exhibit 45. CIP Project Summary of Proposed Expenditures, OCI p. 7286. Exhibit 44. 2/14/12 Email from Maynard Young to Marcia Sakai, UHH p. 18; Exhibit 46.

¹¹⁹ Questionnaire – General Obligation Bond Fund Appropriations, OCI p. 7289. Exhibit 44. See also 9/9/13 Brian Minaai Interview.

¹²⁰ 10/5/11 Budget Breakdown. Exhibit 47.

Maynard Young at OCI from UHH Vice Chancellor for Administrative Affairs Marcia Sakai, “the revenue bond balance reported in the 10/20/11 action memo draft [was] \$16,248,537.61. This was reduced by the amount of one of the early Segawa agreements.”¹²¹ A subsequent Budget Breakdown shows the 2009A Revenue Bond total as \$16,248,537.61, G.O. Bond 8881381 as \$16,000,000, and G.O. Bond 8881251 as \$225,463 for a total budget of \$32,474,001.01.¹²²

An accounting analysis was not completed as part of this Investigation, but these breakdowns reveal the varying budget amounts relied upon during the Project.

II. Schedule/Design Assist Procedure

Act 82, SLH 2011, effective July 1, 2010, exempted UH from most of the requirements of the Hawaii Public Procurement Code, codified in HRS chapter 103D.¹²³ Despite the broad exemption, Act 82 still required UH to select its design consultants (those licensed under HRS chapter 464) using the conventional professional services selection process under HRS § 103D-304.¹²⁴ A UH task force drafted a set of the IPP. The task group comprised of members of the design and construction communities, and various UH representatives, including Minaai and the head of OPRPM Zwald.¹²⁵ The BOR approved the IPP in June 2010, and unanimously approved a set of revised IPP on September 16, 2010.¹²⁶

The IPP included policies governing different types of procurement procedures for goods, services, and construction, and included a procurement method identified as the Qualified-Based Construction Procurement for Negotiated Construction Primarily for Design-Assist Construction

¹²¹ 2/14/12 Email from Sakai to Maynard Young, UHH p. 18. Exhibit 46.

¹²² UHH Budget Breakdown with yellow highlights. Exhibit 48.

¹²³ Act 82. Exhibit 32.

¹²⁴ Act 82. Exhibit 32.

¹²⁵ 9/9/13 Brian Minaai Interview.

¹²⁶ 6/28/10 BOR Minutes. Exhibit 29. 7/22/13 Duff Zwald Interview; 9/9/13 Brian Minaai Interview, 9/16/10 BOR Minutes. Exhibit 30.

Projects (“Design Assist”).¹²⁷ The Design Assist procurement method allows the construction contract to be awarded prior to the completion of the design so that the construction contractor can assist the architect/engineer in the completing the design.¹²⁸ The intent is that during the process of completing the design, the parties can compare costs and review other elements of the project, and then adjust the design and construction as needed to keep the project on budget, on time, and meet the needs of the client.¹²⁹ Design Assist also is meant to save time by eliminating the need for a completed design to be in place prior to initiating the construction procurement process.¹³⁰ Design Assist was established for a project of a highly specialized nature where it would be advantageous to be able to simultaneously adjust the design and construction.¹³¹

Design Assist required UH to publicly notice a solicitation for statements of qualifications for its general construction needs.¹³² When the time came and UH had identified a specific construction need, it solicited for written expressions of interest from those contractors who previously had submitted statements of qualifications in response to the public solicitation.¹³³ UH was then to establish a selection committee, made up of three University employees from OCI or the Facilities Management Office, to evaluate the expressions of interest.¹³⁴ The committee then would rank the evaluated contractors and negotiate a fair and reasonable contract with the first-ranked contractor.¹³⁵ If a satisfactory contract could not be reached with the first-ranked contractor, negotiations would be conducted with the other contractors in order of their ranking until a satisfactory contract was reached.¹³⁶

¹²⁷ IPP A8.280.3. Exhibit 49. 9/9/13 Brian Minaai Interview.

¹²⁸ 7/1/13 Howard Todo Interview; 5/17/13 Maynard Young Interview.

¹²⁹ 7/1/13 Howard Todo Interview; 5/22/13 Robert Yamada, SSFM Interview.

¹³⁰ 7/1/13 Howard Todo Interview.

¹³¹ IPP A8.280.3 ¶ 1.c. Exhibit 49.

¹³² IPP A8.280.3 ¶ 2.a. Exhibit 49.

¹³³ IPP A8.280.3 ¶ 3.a.1). Exhibit 49.

¹³⁴ IPP A8.280.3 ¶ 3.a.2)-5). Exhibit 49.

¹³⁵ IPP A8.280.3 ¶ 3.a.6)-8). Exhibit 49.

¹³⁶ IPP A8.280.3 ¶ 3.a.8). Exhibit 49.

All contracts negotiated under Design Assist were required to be submitted to OPRPM for its review, regardless of the dollar amount of the contract.¹³⁷ OPRPM would then award the contract and issue the winning contractor a Notice to Proceed (“NTP”) authorizing the contractor to commence work under the contract.¹³⁸

III Selection of Design Assist for the Project

For this Project, OCI, acting mainly through Minaai, decided to use Design Assist.¹³⁹ The decision was based on relatively limited construction time frame and the need for the construction contractor to assist the design consultant with the construction systems and cost estimates of the design.¹⁴⁰

It was not illegal for UH and OCI to use Design Assist for the Project because Act 82, SLH 2011, exempted UH from the Hawaii Public Procurement Code and specifically authorized UH to develop its own procurement code, the IPP, which in turn recognized and allowed UH to use Design Assist as a source selection method.¹⁴¹

Use of Design Assist can be further justified by the timeframe of this Project. The revenue bonds funding the Project began to create annual debt service of about \$1.2 million as soon as the bonds were issued on or about 2009. UHH’s intended to use the revenues generated by the occupancy of the completed Project, that is, the student housing facility, to pay down the revenue bonds’ annual debt service.¹⁴² In order to generate the necessary revenues to meet the carryover 2009 debt service, while

¹³⁷ IPP A8.280.3 ¶ 3.b. Exhibit 49.

¹³⁸ IPP A8.280.3 ¶ 3.b. Exhibit 49.

¹³⁹ 7/22/13 Duff Zwald Interview.

¹⁴⁰ 9/9/13 Brian Minaai Interview.

¹⁴¹ Act 82. Exhibit 32. IPP A8.280.3. Exhibit 49.

¹⁴² See 8/17/11 Email from Luoluo Hong concerning the possibility of “very steep rate increases” for students in order to meet the debt service, UHH p. 23-24. Exhibit 50. 5/17/13 Maynard Interview; see 9/9/13 Minaai Interview; see also Luoluo Hong Interview stating debt service was being paid on the revenue bonds awarded September 2010, even before design was complete.

maintaining affordable dorm fees for UHH students, the Project needed to have at least 300 beds and be completed by August 2013.¹⁴³

This sentiment was stressed in an August 22, 2011 email from Dr. Luoluo Hong, UHH Vice Chancellor for Student Affairs, who stated that while there is a need to move forward with housing, there was an “equally important goal of offering housing at a cost that is affordable for students and sustainable fiscally for UH Hilo.”¹⁴⁴ Minaai agreed with Hong that the role of OCI was to “deliver a project within a prescribed budget and acceptable timetable that reflects your campus’s needs.”¹⁴⁵ Gerald DeMello, former UHH Director of University Relations, agreed that Design Assist allowed the student dormitory to be built more quickly and without it, the dormitory would not have been opened on time.¹⁴⁶

Based on his experience and input from others, Minaai estimated that the traditional design, bid, build procurement method would take 37 months to complete.¹⁴⁷ In comparison, Minaai estimated Design Assist would take 26 months, saving 11 months.¹⁴⁸

In July, 2012, ACK submitted a schedule based on Design Assist, indicating a tentative four week schedule to be followed by a full construction schedule with a June 15, 2012 start date and an August 9, 2013 end date.¹⁴⁹ ACK’s schedule also contained design milestones for schematic, sitework,

¹⁴³ 11/10/11 Memorandum – attached Capital Project Information and Justification Sheet, OCI p. 7285. Exhibit 51 (same as exhibit 44). Luoluo Hong Interview; 8/17/11 Email from Luoluo Hong to Donald Straney, Gerald DeMello, Marcia Sakai, Harry Yada, Miles Nagata, Brian Minaai, and Maynard Young, UHH pp. 23-24. Exhibit 50. Gerald DeMello Interview; 7/1/13 Howard Todo Interview; 5/17/13 Interview; 5/22/13 Miles Nagata Interview; 9/9/13 Minaai Interview; 9/10/13 Minaai Interview; Luoluo Hong Interview; 11/5/13 Maynard Young Interview.

¹⁴⁴ 8/22/11 Email from Luoluo Hong, UHH p. 23. Exhibit 50. See also DeMello Interview.

¹⁴⁵ 8/24/11 Email from Minaai to Hong, UHH pp. 22-23. Exhibit 50.

¹⁴⁶ DeMello Interview; see 5/22/13 Miles Nagata Interview explaining need to do design assist in order to be open on time.

¹⁴⁷ Comparison of Alternative University of Hawai‘i Construction Procurement Methods Timetables. Exhibit 52. 9/9/13 Brian Minaai Interview.

¹⁴⁸ Comparison of Alternative University of Hawai‘i Construction Procurement Methods Timetables. Exhibit 52. 7/1/13 Howard Todo Interview; 9/9/13 Minaai Interview.

¹⁴⁹ UHH University Village Student Housing Schedule, SSFM pp. 1353-1292. Exhibit 53.

design development, construction document packages, and permit dates.¹⁵⁰ The schedule's June 15, 2012 construction start date was prior to the scheduled October 3, 2012 completion of the 100% construction document package for the Project to be completed by the August 9, 2013 end date.

The effectiveness of Design Assist is illustrated in an email exchange in early July, 2012. ACK had shared a list of "hot items" which Minaai had asked MAI to address.¹⁵¹ MAI's Kaiemi Shimabuku responded that the hot items consisted of additional work not normally included in a 50% Construction Drawing ("CD") and would necessitate amending the end date. When Minaai would not agree to a later date, Shimabuku informed him MAI would not be able to address all of the "hot items" but would turn over the items required for the original 50% CD submittal.¹⁵² Minaai responded that the Project was being done using Design Assist, whereby the plans and specifications are completed by construction sequence, i.e. first site work package, then foundation package, then building envelope package.¹⁵³ Minaai concluded that addressing the "hot list" items is more important than submission of the 50% CDs, and was to be MAI's first priority.¹⁵⁴

NOTES AND COMMENTS ON FUNDING AND USE OF DESIGN ASSIST

Issues about the funding for the Project were not made by Mitsunaga or MAI; the funding information is provided here as background and to provide context to the actions taken on this Project.

Evidence supports the use of Design Assist as appropriate for the Project. Although Design Assist required MAI's delivery of plans and specifications to be properly sequenced to ensure there would be no disruptions to the ongoing construction, it is also evident that Design Assist allowed the various parties to act quickly and with flexibility to modify plans and specifications as warranted.¹⁵⁵

¹⁵⁰ UHH University Village Student Housing Schedule, SSFM pp. 1284-1292. Exhibit 53.

¹⁵¹ 7/9/12 Email from Michael Young to Brian Minaai, SSFM p. 847. Exhibit 54. 7/9/12 Email from Brian Minaai to Aaron Fujii, Gary Nakatsuka, Kaiemi Shimabuku and Wesley Segawa, p. SSFM 847. Exhibit 54.

¹⁵² 7/11/12 Email from Kaiemi Shimabuku to Brian Minaai, SSFM p. 845. Exhibit 54.

¹⁵³ 7/12/12 Email from Brian Minaai to Kaiemi Shimabuku, SSFM p. 844. Exhibit 54.

¹⁵⁴ 7/12/12 Email from Brian Minaai to Kaiemi Shimabuku, SSFM p. 844. Exhibit 54.

¹⁵⁵ 7/12/12 Email from Brian Minaai to Kaiemi Shimabuku, SSFM p. 844. Exhibit 54.

Given the timeframe for the Project, the above exchange between Minaai and Shimabuku supports the decision to use Design Assist which allowed the parties to address issues as they arose during construction to complete the Project on schedule; such a relatively quick resolution of issues can only serve to accommodate the Project's timeframe. In fact, following the schedule based on Design Assist allowed the student housing facility to be built and opened by August 2013, in time for the Fall semester.¹⁵⁶

¹⁵⁶ See Hong Interview; 5/21/13 Maynard Young Interview. See also County of Hawai'i Certificate of Occupancy. Exhibit 55.

Chapter 5

Site Planning Contract

On June 13, 2011, UH posted a “Notice to Professional Services Firms” soliciting statements of qualifications from firms interested in providing professional services during fiscal year beginning July 1, 2011.¹⁵⁷ OCI created a list of qualified professional from the submittals received.¹⁵⁸ An evaluation committee of OCI employees, Loren Lau, Bruce Teramoto, and Maynard Young reviewed the documents from Segawa’s firm (WRSA), Engineering Partners, Inc., and Imata & Associates, Inc., made independent rankings and determined that Segawa was the most qualified firm.¹⁵⁹ No interviews were held.¹⁶⁰

On July 7, 2011, Segawa submitted a fee proposal for \$662,951.00 in July.¹⁶¹ A cost reasonableness analysis determined that Segawa’s proposed fee was reasonable because it was within the in-house estimate based on the prevailing rates used in the profession and in accordance with wage rates permitted by DAGS.¹⁶²

The contract between Segawa and UH was executed on August 3, 2011, for \$662,951.¹⁶³ The contract states Segawa was to provide civil engineering design services necessary to plan, design, and observe the construction of the 33 acre University Village Parcel adjacent to UHH’s main campus along Kawili Street.¹⁶⁴ As part of its contract, Segawa’s services included “providing the topographic survey; providing geotechnical survey; performing environmental investigations; providing site development

¹⁵⁷ Notice to Professional Services Firms, SSFM p. 11-12. Exhibit 56.

¹⁵⁸ Notice to Professional Services Firms, SSFM p. 11. Exhibit 56. 7/22/13 Duff Zwald Interview; see also 8/21/13 Segawa Interview.

¹⁵⁹ Evaluation Summary Abstract, OCI p. 4922. Exhibit 57. 3/1/11 Memorandum from Maynard Young to Ryan Kurashige, Manager of Administration and Support Services in the OCI; OCI p. 4921. Exhibit 58. 5/16/12 Loren Lau Interview.

¹⁶⁰ 5/16/12 Bruce Teramoto Interview; 5/16/12 Loren Lau Interview.

¹⁶¹ Fee Proposal – Civil Engineers by Segawa, OCI p. 4909-4916. Exhibit 59.

¹⁶² Segawa Cost Reasonableness, OCI pp. 4917-4920. Exhibit 60.

¹⁶³ Segawa Contract, OCI p. 7046. Exhibit 61. 8/21/13 Segawa Interview.

¹⁶⁴ Segawa Contract 1.1-1.2, OCI p. 7050. Exhibit 61.

plans to include subdividing the 33 acres, grading, roadways, utilities distribution, drainage, a walkway system, parking areas, service drives, and pedestrian overpasses.”¹⁶⁵ The contract also required Segawa to provide estimates of probable costs of construction during each design phase, prepare and route all necessary construction permits, and provide site observations and construction administration, along with any other services required to implement the project.¹⁶⁶

Along with the executed contract, an NTP was issued to Segawa on August 3, 2011, authorizing Segawa to proceed with work effective August 8, 2011.¹⁶⁷

NOTES AND COMMENTS ON CIVIL ENGINEERING CONTRACT

The evidence indicates the contract with Segawa for a site development plan was procured in compliance with UH’s IPP. Maynard Young led the selection process.¹⁶⁸ No evidence was found to dispute Minaai’s statement that he never spoke to Segawa before Segawa’s firm was selected and did not coerce the selection committee into choosing Segawa.¹⁶⁹ OCI’s Loren Lau supports Minaai’s statement, stating there may have been discussions about the candidates, but the scoring of the candidates was done independently and free from influence.¹⁷⁰

Although questioned by Mitsunaga, Minaai’s decision to split the site plan from the rest of the design plan was reasonable. Lau’s colleague at OCI, Teramoto, explained that while site planning is a normal part of the overall design plan and that site planning may be difficult without knowing the design of the structure(s) for the site, in this case the Project was only a portion of the entire 33 acre parcel, and so site planning for the entire 33 acre parcel would not have been solely dependent on the design of the Project.¹⁷¹ Teramoto agreed with Minaai’s idea to split the site plan from the rest of the design plan, as

¹⁶⁵ Segawa Contract 1.1, OCI p. 7050. Exhibit 61.

¹⁶⁶ Segawa Contract 1.1, OCI p. 7050. Exhibit 61.

¹⁶⁷ 8/3/11 Segawa NTP letter, OCI 7044. Exhibit 62.

¹⁶⁸ 9/24/13 Brian Minaai Interview.

¹⁶⁹ 9/24/13 Brian Minaai Interview.

¹⁷⁰ 5/16/12 Loren Lau Interview.

¹⁷¹ 5/16/12 Bruce Teramoto Interview.

the schedule was compressed and a large amount of work needed to be completed within that timeframe.¹⁷²

¹⁷² 5/16/12 Bruce Teramoto Interview.

Chapter 6

Design Contract

The IPP governing the procurement of professional services stated, “the acquisition of design professional services in the disciplines of engineering, architecture, land surveying, and/or landscape architecture and furnished by licensees . . . shall be procured in accordance with the procedures set forth in Section 103D-304, HRS, and in this section, except in the case of an emergency procurement.”¹⁷³ Accordingly, the IPP for the procurement of professional services was patterned after HRS § 103D-304.¹⁷⁴

HRS § 103D-304 governs the procurement of professional services.¹⁷⁵ State law requires contracts for professional services to be awarded based on demonstrated competence and qualifications.¹⁷⁶ Agencies requiring professional services are required to publish notices at a minimum, at the beginning of each fiscal year, inviting submissions of statements of qualifications and expressions of interest by professionals.¹⁷⁷ A review committee consisting of qualified persons reviews the submissions and prepares a list of qualified persons/firms for the services (“Prequalified List”).¹⁷⁸ Then whenever a particular professional service is needed, a separate selection committee is designated to evaluate, based on certain selection criteria, the statements of qualifications and performance data, and to conduct any confidential discussions with the persons/firms on the prepared list.¹⁷⁹ The selection committee ranks a minimum of three persons/firms and a fair and reasonable contract is negotiated with the first ranked person/firm.¹⁸⁰

¹⁷³ IPP A8.245 ¶ 1.b). Exhibit 63.

¹⁷⁴ See IPP A8.245 ¶ 2-7. Exhibit 63.

¹⁷⁵ HRS § 103D-304. Exhibit 64.

¹⁷⁶ HRS § 103D-304(a). Exhibit 64.

¹⁷⁷ HRS § 103D-304(b). Exhibit 64.

¹⁷⁸ HRS § 103D-304(c). Exhibit 64.

¹⁷⁹ HRS § 103D-304(d)-(f). Exhibit 64.

¹⁸⁰ HRS § 103D-304(h). Exhibit 64.

On June 13, 2011, OCI posted a Notice to Professional Services Firms soliciting statements of qualifications from firms interested in providing services for the fiscal year beginning July 1, 2011.¹⁸¹ OCI created a list of qualified professionals from the submissions.¹⁸² An early email by OCI's Lau contained a list of five architect firms taken from OCI's qualified professionals list.¹⁸³ MAI was not among the five firms listed.¹⁸⁴ Although there is no clear record, at some point in time for some reason, MAI was placed on the list.¹⁸⁵ OCI's Maynard Young claims Minaai asked that MAI be included on the list.¹⁸⁶

OCI then sent a letter to the now six firms on the qualified professionals list, MAI, Shimokawa Nakamura, Inc., Richard Matsunaga & Associates, CDS International, Design Partners, Inc., and Ushijima Architects, asking if each firm was interested in the Project, and, if so, to submit a letter of interest with a description of the firm's expertise and qualifications.¹⁸⁷ All six firms responded with letters of interest.¹⁸⁸ OCI then scheduled interviews with the six firms for August 9, 2011.¹⁸⁹ MAI's presentation was led by Ron van der Veen of MAI's sub-consultant, the DLR Group.¹⁹⁰

¹⁸¹ Notice to Professional Firms, SSFM p. 11-12. Exhibit 56.

¹⁸² Notice to Professional Firms, SSFM p. 11. Exhibit 56. 7/22/13 Duff Zwald Interview.

¹⁸³ 5/16/12 Loren Lau Interview; 4/29/11 Email from Loren Lau to Maynard Young and Bruce Teramoto. Exhibit 65.

¹⁸⁴ 5/16/13 Bruce Teramoto Interview; 5/16/12 Loren Lau Interview.

¹⁸⁵ 5/16/13 Bruce Teramoto Interview.

¹⁸⁶ 11/5/13 Maynard Young Interview.

¹⁸⁷ 6/23/11 Letters of Interest from UH-OCI. Exhibit 66.

¹⁸⁸ Reply Letters of Interest. Exhibit 67.

¹⁸⁹ 8/1/11 Letters from UH-OCI informing firms of interviews. Exhibit 68.

¹⁹⁰ MIA Presentation Cover Page. Exhibit 69. MAI sought to partner with the DLR Group because the DLR Group was experienced in designing student housing projects, although it had not done any in Hawai'i. 8/29/13 Michael Swanson, DLR Group, Interview.

A selection committee of Lo-Li Chih, UHH Director of Facilities Planning and Construction, and OCI's Teramoto and Maynard Young evaluated the six firms.¹⁹¹ Although not members of the committee, also present during the interviews were UHH administrators Luoluo Hong, Marsha Sakai, Gerald DeMello, Harry Yada, and Miles Nagata, as well as Minaai.¹⁹² Everyone present in the room discussed the strengths and weaknesses of the candidates, but the selection was based on the independent scoring by the members of the selection committee.¹⁹³ The committee ranked MAI as the top ranked firm, in large part due to its sub-consultant the DLR Group, which has strong record of successful student housing construction.¹⁹⁴

On August 15, 2011, MAI's Chad McDonald emailed Gary Nakatsuka and Steve Wong of MAI and well as Aaron Fujii, Executive Vice President/Chief Operating Officer of MAI, about the Project and stated he told Minaai that Gary Nakatsuka would be the Project Manager and Point of Contact, while Steve Wong would be the Principal Architect.¹⁹⁵ McDonald stated Minaai requested MAI use Wilson Okamoto, instead of Kimura International, for the environmental analysis, Palekana for permit routing, and Segawa for civil engineering.¹⁹⁶ McDonald also stated Minaai said he did not have an issue with MAI doing the civil work, but knew Segawa had knowledge of the infrastructure.¹⁹⁷ McDonald stated he had spoken with Mitsunaga about Minaai's requests and Mitsunaga agreed.¹⁹⁸ McDonald

¹⁹¹ Evaluation Summary Abstract, OCI pp. 6318-6320. Exhibit 70. Individual Evaluation Forms, OCI pp. 6321-6356. Exhibit 70. 9/12/12 Memorandum from Zwald to Todo with Firms Listed in Ranking Order, OCI p. 6296. Exhibit 71. Interview Schedule; Lo-Li Chih Interview; 9/10/13 Minaai Interview; 11/5/13 Maynard Young Interview.

¹⁹² 8/28/13 Lo-Li Chih Interview; 5/16/12 Bruce Teramoto Interview; 5/22/13 Miles Nagata Interview.; 11/5/13 Maynard Young Interview.

¹⁹³ 5/17/13 Maynard Young Interview; 8/28/13 Lo-Li Chih Interview; 5/16/12 Bruce Teramoto Interview.

¹⁹⁴ 8/16/11 Memorandum from Maynard Young to Kurashige, OCI p. 6317. Exhibit 72. Luoluo Hong Interview; 5/16/12 Bruce Teramoto Interview; 5/22/13 Miles Nagata Interview; 9/10/13 Minaai Interview.

¹⁹⁵ 8/15/11 Email from Chad McDonald to Gary Mitsunaga, Steve Wong, and Aaron Fujii. Exhibit 73.

¹⁹⁶ 8/15/11 Email from Chad McDonald to Gary Mitsunaga, Steve Wong, and Aaron Fujii. Exhibit 73.

¹⁹⁷ 8/15/11 Email from Chad McDonald to Gary Mitsunaga, Steve Wong, and Aaron Fujii. Exhibit 73.

¹⁹⁸ 8/15/11 Email from Chad McDonald to Gary Mitsunaga, Steve Wong, and Aaron Fujii. Exhibit 73.

concluded that “[w]ith the changes to the project team, UH would select MAI. Selection letter should be forthcoming.”¹⁹⁹

Thereafter, although no contract had been executed, MAI began performing the necessary design work for the Project. It was the intention for the DLR Group to take the planning and conceptual design lead during the initial phases and for MAI to take over the preparation of detailed plans and specifications for the Project.²⁰⁰ Although Minaai sought and received approval from the BOR for MAI’s design contract on September 29, 2011, MAI did not submit its fee proposals until March 8, 2012, and the fee proposals were not stamped as received by UH until July 25, 2012.²⁰¹ MAI’s first fee proposal was for \$175,154 and included architectural fees for pre-design services by MAI and the DLR Group.²⁰² Around April 2012, a disagreement arose between MAI and the DLR group. MAI claimed the DLR Group’s fee was too high, while the DLR Group stated that the lack of design contract and forthcoming payment created problems.²⁰³ Eventually, the DLR Group withdrew from the project and was replaced with Sasaki.²⁰⁴

MAI’s second fee proposal was for \$1,089,084 for architectural, structural, mechanical, and electrical work, plus consultant fees in the amount of \$710,025 for interiors, civil, fire protection,

¹⁹⁹ 8/15/11 Email from Chad McDonald to Gary Mitsunaga, Steve Wong, and Aaron Fujii. Exhibit 73.

²⁰⁰ 8/29/13 Michael Swanson Interview.

²⁰¹ 9/15/11 Memorandum from Minaai to BOR, OCI pp. 7269-7281. Exhibit 74. 9/29/11 BOR Meeting Minutes, OCI p. 7282. Attached to Exhibit 74. UH Professional Services Contracts approved by BOR, OCI p. 6315. Exhibit 75. MAI Contract, Fee Proposal-Summary 1 and 2, NEED OCI 6405-6427. Exhibit 76.

²⁰² MAI Contract, Fee Proposal 1, OCI p. 6428-6434. Exhibit 77.

²⁰³ See Luoluo Hong Interview, p. 35; 2/29/12 Email from Ron van der Veen of DLR Group to Luoluo Hong, of UHH stating DLR was asked not to participate in a meeting, UHH p. 95. Exhibit 78. 3/21/12 Email from Luoluo Hong to Minaai, pp. 108-109. Exhibit 79. 4/11/12 and 4/17/12 Email exchange between Ron van der Veen to Luoluo Hong, p. UHH 3-4. Exhibit 80. 11/5/13 Maynard Young Interview. 8/29/13 Michael Swanson Interview,

²⁰⁴ See Luoluo Hong Interview. 2/29/12 Email from Ron van der Veen of DLR Group to Luoluo Hong, of UHH stating DLR was asked not to participate in a meeting, UHH p. 95. Exhibit 78. 3/21/12 Email from Luoluo Hong to Minaai, pp. 108-109. Exhibit 79. 4/11/12 and 4/17/12 Email exchange between Ron van der Veen to Luoluo Hong, p. UHH 3-4. Exhibit 80. 9/10/13 Minaai Interview. 11/5/13 Maynard Young Interview. OCI had no preference for the DLR Group and was not concerned about the completion of the Project when the DLR Group left. 8/29/13 Michael Swanson Interview, pp. 59-60.

landscape, permitting, and green building/energy analysts.²⁰⁵ The total fee proposed was \$1,823,003 for MAI and its subcontractor's work, plus expenses.²⁰⁶ MAI's first fee proposed of \$175,154 and second fee proposal of \$1,823,003, totaling \$1,998,157, was determined to be a reasonable fee by OPRPM.²⁰⁷

Subsequently, evidence of discrepancies in MAI's fee proposals caused its contract to be further delayed.²⁰⁸ In July 2012, Minaai received a call complaining about the lack of a design contract with MAI.²⁰⁹ Despite the protracted delay in coming to an agreement and the alleged discrepancies, there was no evidence to indicate OCI considered terminating negotiations with MAI and begin negotiations with the second ranked design firm.

Emails from OPRPM's Glen Shiraki to OCI's Maynard Young dated August 14 and 15, 2012, point out: the total of MAI's proposals did not match the Encumbrance Document and Agreement Amount; travel expenses were listed twice on both fee summaries; the calculated tax rate was not the same as the tax rate listed on the proposals; and the description of work and man hours did not correspond with the personnel costs.²¹⁰ After its preliminary submittal, MAI was made aware by OPRPM's Shiraki that Segawa's sub-contractor fee proposal was for \$288,150 but was listed as \$228,150 on MAI's summary fee, and MAI failed to correct the discrepancy before submitting its final proposal.²¹¹

²⁰⁵ MAI Contract, Fee Proposal 2, OCI pp. 6405-6427. Exhibit 76.

²⁰⁶ MAI Contract, Fee Proposal 2, OCI p. 6405. Exhibit 76.

²⁰⁷ MAI Contract, Cost Reasonableness. Exhibit 81.

²⁰⁸ 9/9/13 Minaai Interview. 9/10/13 Minaai Interview. 11/5/13 Maynard Young Interview.

²⁰⁹ 5/17/13 Maynard Young Interview. 9/9/13 Minaai Interview.

²¹⁰ 8/14/12 and 8/15/12 Emails from Glen Shiraki to Maynard Young concerning MAI's Fee Proposals and Contract., OCI pp. 6394-6395. Exhibit 82.

²¹¹ 8/14/12 Email from Glen Shiraki to Maynard Young, OCI p. 6395. Exhibit 82.

In August, 2012, OCI received two new fee proposals from MAI. The fee for planning and programming was \$174,553 and the fee for construction documents was \$1,821,405 for a total of \$1,995,958, which being less than the previously submitted fee total was again deemed reasonable.²¹²

MAI's Design Services Contract for this Project was a standard form contract used by OCI and OPRPM. On August 27, 2012, MAI's Fujii returned to OPRPM two copies of the executed contract, and on August 30, 2012, the requisite insurance certificates.²¹³ The contract was executed by Todo on September 19, 2012.²¹⁴ The contract was for \$1,995,958, and required MAI to "provide professional services necessary to plan, design, and observe the construction of the project, including field observations and cost estimates."²¹⁵ The contract also included a time line for the completion of MAI's services, and was to begin the day after the issuance of the NTP.²¹⁶ The NTP was issued September 19, 2012, and MAI was authorized to proceed with work effective September 21, 2012.²¹⁷

NOTES AND COMMENTS ON THE DESIGN CONTRACT

1. There is no evidence the procurement for design services for the Project was done in violation of UH's IPP. Although UH had a temporary exemption from the state's procurement policy, Act 82 specified that any procurement policies and procedures developed by UH were still subject to a number of specifically enumerated procurement laws.²¹⁸ One of the enumerated statutes was § 103D-304, which governed the procurement of design professional services furnished by HRS chapter 464 licensees, such as architects and designers.²¹⁹ As a result, when UH developed its IPP, it appropriately

²¹² MAI Fee Proposal for Planning and Programming Received 8/20/12, OCI pp. 6386-6393. Exhibit 83. MAI Fee Proposal for Construction Documents received by 8/22/12, OCI pp. 6362-6385. Exhibit 83. Memorandum for Cost Reasonableness, OCI pp. 6357-6361. Exhibit 84.

²¹³ 8/27/12 Letter from Shiraki to Fujii, OCI p. 6314. Exhibit 85. 8/30/12 Letter from Aaron S. Fujii, MAI, to Glen Shiraki, OPRPM, OCI pp. 6297-6300. Exhibit 86.

²¹⁴ MAI Contract, OCI p. 7115-7143. Exhibit 87.

²¹⁵ MAI Contract, Agreement for Services, Scope of Services 1.2, OCI pp. 7115-7119. Exhibit 87.

²¹⁶ MAI Contract, Time Schedule, OCI p. 7122. Exhibit 87.

²¹⁷ 9/19/12 MAI NTP letter, OCI, p. 7112. Exhibit 88.

²¹⁸ Act 82 Section 3. Exhibit 32.

²¹⁹ Act 82 Section 3. Exhibit 32. HRS § 103D-304. Exhibit 64.

patterned its procurement for professional services after 103D-304.²²⁰ Additionally, the Memorandum associated with MAI's cost reasonableness analysis stated that it was for "Professional Services Procured Consistent with Chapter 103D-304 H.R.S."²²¹

An initial email contained a list of five recommended architect consultants.²²² MAI was not on the initial list.²²³ Although there is no clear explanation, at some point and for some reason, MAI was placed on the list and was interviewed.²²⁴ Other than the change in the list of approved firms, the design professional procurement was completed in compliance with HRS 103D-304 and UH's IPP.

2. The Project's timeline was not affected despite evidence of delays involving the negotiations and execution of the contract. The contract was not executed until over a year after MAI was selected as the top ranked firm for the Project. It took approximately six months for MAI to submit a detailed fee proposal for UH's consideration. Questions about MAI's revised fee proposal, and the MAI's negotiator being out of town with no one else with delegated authority to negotiate on behalf of MAI, resulted in additional delay in the execution of the contract.²²⁵ OCI's Maynard Young states that there was no pressure from Mitsunaga to finalize the contract.²²⁶ Regardless of the lack of contract, upon being selected, MAI immediately began performing design work and continued working on the project to the apparent satisfaction of OCI.

The delay in execution also could have affected the timely completion of the Project because of the contract's boilerplate time schedule which set deadlines beginning from the issuance of the NTP (which is only issued after contract execution). Had MAI followed that time schedule, the Project would not have been completed by the August 2013 deadline.

²²⁰ See IPP A8.200. Exhibit 33. IPP A8.245. Exhibit 63.

²²¹ Memorandum for Cost Reasonableness, OCI pp. 6357-6361. Exhibit 84.

²²² 5/16/12 Loren Lau Interview.

²²³ 5/16/13 Bruce Teramoto Interview. 5/16/12 Loren Lau Interview.

²²⁴ 5/16/13 Bruce Teramoto Interview.

²²⁵ 5/17/13 Maynard Young Interview.

²²⁶ 11/5/13 Maynard Young Interview.

According to OPRPM's Zwald, it is not unusual for a contract to take some time to execute; depending on how quickly OPRPM receives the necessary information, the contract could take anywhere from two weeks to a year to execute.²²⁷ Although a delay of 13 months in the execution of MAI's design contract was unusually long, the delay was in part, caused by MAI's own actions in the delay in submitting its fee proposal and correcting fee discrepancies.²²⁸

3. Mitsunaga alleges Minaai inappropriately directed MAI to retain Segawa as MAI's subcontractor for civil work. MAI claims it had intended to do the civil work in-house and that if forced to use Segawa, MAI would be required to add a 10% coordination markup to the Segawa subcontractor price, and in turn pass the additional cost on to the State.

There is evidence that Minaai stated he had no problem with MAI doing the civil work, but that Segawa had knowledge of the infrastructure.²²⁹ Minaai believed that because Segawa had already been contracted to perform the civil engineering work for the entire 33 acre University Village parcel, Segawa was knowledgeable of the site's drainage, access, utilities hookups, etc.²³⁰ Minaai noted Segawa was already in Hilo, while MAI would have had to fly people over to Hilo.²³¹ Minaai reasonably concluded it would be more advantageous in terms of cost and time, for MAI to use Segawa for the Project.²³² There is evidence Mitsunaga agreed with Minaai's suggestion to use Segawa.²³³ As was realized, using Segawa for the civil work on the Project precluded a duplication of tasks.²³⁴

²²⁷ 7/22/13 Duff Zwald Interview; see also 11/5/13 Maynard Young Interview.

²²⁸ See 9/9/13 Brian Minaai Interview.

²²⁹ 8/15/11 Email from Chad McDonald to Gary Mitsunaga, Steve Wong, and Aaron Fujii. Exhibit 73.

²³⁰ See 9/9/13 Minaai Interview; 9/10/13; and 9/24/14; 5/20/13 Maynard Young Interview. 11/5/13 Maynard Young Interview.

²³¹ 9/9/13 Minaai Interview; 9/24/13 Minaai Interview.

²³² See 9/9/13 Minaai Interview; 9/10/13; and 9/24/14; 5/20/13 Maynard Young Interview; 11/5/13 Maynard Young Interview.

²³³ 11/5/13 Maynard Young Interview.

²³⁴ 8/21/13 Segawa Interview; see 9/9/13 Brian Minaai Interview stating Segawa was not paid twice for work on site grading and then again under MAI's contract; 11/5/13 Maynard Young Interview.

OCI's Maynard Young confirmed that Minaai suggested and did not direct that Segawa be used (see above), and if MAI chose not to subcontract with Segawa, MAI would have still been awarded the design contract.²³⁵ Minaai admits knowing WRSA principal Wesley Segawa from childhood, but states it was Maynard Young's idea to use Segawa, and denies making any request that MAI use Segawa.²³⁶ Minaai also denies the email discussion with McDonald in which Minaai states he has no problem with MAI performing the civil work but that Segawa was knowledgeable of the Project site.²³⁷ Minaai states that the final decision to use Segawa for the civil design would have been MAI's.²³⁸ Aaron Fujii of MAI did eventually approached Segawa to join the MAI design team.²³⁹

Despite the inconsistency regarding Minaai's knowledge of the McDonald email, there appears to be an engineering/business related basis for using Segawa's firm as the civil engineer. Therefore, Minaai's request that MAI use Segawa as the civil engineer does not amount to any criminal wrongdoing or unethical behavior.

4. There is insufficient evidence to support Mitsunaga's allegation that Minaai directed MAI to replace its Environmental Assessment consultant, Kimura International, with Wilson Okamoto Corporation, and that MAI's contract was contingent on the use of Wilson Okamoto. Instead, there is McDonald's August 15, 2011 email in which he states Minaai suggested to MAI that Wilson Okamoto be used for the EA instead of Kimura International.

Wilson Okamoto is a consulting, planning and engineering company, in business since 1947, providing environmental impact statements, environmental impact assessments, and regulatory and permitting work affiliated with the statements and assessments.²⁴⁰ Wilson Okamoto was contacted by

²³⁵ 5/17/13 Maynard Young Interview; 5/21/13 Maynard Young Interview; 9/9/13 Minaai Interview; 11/5/13 Maynard Young Interview.

²³⁶ 9/9/13 Minaai Interview; 9/10/13 Minaai Interview.

²³⁷ 9/10/13 Minaai Interview.

²³⁸ 9/9/13 Minaai Interview.

²³⁹ 8/21/13 Segawa Interview.

²⁴⁰ 8/20/13 Gary T. Okamoto Interview.

MAI for a fee proposal, but no contract was executed and Wilson Okamoto did not complete any work on the Project nor did it receive any compensation.²⁴¹ However, Wilson Okamoto did inform OCI that the Project did not require an environmental impact assessment or environmental impact statement because a previous environmental impact statement previously was done for the UHH master plan.²⁴² This resulted in a significant savings for the Project.²⁴³

There appears to be no favoritism of environmental engineering firm Wilson Okamoto by Minaai. Gary Okamoto, the principal of Wilson Okamoto, states he knows Minaai as a client from other projects on which they have worked together, but Wilson Okamoto has not received an increase in UH contracts as a result of Minaai's position at OCI, and has received only two or three UH contracts as the prime consultant since 2010.²⁴⁴ However, Wilson Okamoto has been contacted by MAI for prior projects, and so it appears natural for MAI to have contacted Wilson Okamoto for a fee proposal.²⁴⁵

Minaai's suggestion for MAI to use Wilson Okamoto was not an indication of favoritism towards Minaai's friends. Based on the fact that Wilson Okamoto has been in business a significant length of time and has successfully completed prior UH projects, it was not unreasonable for Minaai to suggest MAI use Wilson Okamoto.

5. Mitsunaga alleges Minaai directed MAI to use Palekana, a building permit specialty subcontractor, to perform permit/process routing for an approximate fee of \$23,000.²⁴⁶ Mitsunaga contends such permitting activities are usually included as part of the design contract. DLR's Michael Swanson believed MAI already had connections to facilitate the permitting, and there was no need to

²⁴¹ 8/20/13 Gary T. Okamoto Interview.

²⁴² 8/20/13 Gary T. Okamoto Interview; see also 9/15/11 Meeting No. 1 where MAI was told by Minaai and Maynard Young that the environmental impact statement was still in good standing but that an environmental analyst would need to take care of any archaeological studies. Exhibit 110. 11/5/13 Maynard Young Interview.

²⁴³ 8/20/13 Gary T. Okamoto Interview.

²⁴⁴ 8/20/13 Gary T. Okamoto Interview.

²⁴⁵ 8/20/13 Gary T. Okamoto Interview.

²⁴⁶ See MAI fee proposal for Palekana Permits. Exhibit 89. 8/7/13 Email from Dennis Enomoto to Ryan Yamasaki. Exhibit 90.

bring in a third-party router.²⁴⁷ Other MAI employees also stated MAI could have done the permit routing itself as there was no indication Palekana had reviewed any of the drawings.²⁴⁸ Instead, it appeared to MAI employees that Palekana merely took MAI's drawings and dropped them off.²⁴⁹

Minaai and Maynard Young had discussed the possible need for a permit processor to speed up the Project; and although Minaai admitted to being a friend of the owner of Palekana, there is conflicting evidence he demanded MAI use Palekana.²⁵⁰ Minaai did write to MAI's Fujii stating MAI was not required to use Palekana, but because of the Project's accelerated schedule, OCI was requesting MAI have someone experienced in incremental permitting, and county processes and personnel.²⁵¹ Further, Palekana was contacted directly by Gary Nakatsuka of MAI and had no contact with Minaai concerning the Project until after an arrangement with MAI had been reached.²⁵² Palekana denies it was offered any consideration or benefits from Minaai or Maynard for work.²⁵³

Palekana employs a phasing approach to obtain permits by which it is allegedly able to obtain a foundation permit in approximately two months instead of the usual six months.²⁵⁴ In fact, Palekana's involvement with the Project helped to educate Hawai'i County officials on the expedited process.²⁵⁵ Palekana principal Dennis Enomoto also asserts that Palekana assisted in processing the Foundation, Superstructure (vertical shell) and Building Permits (interiors and finishes).²⁵⁶ Robert Yamada, SSFM, also believed Palekana successfully completed its review of the permits and helped the plans go through

²⁴⁷ 8/29/13 Michael Swanson Interview.

²⁴⁸ Kaiemi Shimabuku and Gary Nakatsuka June 25, 2013 Interview

²⁴⁹ Kaiemi Shimabuku and Gary Nakatsuka June 25, 2013 Interview

²⁵⁰ 8/15/11 Email from Chad McDonald to Gary Mitsunaga, Steve Wong, and Aaron Fujii. Exhibit 73. 9/10/13 Minaai Interview; Maynard Interview 5/20/13; Teramoto Interview 5/16/12.

²⁵¹ 2/23/12 Email from Minaai to Aaron Fujii sent to Gary Nakatsuka on 8/27/13. Exhibit 91.

²⁵² 8/7/13 Dennis Enomoto, Palekana, Interview.

²⁵³ 8/7/13 Dennis Enomoto, Palekana, Interview.

²⁵⁴ 8/7/13 Dennis Enomoto Interview

²⁵⁵ 8/7/13 Dennis Enomoto Interview.

²⁵⁶ 8/7/13 Email from Dennis Enomoto to Ryan Yamasaki. Exhibit 90.

the necessary agencies before reporting back to MAI.²⁵⁷ Yamada also believed Palekana sped up the process by successfully completing its review of the permits and directing the plans to the necessary agencies.²⁵⁸ While there was at least one significant delay in obtaining a necessary permit, there is insufficient evidence as to the cause of the delay.²⁵⁹

There is insufficient evidence to support Mitsunaga's allegation that MAI was directed to use Palekana. Because the Project was on a compressed schedule, any request for and eventual use of a permit process router such as Palekana to expedite the project time line, was reasonable.²⁶⁰ The AG makes no claim as to whether Palekana actually reviewed MAI's drawings or that Palekana's services were essential to the completion of the Project. However, the issue of whether Palekana performed its required review of the drawings does not support Mitsunaga's allegation that Minaai's suggested use of Palekana was unethical or criminal. The required permits were obtained and the Project was built on schedule. Finally, MAI's Fujii denied that a 10% coordination on Palekana's \$23,000 fee was charged by MAI.

²⁵⁷ 5/22/13 Robert Yamada, SSFM, Interview.

²⁵⁸ 5/22/13 Robert Yamada, SSFM, Interview.

²⁵⁹ 5/22/13 Robert Yamada, SSFM, Interview.

²⁶⁰ See 5/20/13 Maynard Young Interview.

Chapter 7

Pre-construction and Construction Contract

On November 22, 2011, UH posted on its website a Request for Statements of Qualifications No. 12-006 for Preconstruction and Construction Services for University Village Student Housing Project, Phase 1, UHH (“Request”).²⁶¹ The Request included a statement the Project was to be completed as a Design Assist project under IPP A8.280.3. and descriptions of the Project, statement of qualifications, evaluation and selection process, and selection criteria.²⁶²

Six contractors, A.C. Kobayashi (“ACK”), DCK Pacific, Hawaiian Dredging, Jacobsen Construction, Kiewit Building Construction, and Nan Construction, submitted statements of qualifications which were evaluated by OCI.²⁶³ ACK submitted its statement on December 13, 2011, and highlighted its qualifications:

1. 75% of ACK’s jobs had been completed using the “design-assist” format;
2. Over the past 15 years, ACK completed five design assist projects totaling over \$175 million with selected designer MAI, and had completed five projects for UH, totaling over \$80 million;
3. ACK is the largest 100% locally owned general contracting firm in Hawaii;
4. ACK is highly familiar with agency and permitting requirements on all islands and can assist the design team in procuring the required permits;
5. ACK’s organizational structure is uniquely tailored to promote communication with UH officials and encourage collaboration through the design assist process by using a design assist team responsible for preconstruction services and a project management team responsible for construction services;
6. ACK has design assist and construction experience with Leadership in Energy and Environmental Design (LEED) projects;
7. All of ACK projects constructed for UH over the past 20 years have been completed on time;

²⁶¹ Request for Statements of Qualifications, OCI p. 6958. Exhibit 92.

²⁶² The Request, OCI p. 6958-6967. Exhibit 92. Pre-Con Agreement, OCI p. 6939. Exhibit 93.

²⁶³ Contractor’s Statement of Qualifications Evaluation Ranking, OCI p. 6733. Exhibit 94.

8. ACK is currently building the UH Cancer Center and UH West Oahu Campus, both of which used the design assist process and both scheduled to be completed on time; and
9. ACK uses the Critical Path Method (CPM) of network scheduling and the Primavera Software Programs which create and monitor the schedules of all of ACK's projects, including both preconstruction and construction activities.²⁶⁴

An evaluation committee of UHH's Harry Yada and OCI's Loren Lau and Maynard Young evaluated the statements of qualifications and conducted interviews.²⁶⁵ ACK was evaluated as the top ranked firm and selected.²⁶⁶ A notice of award was posted on March 13, 2012, stating the contract for preconstruction services was \$2,095 per month for a total of \$71,131.²⁶⁷ However, a memorandum from Maynard Young to OCI Fiscal Officer Oshiro, stated the monthly cost for pre-construction services as \$25,131.²⁶⁸ Further discrepancies were apparent in an attached cost reasonableness analysis stating ACK's \$20,000 monthly fee for pre-construction services was reasonable because it was within the in-house pre-construction estimate of \$23,768.40 per month.²⁶⁹

By a February 8, 2012 memorandum to the BOR, OCI requested the release of the \$28,200,000 funding for construction of the Project.²⁷⁰ UH and ACK signed the Pre-Construction Agreement on May 25, 2012.²⁷¹ For the contract price of \$75,131, ACK was to provide pre-construction services including, but not limited to, cost estimating, value engineering, construction scheduling, possible

²⁶⁴ ACK's Statements of Qualifications, OCI pp. 6980-7020, 7035. Exhibit 95.

²⁶⁵ Contractor's Statements of Qualifications, Evaluation Summary Abstract, OCI p. 6734. Exhibit 94. 5/16/12 Loren Lau Interview states that he, Harry Yada, and Maynard Young were on the selection committee; Pre-Con Agreement, OCI p. 6939. Exhibit 93.

²⁶⁶ Contractor's Statement of Qualifications Evaluation Ranking, OCI p. 6733-6755. Exhibit 94. Pre-Con Agreement, OCI p. 6939. Exhibit 93. 3/13/12 UH Notice of Award, OCI p. 6730. Exhibit 96.

²⁶⁷ 3/13/12 UH Notice of Award, OCI p. 6730. Exhibit 96. While the Notice of Award states it is for the Preconstruction and Construction Services for the Project, it is clear from ACK's Statements of Qualifications and the actual contracts that the amount is for preconstruction services only.

²⁶⁸ OPRPRM Form 95, Memorandum signed 6/4/12, OCI pp. 6726-6727. Exhibit 97.

²⁶⁹ Cost Reasonableness, p. 6728. Exhibit 97.

²⁷⁰ 2/8/12 Memorandum from Minaai to Martinson, Chair BOR and attachments, OCI pp. 7291-7299. Exhibit 98. Although the 2/23/12 BOR meetings defer the approval of the funds for the construction contract until later in the day when the BOR would also be considering UHH student housing rates, it is assumed the contract was approved. See also 5/17/13 Maynard Interview. Although Maynard later states that the \$28,000,000 was for the entire Project, it is clear from other cost breakdowns that the budget for the \$28,000,000 was only for construction costs and the entire Project budget was approximately \$32,000,000.

²⁷¹ Pre-Con Agreement, OCI p. 6939-7042. Exhibit 93.

construction alternatives, construction process options and feasibility, and coordination of operational issues.²⁷² UH also wanted ACK to be proactive and work with the architect and engineers during the construction phases to develop the best quality, cost, and schedule.²⁷³

UH had sought to issue separate pre-construction and construction services contracts with the understanding that if UH was satisfied with ACK's pre-construction performance, then it would award ACK the construction contract, provided the parties could agree on a construction price.²⁷⁴ ²⁷⁵ UH reserved the right to divide the construction portion of the Project into one or more phases and award construction contracts on a phase by phase basis.²⁷⁶

Nonetheless, UH awarded ACK the Construction Contract also dated May 25, 2012.²⁷⁷ The Construction Contract was to begin on the date of the NTP and stated that substantial completion was to be completed by August 12, 2013.²⁷⁸ The Construction Contract was for \$28,105,828, with a 4% overhead and profit to ACK (approximately \$1,120,000), and consisted of the following: (1) AIA Document A101-2007 Standard Form Between Owner and Contractor, Performance and Payment Bonds, Exhibit B containing Special Provisions, and Exhibit B-1 100% SD Estimate; and (2) AIA Document A201-2007 General Conditions of the Contract for Construction and another Exhibit B

²⁷² Pre-Con Agreement, Agreement § 1 and 3, OCI pp. 6940-6941. Exhibit 93.

²⁷³ Pre-Con Agreement, Background Recitals § C, p. 6975. Exhibit 93.

²⁷⁴ Pre-Con Agreement, Background Recitals § F, Agreement § 17(b), OCI pp. 6940, 6950-6951; see also Exhibit C, OCI p. 6975. Exhibit 93.

²⁷⁵ Paragraph 17(b) of the pre-con contract, titled AWARD OF CONSTRUCTION CONTRACT, provides in pertinent part:

(b) Award of Contract for First Phase. If UH (i) is satisfied with contractor's performance of the services under this Agreement, (ii) decides following the completion of the pre-construction services to proceed with construction of at least the first phase of the Project, and (iii) reaches agreement with contractor upon a guaranteed maximum construction price for the Project, then and in such event, UH and Contractor shall enter into a construction contract of at least the first phase of the Project under the construction contract....

²⁷⁶ Pre-Con Agreement, Agreement § 17(a), OCI p. 6950-6951. Exhibit 93.

²⁷⁷ OCI's Maynard Young states ACK signed the contract on June 12, 2012. AIA Construction Contract, OCI pp. 6165-6281. Exhibit 99. 5/21/13 Maynard Young Interview.

²⁷⁸ AIA Construction Contract §§ 3.1, 3.3, OCI p. 6166. Exhibit 99.

containing Special Provisions.²⁷⁹ The Construction Contract affirmed the use of Design Assist by requiring ACK to review and assist the design team in resolving any errors or omissions prior to finalizing the price to minimize conflicts and create a cooperative working environment, so the Project would be completed on time and budget.²⁸⁰ The contract was supported by an April 2012 estimate from RLB which estimated the total cost of the project to be \$28,500,000.²⁸¹

The BOR approved the Construction Contract for the Project in June 2012.²⁸² VP/CFO Todo issued advance NTPs for pre-construction and construction services on June 15, 2012.²⁸³ The advance NTPs were issued to expedite the Project to meet the time schedule, while the contract documents were being processed by DAGS for certification of funds.²⁸⁴ A groundbreaking ceremony was held June 22, 2012, and clearing and grubbing work followed.²⁸⁵

OPRPM submitted the contract documents to DAGS on June 27, 2012, requesting encumbrance and certification in the amount of \$28,105,828.²⁸⁶ The State Comptroller certified the funds for the pre-construction services contract on June 28, 2012, and for the construction contract on June 29, 2012.²⁸⁷

The executed Pre-Construction Contract was transmitted to ACK on August 21, 2012,²⁸⁸ while the executed Construction Contract was transmitted to ACK on September 10, 2012. The NTP also

²⁷⁹ AIA Construction Contract and attachments, OCI pp. 6165-6281. Exhibit 99. Exhibit B Schedule of Cost and Fees for Contractor, OCI p. 6253. Exhibit 99. ACK's Pre-construction Services Solicitation, OCI p. 7022. Exhibit 95.

²⁸⁰ AIA Construction Contract, A101, Exhibit B, § 3.0, OCI p. 6181. Exhibit 99.

²⁸¹ 4/2012 RLB Estimated Total Cost. Exhibit 100.

²⁸² UH Construction Contracts Approved by BOR, OCI p. 6887. Exhibit 101. The document lists the contract approved as Construction, but it is not clear if this is the Pre-con Agreement or the Construction Contract. See also 6/6/12 Letter recommending construction contract award. Exhibit 102.

²⁸³ 6/15/12 Advance NTP Letters. Exhibit 103.

²⁸⁴ 6/15/12 Advance NTP Letters. Exhibit 103. 5/15/12 Letter from Zwald to Todo with attached advanced NTP for Todo's signature, OCI p. 6709. Exhibit 103.

²⁸⁵ 7/24/12 and 7/25/12 Emails from Yamada, SSFM, to Jack Rosenzweig, AG's Office. Exhibits 104 and 105.

²⁸⁶ Memorandum from OPRPM to State Comptroller, OCI p. 6812-6814. Exhibit 106.

²⁸⁷ 6/28/12 Contract Certification, OCI p. 6938; 6/29/12 Contract Certification, OCI p. 6164. Exhibit 107.

²⁸⁸ 8/21/12 NTP Letter. Exhibit 108.

issued on September 10 affirmed that work had been authorized to begin June 15, 2012, and stated the contract was required to be completed by August 11, 2013.²⁸⁹

NOTES AND COMMENTS ON THE PRECONSTRUCTION SERVICES CONTRACT

1. There is no evidence the award of the Pre-construction Contract was done in violation of the IPP or the result of any criminal or unethical action. There was substantial compliance with the IPP for Design Assist: UH gave notice of its intent to seek pre-construction services and a selection of OCI employees evaluated the interested firms' Statements of Qualifications. ACK's submission indicates it is a highly qualified construction firm, and recently successful in completing the John Burns School of Medicine Cancer Research Center using a similar design-assist format. There is no evidence that ACK's award of the Pre-construction Contract was based on anything other than its strong qualifications.

2. MAI expressed disappointment that its affiliated construction company, Mitsunaga Construction, Inc. ("MCI") was not considered for the Pre-construction Contract, believing efficiencies could have been realized by MAI and MCI working together. Nonetheless, MCI was not considered for the Pre-construction Contract because it did not submit its qualifications for consideration.

During selection of the design firm, some individuals considered MCI's affiliation with MAI as a benefit, while others did not.²⁹⁰ Some believed if MCI were retained, MAI would have been more knowledgeable about construction concerns, and have fewer subcontract work which could have reduced costs.²⁹¹

MAI included MCI as part of its initial design services proposal, but was informed by Minaai that the construction contractor was not going to be selected yet.²⁹² MAI was informed in September 2011 that UH was ready to solicit general contractor services, although no specific date for the

²⁸⁹ Transmittal of Contract Memorandum, OCI p. 6162; 9/10/12 NTP letter, OCI p. 6163. Exhibit 109.

²⁹⁰ 5/16/12 Bruce Teramoto Interview; 9/24/13 Minaai Interview.

²⁹¹ Luoluo Hong Interview; see 5/16/12 Bruce Teramoto Interview.

²⁹² 6/25/13 Kaiemi Shimabuku and Gary Nakatsuka Interview.

solicitation was given.²⁹³ However, when OCI did post its request for statements of qualifications for construction services, MCI again failed to submit its statements of qualifications in response.²⁹⁴ MCI's inclusion as part of MAI's design team proposal was not sufficient as a statement of qualifications. MCI did not submit a statement of qualifications as required by the IPP, and so could not have been evaluated, much less awarded the Pre-construction or Construction contract.

3. It is noted that Carroll Takahashi, who is not a UH employee, was listed as the UH technical contact on the Project solicitation. Takahashi is employed by the Research Corporation, University of Hawaii ("RCUH"). RCUH, pursuant to a contract with UH to undertake the procurement for the Cancer Research Center, assigned Takahashi to OCI to coordinate the Cancer Research Project. She worked in the OCI office which was responsible for the Cancer Research Project management and oversight for UH. According to Minaai, she offered to help out the "overworked" OCI staff wherever needed, and volunteered to be the OCI contact person for the Project on the solicitation.²⁹⁵ She did not serve on the evaluation committee, and seems to have played no other part in the pre-construction services selection process. Technically, as an employee of RCUH, Takahashi's services on behalf of OCI, should have been limited to the Cancer Research Center and not extend to the Project.

4. As with the design services contract, there appears to be no reasonable explanation for the delays in formalizing the pre-construction award and contract, especially in light of the extreme time constraints of the Project. Evaluation of the submittals by firms interested in providing pre-construction services was completed in January, yet the award was not posted for another two months. An advance NTP was issued on June 15, 2012, and the final completed contract was not transmitted to ACK until August 21, 2012. Again, the time taken for contract execution may vary based on circumstances, but it

²⁹³ 9/15/11 Meeting No. 1. Exhibit 110. See also 6/25/13 Kaiemi Shimabuku and Gary Nakatsuka Interview; 9/24/13 Minaai Interview.

²⁹⁴ 9/24/13 Minaai Interview.

²⁹⁵ 9/9/13 Minaai Interview.

is apparent that UH procedures for finalizing and processing contracts need to be improved for time sensitive projects such as this.

5. Despite not having a NTP, or an approved contract, ACK did not waste time and began providing the necessary pre-construction services. ACK completed and distributed its first cost estimate based on MAI's conceptual design by January 31, 2012, which was two weeks after it was notified it received the highest evaluations and that an award of the Pre-construction Contract would be forthcoming. By the time of the June 15, 2012 advance NTP, ACK had completed well over 50% of the pre-construction work. This work was done notwithstanding the lack of a contract and no immediate prospect of payment.

6. Construction (grading and grubbing) for the Project began the week after the formal groundbreaking ceremony on June 22, 2012. By the terms of the Pre-construction Contract, ACK should have been paid only for services rendered between June 15, 2012 (advance NTP date) and the end of June (commencement of construction), a period of two weeks. However with the encouragement of OCI, ACK began providing services in January. This highlights the problems caused by delays in formalizing contracts and failing to pay attention to formal, written contractual provisions, deadlines, and milestones. It is fortunate for all involved with this Project that obligations were undertaken and honored, and the Project completed without mishap. It is beyond the scope of this Investigation to comment on the propriety of authorizing payments for pre-construction services performed prior to the full execution of the contract or beyond the two week window authorized by the contract, and the AG refers the matter to UH for any review and action.

NOTES AND COMMENTS ON THE CONSTRUCTION SERVICES CONTRACT

1. It is likely ACK would not have been impaired by performing work despite the delay in executing and processing the Construction Contract because of the issuance of the advance NTP which

represented UH's intention to pay ACK for work performed without a fully executed contract. The NTP arguably would allow ACK to be paid under the legal theory of *quantum meruit*. However, without a contract, ACK would not be able to be paid for its work performed and costs incurred prior to an executed contract. According to VP/CFO Todo, once a general bond allotment is appropriated by the Legislature and approved by the Governor, DAGS sets up an account for the contract which allows UH to begin billing on the account.²⁹⁶ However, in this case, there was no hurry to execute the contract because UH had access to the \$16,000,000 in revenue bonds acquired in 2009 to draw on to pay the contractor until DAGS was able to set up the account.²⁹⁷ This is not sound practice, however, and it is generally recommended that there should be a fully executed contract in place, prior to the start of any performance (including ordering supplies and materials) by the contractor, in the event the project is cancelled or the substantially amended, etc., and the State is left responsible to pay for goods and services it no longer needs.

2. There is no explanation why an AIA contract form was used or why UH OPRPM's set of standard general conditions was not included as part of the contract.²⁹⁸ While Minaai denies being involved in the preparation or use of the AIA contract and states he relies on OPRPM in vetting construction contracts generated by OCI, other evidence suggests Minaai directed the use of the AIA form believing it was better suited for design assist projects and had been previously used on the UH Campus Center and Cancer Center projects, both of which were design assist.²⁹⁹

²⁹⁶ 7/1/13 Howard Todo Interview.

²⁹⁷ 7/1/13 Howard Todo Interview.

²⁹⁸ 5/17/13 Maynard Young Interview; 7/22/13 Duff Zwald Interview stating that OPRPM has a set of standard general conditions that are patterned after the state's form and that are incorporated into standard construction contracts.; 11/5/13 Maynard Young Interview.

²⁹⁹ 5/16/12 Bruce Teramoto Interview; 5/17/13 & 5/21/13 Maynard Young Interviews; 9/9/13 Minaai Interview; 9/10/13 Minaai Interview; 9/9/13 Brian Minaai Interview; see also 11/1/12 Email from Carroll Takahasi to Brian Minaai showing Minaai was at least minimally involved in the contract as Minaai and Russell Young were to discuss and resolve the issues relating to the safety language in ACK's contract. Exhibit 111.

Takahashi stated the Construction Contract was based on the AIA Contract and its Special Provisions used for the Cancer Center.³⁰⁰ Major amendments were made to the provisions of the Cancer Center Contract for ACK's Construction Contract and including retainage percentage, responsibility of hazardous materials, contractor's insurance responsibility, deletion of OCIP, indemnification, value engineering, and liquidated damages.³⁰¹

While the AIA contract form is commonly used between private parties, it is not usually used by states or its universities, the general opinion of OCI employees involved in the Project was that the AIA form was better suited for design assist projects.³⁰² While the use of the AIA contract form was not necessarily in the best interest of UH because it tends to favor the contractor in a dispute and not the owner, in this case, it had no noticeable impact on the timely completion of the Project nor adverse impact on UH.

3. Commencement of performance of the Construction Contract was intended to be contingent on UH's satisfaction with ACK's work on the Pre-construction Contract. However although no evaluation of ACK's pre-construction services was done, there was little to no effect on the outcome of the Project. There is no evidence that ACK provided substandard pre-construction services or that ACK would not have been authorized to proceed with construction services had an evaluation been done of its pre-construction services. However, there is conflicting documentary evidence as to payment amounts ACK received for either pre-construction services or construction services, or both, which indicates no real distinction was made between the pre-construction and construction services.

³⁰⁰ 5/31/12 Email from Carroll Takahashi to Brian Minaai. Exhibit 112.

³⁰¹ 5/31/12 Email from Carroll Takahashi to Brian Minaai. Exhibit 112. See also ACK's 6/14/12 Certificate of Liability Insurance. Exhibit 113.

³⁰² See 5/17/13 Maynard Young Interview.

While an evaluation of the pre-construction services should have been undertaken in accordance with the Pre-construction Contract, the failure to perform such an evaluation before commencing construction services had no noticeable impact on the timely completion of the Project.

4. Mitsunaga claims ACK wasted money by subcontracting out the general contractor's work for concrete and framing. Specifically, Mitsunaga argues Isemoto Construction should have been awarded the contract for concrete and site work and Coastal Construction should have been awarded the contract for framing; this despite the fact that neither Isemoto Construction nor Coastal Construction responded to the solicitation for statements of qualifications. As such, neither firm was considered and would not have been eligible for a contract. Further, the addition of Isemoto and Coastal at this date would have required additional procurements which delay the completion of the Project.

The Department is unaware of any requirement for the general contractor to perform a certain percentage of the work on the Project. ACK's decision to subcontract various aspects of the work was based on its cost analysis of completing the work itself versus subcontracting.³⁰³ Considering the cost to mobilize ACK's operations from Honolulu to Hilo, use of subcontractors located on Hawai'i Island to reduce costs was reasonable. Mitsunaga's allegations are not supported by evidence of criminal actions by UH or its employees.

5. Mitsunaga alleges ACK increased costs to increase its fee. ACK's construction contract was for \$28,105,828 and with a 4% overhead and profit to ACK.³⁰⁴ The construction budget is the amount appropriated from the Legislature, and as such, appears in the published budget bill and is public information. Since designers and contractors can see how much is budgeted for a particular project, the

³⁰³ See 10/30/13 Michael Young Interview.

³⁰⁴ Construction Contract, Exhibit B Schedule of Cost and Fees for Contractor, OCI p. 6253. Exhibit 99. 11/5/13 Maynard Young Interview.

government is at a disadvantage in negotiations.³⁰⁵ ACK, as well as several other proposals were based on the budgeted \$28,000,000, before the Project budget had even been announced by OCI.³⁰⁶

While OCI tries to reserve a portion for contingency, the transparency of the appropriated amounts makes this difficult.³⁰⁷ For the Project, Minaai intended to reserve 10-15% as contingency but once furnishings and equipment were added to the Project's budget, the contingency virtually disappeared.³⁰⁸ Because the contract amount was set, the only incentive is to keep the Project within the total budget amount, as there is no assurance that additional funds would be forthcoming.

³⁰⁵ 9/9/13 Brian Minaai Interview.

³⁰⁶ See ACK fee submission in Statement of Qualifications. Exhibit 95.

³⁰⁷ 9/9/13 Brian Minaai Interview.

³⁰⁸ 9/24/13 Brian Minaai Interview.

Chapter 8

Project and Construction Management

UH posted a Notice to Professional Services Firms seeking firms to provide services for the fiscal year beginning on July 1, 2011.³⁰⁹ SSFM submitted its information and qualifications on June 28, 2011.³¹⁰ SSFM was approved on July 5, 2011, and the approval was effective until the end of the fiscal year, June 30, 2012.³¹¹

On April 9, 2012, seeking a firm to provide project and construction management services for the Project, a selection committee consisting of OCI's Young, Lau, and Teramoto evaluated submittals from qualified firms Construction Management & Development-Hawai'i, LLC; Project Management, Inc.; and SSFM.³¹² SSFM was chosen as the top ranked firm on April 24, 2012, notified, and on June 13, 2012 submitted its fee proposal.³¹³

The Project and Construction Management Contract was executed September 18, 2012, for \$788,400.³¹⁴ SSFM was to assist in obtaining construction permits; perform initial project planning by further defining the scope of the work, budget, and schedule; keep records; take actions to remain within budget; establish construction plans; complete project cost analysis, monitoring, and control; complete special inspection and safety programs; and coordinate a master schedule.³¹⁵ SSFM also created a communication outline whereby SSFM would facilitate any communication between the contractors and OCI.³¹⁶

³⁰⁹ 6/13/11 Notice to Professional Services Firms, SSFM p. 11-12. Exhibit 56.

³¹⁰ 6/28/11 SSFM's submission to OCI, SSFM p. 82-119. Exhibit 114.

³¹¹ 7/5/11 Email from oci-tech to Michael Matsumoto of SSFM, SSFM p. 119. Exhibit 114. SSFM's questionnaire for the following year was submitted on 6/24/12 and approved on 7/3/12. Exhibit 115.

³¹² Evaluation Summary Abstract and Individual Evaluations Forms, OCI pp. 7245-7254. Exhibit 116.

³¹³ 4/24/12 Memorandum from Young to Kurashige, OCI p. 7244. Exhibit 116. 6/13/12 Fee Proposal, OCI pp. 7255-7256. Exhibit 117.

³¹⁴ SSFM Contract, OCI p. 7203. Exhibit 118.

³¹⁵ SSFM Contract § 1.3, OCI pp. 7207-7213. Exhibit 118.

³¹⁶ 5/22/13 Robert Yamada, SSFM Interview.

The Contract time schedule specified 90 consecutive calendar days for preconstruction preparation, 390 consecutive calendar days for construction, and 90 consecutive calendar days for post-construction closeout; a total of 570 consecutive calendar days from the NTP.³¹⁷ A cost reasonableness analysis was completed and concluded SSFM's \$788,400 fee was reasonable as it was within the in house consultant/contractor estimated fee of \$831,616.³¹⁸

On September 18, 2012, an NTP was issued to SSFM, authorizing it to begin work on September 24, 2012.³¹⁹ However, SSFM actually started working in June 2012.³²⁰ The NTP also required Stage/Phase 3 to be completed on or before April 17, 2014.³²¹

NOTES AND COMMENTS ON PROJECT AND CONSTRUCTION MANAGEMENT CONTRACT

1. There is no evidence of misconduct by SSFM and no complaints concerning its contract for project and construction management services. Although Mitsunaga and MAI did not allege misconduct by SSFM, its contract is discussed here as information regarding the Project.

2. Similar to the other contracts for this Project, SSFM's contract was delayed. SSFM started working in June without a fully executed written contract; its contract was not executed and the NTP was not issued until September 18, 2012. Based on the NTP date, the contract time schedule did not require completion of required services until 570 days later, or April 11, 2014. The NTP letter required services to be completed by April 17, 2014. Both dates were approximately 8 months later than the previously required completion date of August 2013. Fortunately, SSFM began working as soon as it was selected and did not follow the time schedule in its contract. Had SSFM taken the full time allotted, the Project would not have been completed and opened on time.

³¹⁷ SSFM Contract Time Schedule, OCI p. 7214. exhibit 118.

³¹⁸ SSFM Contract, Cost Reasonableness, OCI p. 7243. Exhibit 119.

³¹⁹ 9/18/12 NTP Letter, OCI p. 7200. Exhibit 120.

³²⁰ 5/22/13 Robert Yamada, SSFM Interview.

³²¹ 9/18/12 NTP Letter, OCI p. 7200. Exhibit 120.

Chapter 9

Cost Estimating Contract

According to UH's IPP and to ensure that public funds are being expended to their best advantage, a Determination of Cost or Price Reasonableness must be completed for construction procurements exceeding \$2,500.³²² In April 2012, an evaluation committee of Maynard Young, Loren Lau, and Bruce Teramoto evaluated Davis Langdon, Cumming, and Rider Levett Bucknall's ("RLB") qualifications for providing cost estimating services for the Project.³²³ In late April, RLB was evaluated as the top-ranked firm.³²⁴

RLB submitted a fee proposal on May 2, 2012.³²⁵ RLB's proposed fee was determined to be reasonable as it was within 2% of the in-house estimated fee.³²⁶ RLB was officially selected the same day.³²⁷

The Cost Estimating Services Contract with RLB was executed on October 10, 2012.³²⁸ The contract amount was the proposed \$56,574 and required RLB to provide "design-phase cost estimating services including conceptual, schematic design, design development, project cost management, material takeoffs, material field audits, and construction document phase submittals."³²⁹ ³³⁰ RLB was also to

³²² UH IPPA8.285. Exhibit 121. While the cost or price reasonableness requirement applies to construction procurement under §A8.280, it is reasonable to assume that design assist construction procurements under §A8.280.3 would also require a cost or price reasonableness determination.

³²³ Evaluation Summary Abstract, OCI p. 3820. Exhibit 122.

³²⁴ Evaluation Summary Abstract, OCI p. 3820. Exhibit 122. 4/24/12 Memorandum from Maynard Young to Ryan Kurashige ranking firms, OCI p. 3819. Exhibit 123.

³²⁵ 5/2/12 Fee Proposal – Cost Estimator, OCI p. 3813. Exhibit 124.

³²⁶ Cost Reasonableness for cost estimating services, OCI p. 3817. Exhibit 125.

³²⁷ 5/2/12 Letter to Kevin Mitchell, RLB, from Maynard Young, OCI, RLB p. 1137. Exhibit 126.

³²⁸ RLB Contract, OCI p. 7148. Exhibit 127.

³²⁹ RLB Contract § 1.2, OCI p. 7152. Exhibit 127.

³³⁰ In December 2012, Kevin Mitchell of RLB provided Maynard Young with a Memorandum concerning a request for a modification of RLB's contract in the amount of \$13,986 based on the number of hours that was actually required for each estimate. 12/4/12 Memorandum, RLB p. 8; 6/18/13 Fee Proposal – Cost Estimator, RLB p. 3171. However, in a June 24, 2013 email to Maynard Young, Kevin Mitchell suggested holding off on the modification as only \$43,680 of the allocated \$56,574 had been invoiced. 6/24/13 Email. There is no other evidence that the \$13,986 modification was ever finalized. Exhibit 128.

provide cost estimates of any change order work.³³¹ An NTP letter was also issued on October 10, 2012, authorizing RLB to proceed as of October 22, 2012, and requiring Stage/Phase 3 completion on or before August 12, 2013.³³² Among other things required by its contract, RLB was to review ACK's subcontractor pricing at the Schematic Design ("SD"), Design Drawing ("DD"), and 100% Construction Drawing ("CD") Phase and report to OCI and SSFM.³³³

RLB began performance prior to submitting its fee proposal, execution of its contract, and receipt of the NTP.³³⁴ By September 7, 2012, RLB had completed its evaluation of the Schematic estimate and 75% of the Preliminary Design estimate.³³⁵

RLB also reviewed the estimated prices of the Conceptual, DD, and 50% CD Phases.³³⁶ In April 2012, RLB reviewed the pricings of the Conceptual Phase.³³⁷ ACK's pricing of the Conceptual Phase was \$26,904,266, while RLB's estimate was \$28,500,000.³³⁸ RLB prepared an updated estimate of \$28,250,000, and ACK submitted its own updated estimate of \$27,877,705, that was reviewed by RLB which confirmed its satisfaction that specific subcontractors could be selected for further negotiations.³³⁹ RLB also reviewed Segawa's pricing of \$3,668,300 for the Civil Design.³⁴⁰ RLB determined ACK's Sitework pricing of \$3,417,695 was reasonable.³⁴¹ In June 2012, RLB completed its review of the pricings for the DD Phase.³⁴² In August 2012, ACK submitted to RLB its 50% CD pricing, which it

³³¹ RLB Contract § 1.2, OCI p. 7152. Exhibit 127.

³³² 10/10/12 NTP Letter, OCI p. 7145. Exhibit 129.

³³³ 11/28/12 Letter from Kevin Mitchell, RLB to Robert Yamada, SSFM. Exhibit 130. 5/20/13 Maynard Young Interview.

³³⁴ 4/12/12 Email exchange between Gary Nakatsuka or MAI and Kevin Mitchell of RLB, RLB pp. 786-787, 816-817; 4/13/12 Email from Kevin Mitchell, RLB, to Maynard Young, OCI, RLB pp. 820-824. Exhibit 131.

³³⁵ 9/7/12 Invoice from RLB to UH, RLB p. 1671. Exhibit 132.

³³⁶ 11/28/12 Letter from Kevin Mitchell, RLB to Robert Yamada, SSFM. Exhibit 130.

³³⁷ 11/28/12 Letter from Kevin Mitchell, RLB to Robert Yamada, SSFM. Exhibit 130.

³³⁸ 11/28/12 Letter from Kevin Mitchell, RLB to Robert Yamada, SSFM. Exhibit 130.

³³⁹ 11/28/12 Letter from Kevin Mitchell, RLB to Robert Yamada, SSFM. Exhibit 130.

³⁴⁰ 11/28/12 Letter from Kevin Mitchell, RLB to Robert Yamada, SSFM. Exhibit 130. 2/2/12 Email from Chris Dasch, Segawa, to Kevin Mitchell, RLB, with attached Engineer's Opinion of Probably Cost – Concept for Site Work, Phase 1, RLB pp. 1185-1187. Exhibit 133.

³⁴¹ 11/28/12 Letter from Kevin Mitchell, RLB to Robert Yamada, SSFM. Exhibit 130.

³⁴² 11/28/12 Letter from Kevin Mitchell, RLB to Robert Yamada, SSFM. Exhibit 130.

then updated on September 19, 2012, to \$27,953,435,³⁴³ RLB's 50% CD estimate was \$28,290,000, and in September and October 2012, RLB prepared reports of its review of ACK's pricing.³⁴⁴

RLB also completed a review of the pricings of the 100% CD Phase.³⁴⁵ On December 27, 2012, RLB forwarded his review and recommendations of the 100% CD Phase to OCI.³⁴⁶ RLB informed SSFM of RLB's recommendations and approvals.³⁴⁷

NOTES AND COMMENTS ON THE COST ESTIMATING CONTRACT

1. To ensure public funds are being expended to their best advantage, the IPP requires a Determination of Cost or Price Reasonableness to be completed for construction procurements exceeding \$2,500.³⁴⁸ UH complied with the IPP by contracting with RLB to provide cost estimating services.³⁴⁹

2. The evidence indicates RLB completed thorough cost estimating analyses by reviewing ACK's estimates, reviewing subcontractor pricing submissions, and developing its own estimates.³⁵⁰ RLB often questioned estimated costs and even requested additional information from ACK before

³⁴³ 11/28/12 Letter from Kevin Mitchell, RLB to Robert Yamada, SSFM. Exhibit 130.

³⁴⁴ 11/28/12 Letter from Kevin Mitchell, RLB to Robert Yamada, SSFM. Exhibit 130. 9/26/12 Letter to Brian Minaai, OCI, from Kevin Mitchell, RLB, with 50% CD review recommendations. RLB pp. 1934-1937; 10/24/12 Letter to Brian Minaai, OCI, from Kevin Mitchell, RLB, evaluating changes of ACK's revised 50% CD pricing, RLB pp.1261-1268. Exhibit 134.

³⁴⁵ 11/28/12 Letter from Kevin Mitchell, RLB to Robert Yamada, SSFM. Exhibit 130. See Emails from Kevin Mitchell to Michael Young concerning 100% CD Estimate, RLB pp. 068-069, 072-073. Exhibit 135.

³⁴⁶ 12/27/12 Email to Brian Minaai, Robert Yamada, and Michael Young from Kevin Mitchell, RLB pp. 003-004; 3/29/13 and 4/5/13 Letters to Robert Yamada, SSFM, from Kevin Mitchell, RLB, with recommendations concerning 100% CD Estimate – Partial Review, RLB pp. 117-123, 136-142. Exhibit 135.

³⁴⁷ 3/29/13 and 4/5/13 Letters to Robert Yamada, SSFM, from Kevin Mitchell, RLB, with recommendations concerning 100% CD Estimate – Partial Review, RLB pp. 117-123, 136-142. Exhibit 135.

³⁴⁸ IPP A8.285 1. Exhibit 121. Although the construction procurement listed is under § A8.280, it reasonable to assume that design assist construction procurements under § A8.280.3 would also require a Determination of Cost or Price Reasonableness.

³⁴⁹ UH also complied with the cost estimating requirement by using OPRPM Form 95 to determine the cost reasonableness of the Project contracts. See Exhibits 60, 81, 84, 97, 119, and 125.

³⁵⁰ 5/29/12 Email from Kevin Mitchell, RLB, to Maynard Young, OCI with attached estimate, RLB pp. 2683-2694. Exhibit 136. 5/18/12 Memorandum from Kevin Mitchell, RLB, to Brian Minaai, OCI, concerning a review of construction subcontractors. Exhibit 137. See also 4/2012 Estimate, Exhibit 100; Sitework Estimate, Exhibit 130; 50% Estimate, Exhibit 134, 100% Estimate, Exhibit 130. See 9/10/13 Minaai Interview.

approving or rejecting costs.³⁵¹ RLB was requested by OCI to review more estimated pricings than was originally specified, to such an extent that RLB and OCI's Maynard Young considered the possibility of amending its contract.³⁵² MAI alleges RLB's evaluations and recommendations were not sent to MAI and thus RLB rubber stamped ACK's estimates.³⁵³ Among other things, MAI alleges that RLB attempted to "reconcile" its cost evaluations to match ACK's estimates.³⁵⁴ MAI also alleges that it was admonished by Minaai for inquiring about cost estimates when Minaai felt that MAI should have been focusing on designing and not attempting to dispute ACK's estimates.³⁵⁵ However, the evidence produced from this investigation does not support the position that RLB merely agreed to ACK's estimates, or that there was any other criminal wrongdoing or unethical behavior while performing its cost estimating services. In fact, as shown elsewhere in this report, there were numerous instances where RLB did not immediately accept ACK's estimates and required ACK to produce additional information to justify its estimates. Only after RLB was satisfied with ACK's amended estimates did RLB inform OCI that ACK's estimates were reasonable. It must be noted, however, that MAI was generally out of the loop during ACK's and RLB's cost evaluations. Not including MAI as the architect in the discussion may have contributed to the tension between MAI and other parties.

3. RLB commenced performance prior to submitting its fee proposal, being awarded the contract, and receiving the fully executed contract and NTP. Again, it was fortunate for UH and the

³⁵¹ See 1/15/13 Email from Kevin Mitchell, RLB, to Michael Young, ACK, with questions concerning values proposed in the 100% CD estimate, RLB pp. 68-69; 1/21/13 Email from Kevin Mitchell, RLB, to Michael Young, ACK, with more notes on the 100% CD estimate, RLB pp. 72-73; 3/5/13 Email from Michael Young, ACK, to Kevin Mitchell, RLB, responding to 100% CD pricing with attached Memo, RLB pp. 86-91; 3/29/13 and 4/5/13 Letters to Robert Yamada, SSFM, from Kevin Mitchell, RLB, with recommendations concerning 100% CD Estimate – Partial Review, RLB pp. 117-123, 136-142; 4/5/13 and 4/8/13 Emails between Robert Yamada, SSFM, and Kevin Mitchell, RLB, concerning 100% CD review Recommendation Letter, RLB pp. 451-452. Exhibit 135.

³⁵² 6/24/13 Email from Kevin Mitchell, RLB, to Maynard Young, OCI, RLB pp. 3372-3376. Exhibit 128.

³⁵³ Kaiemi Shimabuku and Gary Nakatsuka's June 25 Interview, states that MAI only saw RLB at the construction cost estimating meetings and did not receive any correspondence directly from RLB or through any other party; 9/10/13 Minaai Interview.

³⁵⁴ See 5/7/12 email from Kevin Mitchell of RLB to Minaai. Exhibit 138.

³⁵⁵ See 2/13/12 email from Minaai to Aaron Fujii of MAI. Exhibit 139.

Project that there were no mishaps with RLB, and RLB performed in a conscientious manner to complete the work required and expected of it to speed the Project.

Chapter 10

Funding, Estimates, Value Engineering and Miscellaneous Allegations

I. Budget Breakdown

A. Initial and Revised Budget of MAI

The original budget breakdown showed the total funds available for the Project to be \$31,585,586.³⁵⁶ The budget allotted the following costs:

\$3,941,951 Total Site Development including Design and Construction

\$2,610,000 Design for Project

\$23,200,049 Total Construction

\$1,733,000 Furnishings and Equipment

\$31,475,000 Total Cost³⁵⁷

On January 24, 2012, MAI along with its then subcontractor, DLR Group, submitted a presentation with drawings of the proposed design, unit plans for suites, density, and parking.³⁵⁸ A preliminary cost analysis given during the presentation stated the current construction budget as \$24,614,109, including \$23,513,229 for the Project and \$1,100,880 for Site Development.³⁵⁹ However, MAI and DLR's preliminary cost analysis for its design was based on a price of \$268 per square foot for an area of 105,495 square feet and a covered lanai.³⁶⁰ The total construction cost was estimated at \$29,455,847, which was almost five million over the budgeted amount.³⁶¹

MAI's presentation also included a revised budget breakdown which left the design budget unchanged, reduced the amount for total site development to \$1,763,831, approximately 45% less than

³⁵⁶ 10/5/11 Budget Breakdown, received by Maynard Young on 1/6/12. Exhibit 47. The budget consisted of \$15,585,586 from the 2009 Revenue Bond and \$16,000,000 from the 2011 G.O. Bond.

³⁵⁷ 10/5/11 Budget Breakdown, received by Maynard Young on 1/6/12. Exhibit 47.

³⁵⁸ Presentation Pamphlet, UHH pp.25-72. Exhibit 140. The presentation did not include a drawing set which would have allowed ACK to start making estimates based on the design. 10/30/13 Michael Young, ACK, interview.

³⁵⁹ Presentation Pamphlet, UHH p. 55. Exhibit 140.

³⁶⁰ Presentation Pamphlet, UHH p. 55. Exhibit 140.

³⁶¹ Presentation Pamphlet, UHH p. 55. Exhibit 140.

the original budgeted amount, and reduced the total construction costs to \$23,513,229, which included a reallocated \$1,733,000 for furnishings and equipment.³⁶² MAI also proposed a schedule which began in October 2011 and ran for 37 months, until September 2013.³⁶³ MAI's presentation would have resulted in the Project being over budget and completed after the August 2013 deadline.

B. Estimated Budget by ACK

1. Conceptual Estimates

When ACK joined the team, it was orally informed by OCI that the maximum construction price was \$24,697,000.³⁶⁴ ACK then prepared an estimate based on the preliminary plans in MAI's presentation and on ACK's experience with similar projects and construction in Hawaii.³⁶⁵ ACK's initial estimate was \$27,314,915 and based on a concrete masonry unit (CMU) structure with a stucco plaster finish and a stucco roof.³⁶⁶ When ACK's initial estimate came in well over the maximum construction price, the consensus of the team was that the Project would have budget issues.³⁶⁷ The DLR Group and MAI asked for a third-party consultant to be involved because they lacked confidence in ACK's figures.³⁶⁸

As a result of its high estimate, ACK was asked and agreed to create a Value Engineering ("VE") Log to reduce costs while UH attempted to obtain additional funds.³⁶⁹ The VE Log included pending

³⁶² Presentation Pamphlet, UHH p. 56. Exhibit 140. The FF&E remained under ACK's Construction Contract for the duration of the Project.

³⁶³ Presentation Pamphlet, UHH p. 57. Exhibit 140.

³⁶⁴ 10/30/13 Michael Young Interview; 12/3/13 Email from Howard Todo to Jon Morton. Exhibit 141 (also at Exhibit 42).

³⁶⁵ 10/30/13 Michael Young Interview.

³⁶⁶ 10/30/13 Michael Young Interview; 1/30/12 #1 Conceptual Estimate. Exhibit 142. 12/3/13 Email from Howard Todo to Jon Morton. Exhibit 141.

³⁶⁷ 10/30/13 Michael Young Interview. 8/29/13 Michael Swanson Interview. See 7/12/12 Email from Michael Young to Kaiemi Shimabuku, SSFM p. 1175. Exhibit 143.

³⁶⁸ 8/29/13 Michael Swanson Interview.

³⁶⁹ 10/30/13 Michael Young Interview; 11/5/13 Maynard Young Interview.

changes to the design which if accepted by UH, would reduce costs.³⁷⁰ OCI had the authority to approve VE items, as well as other changes; OCI had the authority to override MAI's designs.³⁷¹

In its VE Log for January 20, 2012, ACK proposed architectural changes to the roof, exterior facade, and materials for the structure.³⁷² On February 13, 2012, by email, MAI's Nakatsuka informed the team that OCI directed the SD to proceed, based on an all-wood structure for the student housing units.³⁷³ The decision was based on an agreement between Nakatsuka and ACK's Russell Young that only wood construction would bring the Project within budget.³⁷⁴ DLR's van der Veen suggested other options to wood to reduce the cost, and reintroduced earlier design concepts, but Minaai replied such VE savings, if accepted, would instead go to funding the furnishings and equipment costs and design contingency.³⁷⁵ Minaai also instructed MAI to focus on drawing the design, and not disputing ACK's estimates.³⁷⁶ It was alleged that Minaai also instructed the design team not to meet with ACK without UH personnel present.³⁷⁷

³⁷⁰ 10/30/13 Michael Young Interview; 1/30/12 VE Log for Conceptual Estimate. Exhibit 144.

³⁷¹ 9/24/13 Minaai Interview; 10/30/13 Michael Young Interview; 11/27/12 Email from Maynard Young to Nicholas Bassis, SSFM approving a change; 1/4/13 Email chain between Maynard Young, Brian Minaai, and Robert Yamada approving RLB's review; 1/8/13 Email from Maynard Young agreeing with Robert Yamada's recommendation on accepting the telecom price. 7/20/12 Email from Maynard Young to Michael Young accepting VE Item of PVC underground waste piping. Exhibit 145.

³⁷² 1/30/12 VE Log for #1 Conceptual Estimate. Exhibit 145. There is also an unauthorized and undated UH Student Housing Building Type and Cost Options which lists the following options for construction: 1) CMU with post tension slab and metal roof costing approximately \$26,000,000, plus \$250,000 for a wood veneer treatment on the outside; 2) CMU with pre-cast plank for approximately \$25,300,000 plus \$250,000 for any added wood treatments; 3) CMU with pre-cast plank with exterior metal framing and metal siding for \$24,700,000, or 4) all wood for \$19,500,000. Exhibit 146.

³⁷³ 2/13/13 Email, UHH p. 1. Exhibit 147. See 5/22/13 Miles Nagata Interview. 11/5/13 Maynard Young Interview.

³⁷⁴ 2/14/12 Email from Brian Minaai to Luoluo Hong and Marcia Sakai, UHH p. 10. Exhibit 147. See 9/10/13 Minaai Interview. See also 3/1/13 General Meeting, OCI p. 3478. Exhibit 148.

³⁷⁵ 3/1/12 Email Exchange between van der Veen and Minaai; UHH pp. 6-7. Exhibit 149. 8/29/13 Michael Swanson Interview.

³⁷⁶ 2/13/12 Email from Brian Minaai to Aaron Fujii. Exhibit 150.

³⁷⁷ 8/29/13 Michael Swanson Interview.

2. Schematic Design Estimates

On February 29, 2012, ACK developed a 50% SD estimate, which totaled \$27,079,540.³⁷⁸

While this estimate included the use of wood, the estimate had not dropped considerably because it added three elevators, increased the budget for the residential life space, increased the bed count from 288 to 318, and added 18,000 square feet, among other items.³⁷⁹ The VE Log did indicate the use of wood as the new base estimate.³⁸⁰

A 50% #2 SD estimate was prepared on March 13, 2012, by ACK based on drawings completed on February 24, 2012.³⁸¹ The new total was for \$26,904,226 and included refined estimates for the site work and residential life spaces and an added standard 10% contingency to both the site work and residential life spaces.³⁸²

A 100% SD estimate was then prepared on May 8, 2012, based on drawings completed on April 17, 2012.³⁸³ The new estimate was for \$26,883,948 and included an increased landscape/hardscape allowance of \$750,000, increased insulation and glass budgets, the addition of entry windows and deck coating, as well as increases and reductions in budgets based on subcontractors' quotes.³⁸⁴ The estimate also included an added security allowance and reduced the site work contingency to 0% and to 5% for the dormitory and residential life contingencies.³⁸⁵ The Executive Summary of Changes also showed the impact of an additional 17,000 square feet of corridor and public area.³⁸⁶ Further, while the estimate

³⁷⁸ 2/29/12 50% SD Estimate Spreadsheet. Exhibit 151. 2/29/12 50% SD Executive Summary of Changes. Exhibit 152. Estimate spread sheet states it is a 50% SD estimate while the Executive Summary of Changes states it is both a 50% SD and conceptual estimate.

³⁷⁹ 2/29/12 Executive Summary of Changes. Exhibit 152.

³⁸⁰ 2/29/12 VE Log 50% SD. Exhibit 153.

³⁸¹ 3/12/13 50% SD Revised Estimate Spreadsheet. Exhibit 154.

³⁸² 3/12/13 50% SD Revised Estimate Spreadsheet. Exhibit 154. 4/2/12 Email from Michael Young to Minaai. Exhibit 155. The dormitory housing estimate already included a contractor contingency on the previous estimates.

³⁸³ 5/8/12 100% SD Estimate Spreadsheet. Exhibit 156.

³⁸⁴ 5/8/12 100% SD Executive Summary of Changes. Exhibit 157.

³⁸⁵ 5/8/12 100% SD Executive Summary of Changes. Exhibit 157.

³⁸⁶ 5/8/12 100% SD Executive Summary of Changes. Exhibit 157.

breakdown removed the allowances for the residential life space, it now included \$1,200,000 in allowances for FF&E for the dormitory housing.³⁸⁷

On May 18, 2012, Kevin Mitchell of RLB sent Minaai and Maynard Young a memorandum concerning his review of contractors for the civil scope of the work.³⁸⁸ Although ACK requested pricing from five contractors, only three responded with bids.³⁸⁹ After reviewing and normalizing the submitted bids, Mitchell found the pricing was reasonable and recommended the approval of Isemoto Contracting for \$2,652,726.³⁹⁰ Mitchell also completed a review of the entire project finding an estimated total cost of \$28,500,000.³⁹¹

On May 29, 2012, Minaai informed ACK's Michael Young that the new guarantee maximum construction budget would be \$28,105,828, which included the \$1,102,295 contingency and an additional \$1,221,882 for a total contingency of \$2,324,177.³⁹² As a result, ACK created another 100% SD for Contract showing the total estimate as \$26,939,6230 and an owner contingency of \$1,166,198 for a contract total of \$28,105,828.³⁹³

3. Design Drawing Estimates

On July 11, 2012, ACK created a 100% DD estimate based on May 2012 drawings.³⁹⁴ The new total was for \$27,860,322, an increase of \$974,692 from the previous estimate.³⁹⁵ Some of the notable changes included the sitework; foundations; structural, such as various framing additions; architectural, including drywall additions, ceramic tile, added moisture remediation, and painting; skin/roof for

³⁸⁷ 5/8/12 100% SD Executive Summary of Changes, Allowances p. 1-3. Exhibit 156. In the MAI/DLR Group proposed budget, the FF&E was included in the Construction budget. Presentation Pamphlet, UHH p. 56. While, FF&E is not normally included in construction budgets, it was included in the construction budget for the Project and required an increase in the allowance for FF&E and a reduction in budget for other areas. 10/30/13 Michael Young Interview; 11/5/13 Maynard Young Interview.

³⁸⁸ 5/18/12 Memorandum to Minaai from Mitchell. Exhibit 158.

³⁸⁹ 5/18/12 Memorandum to Minaai from Mitchell. Exhibit 158.

³⁹⁰ 5/18/12 Memorandum to Minaai from Mitchell. Exhibit 158.

³⁹¹ 5/29/12 RLB Project Estimate. Exhibit 159.

³⁹² 5/18/12 Email from Minaai to Maynard Young, Carroll Takahashi, and Michael Young. Exhibit 160.

³⁹³ 5/8/12 100% SD FOR CONTRACT Estimate Spreadsheet. Exhibit 161.

³⁹⁴ 7/11/12 100% DD Estimate Spreadsheet. Exhibit 162.

³⁹⁵ 7/11/12 100% DD Estimate Spreadsheet. Exhibit 162.

waterproofing and stainless steel gutters, mechanical for attic fire sprinklers, refined sprinkler layout and dryer exhaust; and electrical, including an increase in site electrical scope and an added allowance for landscape and courtyard lighting.³⁹⁶ At this point, ACK's accepted VE items, other than the change from CMU to wood, consisted of providing only one elevator per building instead of two.³⁹⁷

RLB again reviewed ACK's estimated prices and costs for reasonableness. On July 9, 2012, RLB's Mitchell emailed ACK's Young, confirming the costs for soil treatment, rebar, CMU, and rough carpentry.³⁹⁸ Mitchell also stated he was awaiting feedback on the sitework, mechanical and electrical.³⁹⁹ Additionally, Mitchell wrote to Minaai confirming Mitchell had been meeting with ACK and was satisfied with the proposed selection of subcontractors for further negotiations on the project.⁴⁰⁰

ACK also issued a final 100% DD VE Log and noted all items were accounted for except for the windows, which specifications and design were to be finalized in the 50% CD, and the parking ratio, which was pending.⁴⁰¹ The VE Log also showed the following VE items had been accepted: metal gutters instead of stainless steel, level 4 finish on walls in lieu of level 5, concrete sealer at resident life, rubber instead of wood base at interior of dorm units, deletion of FSC certified wood requirement, a change in the fire sprinkle coverage, DWV PVC underground waste piping in lieu of cast iron, running of open wire telecom/TV cable, and having romex in units.⁴⁰² The VE items saved a grand total of \$640,629, including markups, fees, bonds, taxes, and insurance.⁴⁰³

³⁹⁶ 7/11/12 100% DD Executive Summary of Changes. Exhibit 162.

³⁹⁷ 7/11/12 100% DD VE Log. Exhibit 162.

³⁹⁸ 7/9/12 Email from Kevin Mitchell to Michael Young. Exhibit 163.

³⁹⁹ 7/9/12 Email from Kevin Mitchell to Michael Young. Exhibit 163.

⁴⁰⁰ 7/20/12 Letter from Mitchell to Minaai. The approved subcontractors were for the Sitework – Isemoto Contracting Company, Soil Treatment – Will Kill, Termi-Mesh – Nacis Construction, Reinforcement – Associated Steel Workers, Concrete – Isemoto Contracting Company, CMU – Isemoto Contracting Company, Rough Carpentry – Coastal Construction, Roofing/Waterproofing – Beachside Roofing, Glazing – Pending, Drywall – Pending, Elevators – Kone, Mechanical – Dorvin D. Leis, and Electrical – Wasa Electrical Service. Exhibit 164.

⁴⁰¹ 7/20/12 Email from Michael Young to Minaai, Maynard Young, Fujii, Nakatsuka, Shimabuku, Yamada, Nicholas Bassis, and Mitchell. Exhibit 165.

⁴⁰² 7/11/12 100% DD VE Log. Exhibit 162. 7/20/12 Email from Maynard Young to Michael Young accepting VE of PVC underground waste piping instead of cast iron, SSFM pp. 827. Exhibit 165.

⁴⁰³ 7/11/12 100% VE Log. Exhibit 162.

4. Construction Drawing Estimates

ACK's first 50% CD estimate dated August 29, 2012, was based on July 2012 drawings and specs.⁴⁰⁴ The 50% CD estimated total was \$29,660,978, an increase of \$1,800,656 from the previous 100% DD estimate of \$27,860,322.⁴⁰⁵ The committed costs had also reached \$20,037,260. The changes from the 100% DD in May to the 50% CD in August included an increased allowance for FF&E based on vendor Interior Showplace's quote, an addition of site work based on landscape plans, door and hardware revisions, addition of Salto locks as public/entry doors, revision of windows from Milgard to Marlin, and the accepted VE of metal gutters in lieu of stainless steel, among others.⁴⁰⁶ At this time, the total accepted VE amount was \$1,555,150.⁴⁰⁷

The initial 50% CD estimate was revised, and a second 50% CD estimate dated September 13, 2012, had a new total of \$28,296,859, and committed costs at \$21,179,526.⁴⁰⁸ The revised estimate included the deletion of the computer lab equipment, and change from constructing a cement rubble masonry (CRM) wall to a wall and concrete cap/bench at the center staircase. It also included a deletion of the colored walkways to standard colored walkways with a broom finish, change in the decorative metal gate, and a reduction in the landscape planting budget based on subcontractor quotes.⁴⁰⁹

A third 50% CD estimate dated September 19, 2012, included a total of \$27,953,435 and \$20,893,164 in committed items.⁴¹⁰ The new estimate spreadsheet incorporated all the VE items.⁴¹¹ ACK sent the third 50% CD estimate to RLB for approval for construction and billing.⁴¹² ACK also requested review and comments on the subcontractors for Gypcrete, Roofing, Doors and Frames, Glass,

⁴⁰⁴ 8/29/12 50% CD Estimate Spreadsheet. Exhibit 166.

⁴⁰⁵ 8/29/12 50% CD Estimate Spreadsheet. Exhibit 166.

⁴⁰⁶ 8/29/12 Executive Summary of Changes. Exhibit 166.

⁴⁰⁷ 8/29/12 VE Log. Exhibit 166.

⁴⁰⁸ 8/29/12 (Revised 9/13/12) 50% CD Estimate Spreadsheet. Exhibit 167.

⁴⁰⁹ 8/29/12 (Revised 9/13/12) 50% CD Executive Summary of Changes. Exhibit 167.

⁴¹⁰ 8/29/12 (Revised 9/19/12) 50% CD Estimate Spreadsheet. Exhibit 168.

⁴¹¹ 9/19/12 Email from Michael Young to Kevin Mitchell. Exhibit 169.

⁴¹² 9/19/12 Email from Michael Young to Kevin Mitchell. Exhibit 169.

and Drywall.⁴¹³ Additionally, the September 19, 2012 VE Log showed all of the courtyard hardscape per 50% CD landscape drawings had been deleted, along with the deletion of the added lanai concrete, use of hollow core doors in bedrooms, wood instead of metal pocket frames, deletion of two glass double doors at the courtyard entrances, deletion of storefront windows at student life to be replaced with a framed wall with 14 windows, and deletion of emergency call stations and addressable detectors in all units, except for Americans with Disabilities Act.⁴¹⁴ The total VE accepted amount was \$351,019.⁴¹⁵

An 80% CD Estimate was submitted on September 20, 2012.⁴¹⁶ The estimate created a \$200,000 change on the contingency, mostly for necessary sitework and concrete changes.⁴¹⁷ ACK hoped to offset the increase by working with MAI to find alternative methods of achieving the design or code intent, and alternatives to mechanical changes.⁴¹⁸

ACK responded to RLB's requests for information on October 16, 2012.⁴¹⁹ ACK further revised its 50% CD estimate based on RLB's reviews, with a new total budget of \$27,943,012 and a new total committed value of \$20,956,874.⁴²⁰ RLB's Mitchell then sent a letter to Minaai explaining RLB's review and recommendations associated with the prices submitted by ACK.⁴²¹ RLB reviewed the changes between the committed values of the previous estimate and the 50% CD review for allowances, mass excavation and embankment, soil treatment, concrete reinforcement, cast-in-place concrete, masonry, rough carpentry, waterproofing and damp proofing, doors, frames & hardware, glass and

⁴¹³ 9/19/12 Email from Michael Young to Kevin Mitchell. Exhibit 169.

⁴¹⁴ 8/29/12 (Revised 9/13/12) 50% CD VE Log. Exhibit 170.

⁴¹⁵ 8/29/12 (Revised 9/13/12) 50% CD VE Log. Exhibit 170.

⁴¹⁶ 9/20/12 Executive Summary of Changes, SSFM pp. 2271-2272. Exhibit 171.

⁴¹⁷ 9/21/12 Email from Michael Young, ACK, to Minaai, among others, SSFM p. 2270. Exhibit 172.

⁴¹⁸ 9/21/12 Email from Michael Young, ACK, to Minaai, among others, SSFM p. 2270. Exhibit 172.

⁴¹⁹ 10/16/12 Letter to RLB from Michael Young, ACK on 50% CD Review Backup. Exhibit 173.

⁴²⁰ 8/29/12 (Revised 9/20/12) 50% CD Estimate Spreadsheet. Exhibit 174.

⁴²¹ 10/24/12 Letter to Minaai from Mitchell on 50% CD Review. Exhibit 175.

glazing, gypsum wallboard/plaster, elevators, fire protection, plumbing, HVAC, and electrical.⁴²² RLB recommended approval of changes in some of the committed values and requested additional information on other items in order to complete a cost reasonableness determination.⁴²³

An initial 100% CD estimate was issued on November 1, 2012. At that time, the total budget was \$28,354,814 with committed costs at \$25,896,986.⁴²⁴ The Executive Summary of Changes showed an increase of \$411,802.⁴²⁵ On November 1, 2012, the VE Log showed the additional following items had been accepted: reduction of landscaping to grass only, deletion of the CRM wall and concrete cap/bench (partially accepted), hollow doors at shower and toilet rooms, use of marble solid surface shower stalls instead of pre-fabricated stalls, and deletion of painting of the gutters and downspouts.⁴²⁶

A second 100% CD estimate, also dated November 1, 2012, included a total budget of \$28,258,618, and committed costs at \$27,578,759.⁴²⁷ RLB's review of this estimate showed the lower quotes for FF&E were not pursuant to the specifications and so were rejected.⁴²⁸ RLB then recommended the approval of the pricing quoted by vendor Interior Showplace as the price quote was less than the budgeted value, reasonable, and obtained under competitive bidding.⁴²⁹ RLB made similar recommendations for approval as to the kitchen equipment, door hardware, and fall protection anchors.⁴³⁰

RLB's Mitchell then completed a full review of the second 100% CD estimate. RLB's Mitchell communicated questions and concerns about the prices in the estimate, to ACK's Young by emails dated

⁴²² 10/24/12 Letter to Minaai from Mitchell on 50% CD Review. Exhibit 175.

⁴²³ 10/24/12 Letter to Minaai from Mitchell on 50% CD Review. Exhibit 175.

⁴²⁴ 11/1/12 100% CD Estimate Spreadsheet. Exhibit 176.

⁴²⁵ 11/1/12 Executive Summary of Changes based on 100% CD Estimate. Exhibit 176.

⁴²⁶ 11/1/12 100% CD VE Log. Exhibit 176.

⁴²⁷ 11/1/12 100% CD Estimate (6 R1) Spreadsheet. Exhibit 177.

⁴²⁸ 12/27/12 Letter from Mitchell to Minaai on 100% CD Estimate – Partial. Exhibit 178.

⁴²⁹ 12/27/12 Letter from Mitchell to Minaai on 100% CD Estimate – Partial. Exhibit 178.

⁴³⁰ 12/27/12 Letter from Mitchell to Minaai on 100% CD Estimate – Partial. Exhibit 178.

January 5, 2013, and continuing in an email dated January 21, 2013.⁴³¹ In those emails, Mitchell asked for explanations as to changes in cost, especially for the items with little or no detail.⁴³² Young responded with explanations of the changes and supporting documentation on March 5, 2013.⁴³³

These estimates show that costs were extremely tight and required numerous changes and adjustments as the estimated costs became committed costs.

C. Actual Costs/Budget

At the end of the Project, a closeout process was to be completed, consisting of a final delivery of all in-house documentation from the architect and contractor to UH.⁴³⁴ As of the date of this Report, the Department has not yet received all Project closing documents and final costs and budget details are still pending and no final review of costs and budgets is included.⁴³⁵ It is the Department's further understanding that this Project is anticipated to be over budget by about \$300,000.⁴³⁶ It is unclear as to how this budget shortfall will be addressed.

II. Requests for Information and Change Orders

In the course of a project, Requests for Information ("RFI") are commonly used to gather information needed to make decisions. While RFIs are normally resolved within a week, if left unresolved, RFIs can cause significant delay in completing drawings and ordering materials.⁴³⁷ Approximately 300 RFIs were issued during the Project.⁴³⁸ ACK and SSFM allege that most of the delay resulting from unresolved RFI's was caused by MAI.⁴³⁹ They point to various Owner-Architect-Contractor meeting minutes in support of their contention and allege a consistent pattern of the parties

⁴³¹ 1/15/13 Email from Mitchell to Young. Exhibit 179. 1/21/13 Email from Mitchell to Young. Exhibit 180.

⁴³² 1/15/13 Email from Mitchell to Young. Exhibit 179. 1/21/13 Email from Mitchell to Young. Exhibit 180.

⁴³³ 3/5/13 Letter to Mitchell, RLB, from Mike Young, ACK. Exhibit 181.

⁴³⁴ 8/28/13 Interview Jo-Anna Herkes, SSFM.

⁴³⁵ See 2/21/14 email from Robert Yamada, SSFM, to DAG Jack Rosenzweig. Exhibit 182.

⁴³⁶ See 2/21/14 email from Robert Yamada, SSFM, to DAG Jack Rosenzweig. Exhibit 182. See also 8/23/13 Modification 1 Estimate. Exhibit 183.

⁴³⁷ 9/11/12 OAC Meeting, OCI p. 2886. Exhibit 184.

⁴³⁸ 8/28/13 Robert Yamada, SSFM, Interview.

⁴³⁹ See all OAC Meeting Minutes, OCI p. 2860-3041. Exhibit 184.

waiting for MAI to respond to an RFI, check on an item, or complete a review.⁴⁴⁰ As an example, at the September 25, 2012 OAC meeting there were 21 RFI's under review, for which MAI had no update on 14 and needed to follow up with consultants on three others.⁴⁴¹ At the same meeting, ACK had to request MAI to expedite its responses to RFIs so that the Project could stay on schedule.⁴⁴²

One of the alleged benefits of using the design assist process is to limit the number of change orders. However, SSFM's Yamada disagrees and expected to have numerous RFIs and change orders.⁴⁴³ There were 60 total change orders during the Project.⁴⁴⁴ The relatively large number of change orders could be the result of a lack of communication among some of the parties and the absence of the appropriate decision at discussions.⁴⁴⁵ As an example, an email from UHH's Miles Nagata to SSFM's Yamada and OCI's Maynard Young indicated MAI's lack of knowledge as to the required code specifications resulted in change orders and would probably result in future change orders.⁴⁴⁶

III. Value Engineering

Mitsunaga and MAI made various allegations about the construction of the Project. A short explanation and finding for each issue follows.

A. Wood Structure

The first major VE decision involved the building material for the student dormitory. Although there were no specifications, ACK was directed by OCI and completed its initial estimate based on a CMU structure with stucco.⁴⁴⁷ Although most residential buildings in Hilo are constructed of wood and

⁴⁴⁰ See all OAC Meeting Minutes, OCI p. 2860-3041; see also 9/25/12 OAC Meeting, pp. 2895-2896; 12/11/12 OAC Meeting pp. 2958-2959; 1/21/13 OAC Meeting, OCI p. 2986; 2/12/13 OAC Meeting, OCI pp. 3008-3009. Exhibit 184.

⁴⁴¹ 9/25/12 OAC Meeting, OCI pp. 2895-2896. Exhibit 184.

⁴⁴² 9/25/12 OAC Meeting, OCI p. 2897. Exhibit 184.

⁴⁴³ 8/28/13 Robert Yamada, SSFM, Interview.

⁴⁴⁴ 2/20/13 Change Proposal Log. Exhibit 185. See also 2/21/14 Email from Robert Yamada to Jack Rosenzweig. Exhibit 182.

⁴⁴⁵ See 8/28/13 Jo-Anna Herkes, SSFM, Interview.

⁴⁴⁶ See 8/10/12 Email from Miles Nagata to Robert Yamada and Maynard Young. Exhibit 186.

⁴⁴⁷ 10/30/13 Michael Young Interview.

wood is used for temporary buildings, all UHH housing units, prior to this Project, were made of concrete.⁴⁴⁸ In UHH Facilities Director Lo-Li Chih's opinion, concrete was used for UHH buildings because CMU construction is more durable and easier to maintain for fire protection.⁴⁴⁹ However, a concrete dormitory would have resulted in only 200 beds, so to meet the 300 bed target, which was required to meet the carryover \$1.2 million annual debt service on the revenue bonds, ACK was asked by OCI to estimate various options including both concrete and wood.⁴⁵⁰

1. Options

The first replacement option was to use wood framing and wood siding, which would decrease the budget by \$2,541,052.⁴⁵¹ The second option consisted of a wood frame with metal siding, a decrease in price of \$1,965,302.⁴⁵² The third option was to use concrete tilt up exterior walls with wood interior walls, a savings of \$1,386,291.⁴⁵³ The fourth option was to have a wood structure with gypcrete topping, a savings of only \$457,091.⁴⁵⁴ The fifth option included changing the second and third floors from cast in place concrete to structural steel frame with a metal deck and concrete topping, which increased the budget by \$210,177.⁴⁵⁵ However, this only would be an option in conjunction with the third option for concrete tilt up exterior walls, not with wood.⁴⁵⁶ The sixth option changed the base design of a steel frame to a wood truss with plywood, which would result in a savings of \$231,192.⁴⁵⁷

⁴⁴⁸ 8/28/13 Lo-Li Chih Interview; 5/22/13 Miles Nagata Interview – not concerned about mold/moisture due to wood construction as most buildings in Hilo are made of wood; same from 5/22/13 Robert Yamada Interview.

⁴⁴⁹ 8/28/13 Lo-Li Chih Interview.

⁴⁵⁰ 9/9/13 Brian Minaai Interview; 9/10/13 Brian Minaai Interview.

⁴⁵¹ 10/30/13 Michael Young Interview. 1/30/12 Conceptual VE Log. Exhibit 144.

⁴⁵² 10/30/13 Michael Young Interview. 1/30/12 Conceptual VE Log. Exhibit 144.

⁴⁵³ 10/30/13 Michael Young Interview. 1/30/12 Conceptual VE Log. Exhibit 144.

⁴⁵⁴ 10/30/13 Michael Young Interview. 1/30/12 Conceptual VE Log. Exhibit 144.

⁴⁵⁵ 10/30/13 Michael Young Interview. 1/30/12 Conceptual VE Log. Exhibit 144.

⁴⁵⁶ 10/30/13 Michael Young Interview.

⁴⁵⁷ 10/30/13 Michael Young Interview. 1/30/12 Conceptual VE Log. Exhibit 144.

Early on in this Project, Minaai determined that the only way to complete the Project on-time and under budget would be to use wood.⁴⁵⁸ The options accepted were wood framing and wood siding, plus wood framing with gypcrete topping, and the wood truss with plywood.⁴⁵⁹ Thereafter, when the first specs came out, they were based on wood framing.⁴⁶⁰

2. Long Range Development Plan

UHH's March 1996 Long Range Development Plan ("LRDP") "serves as a guide to the form and character of the campus, seeking to achieve a safe, efficient, cohesive and pleasant environment that is supportive of UH's programs, goals and overall mission."⁴⁶¹ The LRDP includes "design guidelines to control the architectural and landscape character of the campus, as well as, special design considerations with regard to access, safety, circulation, and parking."⁴⁶²

Architectural design guidelines are required in order to promote a strong sense of harmony and unity among the buildings on campus and to encourage future projects to be planned and constructed as part of an ongoing process based on the updated LRDP. It is not the intent to dictate a rigid architectural style for buildings, but rather to guide the development of the campus towards a unification in architectural character derived from color and materials, sensitivity to climatic factors, building scale, and siting relationships within the campus.⁴⁶³

Regarding materials, the LRDP called for building materials appropriate for a rainy climate location and a pedestrian oriented campus.⁴⁶⁴ The LRDP concluded that the primary material should be concrete and any use of CMU as an exterior wall was to be covered in plaster or skim coating, and that wood, due to its high maintenance requirements, was not recommended as an exterior building

⁴⁵⁸ 11/5/13 Maynard Young Interview.

⁴⁵⁹ 10/30/13 Michael Young Interview.

⁴⁶⁰ 10/30/13 Michael Young Interview.

⁴⁶¹ March 1996 UHH Long Range Development Plan, Executive Summary, p. 1. Exhibit 187.

⁴⁶² LRDP, Executive Summary, p. 1. Exhibit 187.

⁴⁶³ LRDP, Planning Design Guidelines, p. 7-25. Exhibit 187.

⁴⁶⁴ LRDP, Planning Design Guidelines, p. 7-27. Exhibit 187.

material.⁴⁶⁵ Further, wood, due to its high maintenance requirements, was not recommended as an exterior building material.⁴⁶⁶

It was the responsibility of UH to implement the LRDP.⁴⁶⁷ Implementation was to be accomplished by (1) using the LRDP as a reference source for those involved in future planning and construction, (2) establishing a Campus Design Review Committee charged with reviewing all new projects and ensuring effective dialogue with consultants for LRDP compliance during all major design changes and (3) making the LRDP available to consultant and landscape architects on projects.⁴⁶⁸

There was no evidence that UHH's LRDP was ever seriously considered or discussed during the Project.⁴⁶⁹ Other than Lo-Li Chih raising the concern over the use of wood instead of concrete, no UH employee nor any Campus Design Review Committee brought the LRDP's guidelines to the attention of the parties working on the Project. Although UHH preferred concrete over wood, it reluctantly accepted the wood framing in order to hit the 300 bed target.⁴⁷⁰

In any event, the LRDP is merely a guideline, a preference, and not a mandatory requirement.⁴⁷¹ While it would have been preferable to follow the LRDP's guidelines, based on the fact that an all wood structure was the only material that would finish the student housing within the budget and on time, there was no criminal or unethical action in determining that the student housing would be all wood instead of concrete.

Additionally, the budgetary imposition on the choice of wood for the Project serves as an example of how using Design Assist was beneficial. In the conventional design bid build method, the concrete design would have been developed and only well into the Project, during pricing, would the

⁴⁶⁵ LRDP, Planning Design Guidelines, p. 7-27. Exhibit 187.

⁴⁶⁶ LRDP, Planning Design Guidelines, p. 7-28. Exhibit 187.

⁴⁶⁷ LRDP, Planning Design Guidelines, p. 7-29. Exhibit 187.

⁴⁶⁸ LRDP, Planning Design Guidelines, 7-29-7-31. Exhibit 187.

⁴⁶⁹ 9/10/13 Minaai Interview; 8/28/13 Robert Yamada and Jo-Anna Herkes, SSFM, Interview; 11/5/13 Maynard Young Interview.

⁴⁷⁰ 9/9/13 Brian Minaai Interview.

⁴⁷¹ 9/10/13 Minaai Interview.

teams have realized the Project exceeded the budget.⁴⁷² The options at that point would have included requesting additional funds and redesigning the Project, either of which would have caused the Project to be delayed.

B. Roof Hatch

A roof hatch was added to the design because UHH wanted supports for roof safety and maintenance access.⁴⁷³ The roof hatch was added in MAI's last submitted plans.⁴⁷⁴ However, the hatch designed by MAI was too small under the county code and a permit could not be obtained.⁴⁷⁵ MAI claims the problems with the roof hatch were due to a difference of opinion between MAI and the Hawai'i County Building Department, as to the interpretation of the roof access requirements.⁴⁷⁶ However, the design, as submitted, was only nine square feet while the 2006 International Building Code ("IBC") 1009.11.1 requires an opening of at least sixteen square feet.⁴⁷⁷ Further, Kelly Wilson, the County Building Plans Examiner, believed the truss system was 24" on center which would force the hatch to be two feet by eight feet to meet the IBC requirement.⁴⁷⁸ Although MAI continued to disagree with the Hawai'i County Building Department, the problem with the structural framing of the roof hatch resulted in cost and scheduling impacts so MAI provided UH with options on either removing the hatch or making it into a skylight.⁴⁷⁹

⁴⁷² 9/9/13 Brian Minaai Interview.

⁴⁷³ 5/20/13 Maynard Young Interview.

⁴⁷⁴ Investigator's Report. Exhibit 188.

⁴⁷⁵ 5/22/13 Robert Yamada, SSFM, Interview.

⁴⁷⁶ 1/17/13 Email from Rodney Kanno of MAI to Miles Nagata, Maynard Young, and Robert Yamada. Exhibit 189.

⁴⁷⁷ Investigator's Report. Exhibit 188. 12/16/13 Kelly Wilson Interview; See IBC 1009.11.1; "In buildings without an occupied roof, access to the roof shall be permitted to be a roof hatch or trap door not less than 16 square feet (1.5 m²) in area and having a minimum dimension of 2 feet (610 mm)." Exhibit 189. 1/15/13 OAC Meeting Minutes, OCI p. 2982. Exhibit 184.

⁴⁷⁸ Investigator's Report. Exhibit 188. 12/16/13 Kelly Wilson Interview.

⁴⁷⁹ 1/17/13 Email from Rodney Kanno of MAI to Miles Nagata, Maynard Young, and Robert Yamada. Exhibit 189. 1/21/13 OAC Meeting, OCI pp. 2988-2989.; 1/29/13 OAC Meeting, OCI p. 2995; 2/5/13 OAC Meeting, OCI p. 3003; 3/12/13 OAC Meeting Minutes. Exhibit 184.

The designed roof hatch required the use of a ladder.⁴⁸⁰ A price quote on October 24, 2012, for safety rails and posts and access ladders totaled \$17,448.⁴⁸¹ In addition to the size problems, the required ladder added too much cost, so the entire roof hatch was eliminated in a joint decision by Minaai, Maynard Young, and Miles Nagata, and the hatch was eventually sealed.⁴⁸²

C. Ventilation

In a letter to OCI's Young dated April 30, 2013, MAI's Nakatsuka alleges the removal of three corridor windows (in the common wall between the dormitory wall and corridor) to save on construction costs would make the dormitory rooms "dark, humid, and uninhabitable."⁴⁸³ Nakatsuka further claims if at least an "entry window" is installed it would "satisfy the Building Inspector's requirement for ventilation for the lavatory in the Entry space...." Minaai does not remember seeing any windows in the drawings, and believed that regardless, such windows would need to be fire rated and present security and privacy issues.⁴⁸⁴

However, at the September 11, 2012 OAC meeting, ACK requested an update on the fire rated windows requirement.⁴⁸⁵ MAI stated it was working on a memo, "however, based on initial calculations (light and ventilation), no windows will be required for all units on corridor side."⁴⁸⁶ MAI left the decision up to UH but noted that UHH had previously requested a window in entryway of each unit.⁴⁸⁷

⁴⁸⁰ 5/20/13 Maynard Young Interview.

⁴⁸¹ 5/22/13 Miles Nagata Interview. 5/22/13 Robert Yamada, SSFM, Interview. 12/6/12 ACK Subcontract and Material Quotation for Roof Access Hatch, Exterior Safety Railing, Interior Safety Post and Roof Access Ladder. Exhibit 189.

⁴⁸² 5/20/13 Maynard Young Interview. 5/22/13 Miles Nagata Interview. 3/8/13 Email from Robert Yamada to Rodney Kanno, SSFM p. 3537. Exhibit 189.

⁴⁸³ 4/30/13 Letter to Maynard Young from Gary Nakatsuka. Exhibit 190.

⁴⁸⁴ 9/24/13 Minaai Interview.

⁴⁸⁵ 9/11/12 OAC Meeting, OCI p. 2887. Exhibit 184.

⁴⁸⁶ 9/11/12 OAC Meeting, OCI p. 2887. Exhibit 184.

⁴⁸⁷ 9/11/12 OAC Meeting, OCI p. 2887. Exhibit 184.

At some point the corridor windows were deleted. Additionally, in the February 29, 2012 50% SD VE Log, deletion of the exhaust in the bathrooms was cited as a possible cost saving opportunity.⁴⁸⁸ However, the option was rejected as an exhaust to an exterior side is required by code.⁴⁸⁹ Tod Tanimoto, County of Hawai'i Building Inspector, completed an inspection and his report list showed "Comments: 1. Building C-floor 1 approved; 2. Vent in lavatory required."⁴⁹⁰ Pursuant to Tanimoto, the 2006 IBC 1203.4.2 requires a dorm room's lavatory area, where the sink is located, to be vented to an "exterior side."⁴⁹¹ Further, a window from the lavatory area into the corridor, as suggested by MAI's Nakatsuka, would be insufficient as the hallway/corridor is not an "exterior side."^{492 493} Therefore, although MAI recommended against such action, the corridor windows were deleted and a recirculation fan was installed in the lavatories with the County's approval.⁴⁹⁴

D. Windows

MAI also complains about the use of Marlin brand exterior windows, saying they did not meet the 105 MPH wind requirement.

The window specifications for the Project initially called for Kawneer windows.⁴⁹⁵ In the July 11, 2012 VE Log, ACK suggested the use of Plygem Vinyl Windows which had no impact rating as the

⁴⁸⁸ 2/29/12 50% SD VE Log. Exhibit 153.

⁴⁸⁹ See 7/11/12 100% DD VE Log. Exhibit 162. See 5/8/13 Email from Tod Tanimoto to Matthew Kugiya, Christ Okamura. Exhibit 190.

⁴⁹⁰ Investigator's Report. Exhibit 188. Inspection Summary, SSFM p. 4285. Exhibit 190. 4/11/13 Email from Matthew Kugiya, ACK to MAI and SSFM. Exhibit 190.

⁴⁹¹ Investigator's Report. Exhibit 188. Attachment to 4/11/13 Email from Kugiya to MAI and SSFM. Exhibit 190. See Hawaii County Building Code § 5-71 containing amendments to adopted IBC 310.3.5. Exhibit 190.

⁴⁹² Investigator's Report. Exhibit 188. 5/8/13 Email from Tanimoto to Kugiya. Exhibit 190.

⁴⁹³ Investigator's Report. Exhibit 188. 5/7/13 - 5/10/13 Email chain. Exhibit 190. It is important to note that during the ACK interview conducted on September 27, 2013 KUGIYA related that if the windows were installed on the hallway/corridor side of the dorm rooms they would have to be fire rated, like the entry door. Due to the fire rating requirement, the windows would be more expensive (approximately \$800,000 increase) than standard windows and they would still not meet the code requirements for ventilation.

⁴⁹⁴ Investigator's Report. Exhibit 188. 6/25/13 Kaiemi Shimabuku and Gary Nakatsuka Interview.

⁴⁹⁵ 5/20/13 Maynard Young Interview; 4/22/13 Dennis Mitsunaga Testimony on HB114. Exhibit 191.

impact rating was not required by the building department.⁴⁹⁶ The window substitution would save \$266,928.⁴⁹⁷ This option was reviewed by MAI.⁴⁹⁸ At some point, MAI suggested Marlin windows as a substitute for Kawneer as long as the windows met the 105 MPH requirement was met.⁴⁹⁹ The windows were discussed at the August 14, 2012 OAC Meeting.⁵⁰⁰ MAI had spoken with Kelly Gomez of the County of Hawai'i Building Department who stated the Project was outside the impact zone but that the windows still needed to comply with the 105 Exposure B requirements.⁵⁰¹ Neil Erickson, also with the County of Hawai'i Building Department, was contacted for confirmation but he stated the resistant-impact rating did not apply to dormitory type projects.⁵⁰² MAI was to confirm whether the Marlin windows would meet the requirements, as the windows were affecting both the schedule and the budget.⁵⁰³

In the meantime, ACK asked OCI's Young about the ability to price other suppliers because the Marlin windows would cost approximately \$500,000.⁵⁰⁴ Young responded to MAI's Kaiemi Shimabuku and requested that "other manufacturers (e.g. Marcer, PlyGem) be included in the specifications to allow the general contractor to provide a value engineering cost in lieu of the Marlin specified. This is with the understanding that other manufacturers can meet the missile impact rating or MAI is able to obtain a waiver from the County."⁵⁰⁵ There is no evidence that MAI ever included other manufacturers in its specs as requested.

⁴⁹⁶ 7/11/12 100% DD VE Log. 8/29/12 50% CD VE Log. See also 6/16/12 Email from Wesley Tsutsui, ACK, to Michael Young and Kaiemi Shimabuku, RLB p. 2750. Exhibit 191.

⁴⁹⁷ 7/11/12 100% DD VE Log. Exhibit 191.

⁴⁹⁸ Revised 7/11/12 100% DD VE Log. Exhibit 191.

⁴⁹⁹ 5/20/13 Maynard Young Interview. See also 8/29/12 50% CD VE Log providing a VE option for vinyl windows in lieu of Marlin at Bedrooms and Student Life, although the exposure B requirement was not confirmed in stacked bedroom. These options were rejected in the 8/29/12 (Revised 9/19/12) 50% CD VE Log. Exhibit 191.

⁵⁰⁰ 8/14/12 OAC Meeting, OCI pp. 2865-2866. Exhibit 184.

⁵⁰¹ 8/14/12 OAC Meeting, OCI pp. 2865. Exhibit 184.

⁵⁰² 8/14/12 OAC Meeting, OCI pp. 2865-2866. Exhibit 184. 6/26/12 and 6/27/12 Emails between Robert Yamada and Aaron Fujii, SSFM 3421-3422. Exhibit 191.

⁵⁰³ 8/14/12 OAC Meeting, OCI pp. 2866. Exhibit 184.

⁵⁰⁴ 8/7/12 Email from Robert Yamada, SSFM to Maynard Young. Exhibit 191.

⁵⁰⁵ 8/8/12 Email from Maynard Young to Kaiemi Shimabuku, MAI. Exhibit 191.

On August 9, 2012, MAI's Shimabuku emailed OCI's Young with new window specifications based on the Marlin windows.⁵⁰⁶ After discussing the specifications with ACK, SSFM's Yamada concluded that the specifications called for the windows to be 1) commercial or heavy commercial grade, which would disqualify many VE options that MAI would categorize as residential, 2) aluminum windows, which prevented vinyl alternatives from being acceptable, 3) meeting the Expose C requirement, although MAI was previously stating Expose B (105 MPH), and 4) impact resistance, which would eliminate some alternatives.⁵⁰⁷ Further, products from Kawneer, Arcadia, EFCO, etc. were priced about \$1,000,000 which was significantly over budget resulting in Yamada's conclusion that Marlin to be the only option.⁵⁰⁸ Any window product other than Marlin would cause further delay as it would need to be reviewed by MAI to determine if it would meet the design criteria of the specifications.⁵⁰⁹

In the September 19, 2012 ACK Subcontract and Material Quotation for Glass, which included Aluminum windows, three of the quotes were based on Marlin windows, while two were for Arcadia windows.⁵¹⁰ The Marlin Windows were marked as per spec.⁵¹¹ Further, ACK's subcontractor breakdown for the Marlin Windows states that the bid qualifications include standard manufacturer specifications and meets or exceeds 105 MPH/Exposure B requirement.⁵¹²

⁵⁰⁶ 8/9/12 Email from Kaiemi Shimabuku to Maynard Young, SSFM p. 3870; Technical Specifications, Aluminum Windows, Section 08520, SSFM pp. 3388-3389. Exhibit 191.

⁵⁰⁷ 8/10/12 Email from Robert Yamada to Miles Nagata, Maynard Young, Brian Minaai, and Nicholas Bassis, SSFM pp. 3868-3869; Technical Specifications, Aluminum Windows, Section 08520, p. 3383, 3385. Exhibit 191.

⁵⁰⁸ 8/10/12 Email from Robert Yamada to Miles Nagata, Maynard Young, Brian Minaai, and Nicholas Bassis, SSFM pp. 3868-3869; Technical Specifications, Aluminum Windows, Section 08520, p. 3383, 3385; see also 9/18/12 OAC Meeting, OCI p. 2888, 2891. Exhibit 191.

⁵⁰⁹ 8/8/12 Email from Gary Nakatsuka to Robert Yamada and Maynard Young, SSFM pp. 3426-3429. Exhibit 191.

⁵¹⁰ 9/19/12 ACK Glass Subcontract and Material Quotation. There was also a quote using Andersen and a quote using Milgard, but these were noted as rejected for VE. Exhibit 191.

⁵¹¹ 9/19/12 ACK Glass Subcontract and Material Quotation. Exhibit 191.

⁵¹² ACK's spreadsheet - Marlin Windows and Doors by Subcontractor Honsador Lumber, attached to 9/19/12 Quotation. Exhibit 191.

In October, glass samples were delivered to MAI for its review.⁵¹³ Also submitted was Marlin Window's NFRC Size AA U-Values.⁵¹⁴ MAI responded to the submittal with No Exceptions Taken.⁵¹⁵

However, on November 23, 2012, MAI submitted a comparison letter comparing Marlin's testing documents to the Project specifications.⁵¹⁶ Specifically, MAI noted that the windows tested and approved for value engineering costs savings and ordered were "Commercial Windows" while the specifications designate "Heavy Commercial Windows."⁵¹⁷ "Although the Marlin Windows that were approved by the University and ordered by the General Contractor do not meet the current project specifications for Section 08520 Aluminum Windows, based on the available manufacturing and testing information provided by Marlin Windows, the Marlin Windows meets the current Building Code requirements (wind load of 105 mph and exposure B)."⁵¹⁸ MAI concluded that the windows should not impact UH's ability to obtain a Certificate of Occupancy.⁵¹⁹ In its letter, MAI also stated that it would cease attempting to obtain comparable test results from Marlin Windows and, per protocol, would update the specifications to reflect the products selected by UH and installed by ACK.⁵²⁰

Thereafter at the November 27, 2012 OAC meeting, MAI indicated the windows met all code requirements.⁵²¹ MAI also noted that the revised specs had been completed and would be sent out shortly.⁵²² As a result, a Subcontract and Material Quotation on November 29, 2012, was also only based on Marlin windows per specs.⁵²³

⁵¹³ SSFM Submittal, Aluminum Windows Glass Samples and Data, Spec Section 08520, Forwarded 10/10/12, SSFM, p. 4229. Exhibit 191.

⁵¹⁴ Marlin Window's NFRC Size AA U-Values, attached to SSFM p. 4230. Exhibit 191.

⁵¹⁵ Submittal Review, signed 10/16/12, attached to SSFM p. 4229. Exhibit 191.

⁵¹⁶ 11/23/12 MAI Letter, Revised, SSFM p. 4227. Exhibit 191.

⁵¹⁷ 11/23/12 MAI Letter, Revised, SSFM p. 4227. Exhibit 191.

⁵¹⁸ 11/23/12 MAI Letter, Revised, SSFM p. 4227, p. 3. Exhibit 191.

⁵¹⁹ 11/23/12 MAI Letter, Revised, SSFM p. 4227, p. 3. Exhibit 191.

⁵²⁰ 11/23/12 MAI Letter, Revised, SSFM p. 4227, p. 3. Exhibit 191.

⁵²¹ 11/27/12 OAC Meeting, p. 2946. Exhibit 184.

⁵²² 11/27/12 OAC Meeting, p. 2946. Exhibit 184.

⁵²³ 11/29/12 ACK Subcontract and Material Quotation for Glass. Exhibit 191.

The revised window specifications were sent out on January 11, 2013.⁵²⁴ While both the Marlin 1505 Series, Projected Window and the Marlin 3500 Series, Horizontal Sliding Window were specifically listed under the performance requirements, the Product section called for “Heavy Commercial” for both windows.⁵²⁵

In a following submittal, a marked up copy of the specifications was submitted, along with Quality Testing’s report on the Marlin 1505 Series Projected Window and Marlin Windows’ NFRC Size AA U-Values chart.⁵²⁶ The marked up copy of the specifications had crossed out the Heavy requirement for both windows.⁵²⁷ No action was taken by MAI as to this submittal.⁵²⁸

Then on April 30, 2013, Matthew Kugiya of ACK submitted to MAI the National Certified Testing Laboratories Wind Velocity Chart and Quality Testing’s report of the Marlin 3500 Horizontal Sliding Window.⁵²⁹ Quality Testing’s Marlin 1505 Projected Window report was also resubmitted.⁵³⁰ Brian Niitani submitted more documentation including a letter issued by Marlin Windows certifying that the Marlin 1505 and 3500 series satisfy the 105 mph wind speed and exposure B requirements and an email from Marlin Windows’ third party testing lab.⁵³¹ ACK completed an additional submittal on June 3, 2013, with a letter from Wiss, Janney, Elstner Associates, Inc. who completed a review and analysis of the glass thickness in the installed windows.⁵³² WJE concluded that the installed windows appear to

⁵²⁴ 1/11/13 Email from Rodney Kanno to Theodore Miller, Robert Yamada, and Nicholas Bassis, SSFM p. 4234.

⁵²⁵ Technical Specifications, Aluminum Windows, 08520-1, SSFM p. 3383. Exhibit 191.

⁵²⁶ Submittal 109 and attachments, SSFM p. 4230. Exhibit 191.

⁵²⁷ Submittal 109 and attachments, SSFM p. 4230. Exhibit 191.

⁵²⁸ Submittal 109 and attachments, specifically the 2/4/13 Shop Drawing Review, SSFM p. 4230. Exhibit 191.

⁵²⁹ 4/30/13 Submittal 109r01 from Matthew Kugiya to MAI, SSFM p. 4231. Exhibit 191.

⁵³⁰ 4/30/13 Submittal 109r01 from Matthew Kugiya to MAI, SSFM p. 4231. Exhibit 191.

⁵³¹ 5/24/13 Submittal 178 from Brian Niitani to MAI, Submittal Number 08520-005, SSFM p. 4232. Exhibit 191.

⁵³² 6/3/13 Submittal 181 from Matthew Kugiya with a 5/31/13 Letter from WJE to Brian Niitani, SSFM p. 4233. Exhibit 191.

meet the specified thickness requirements and have a design load of 86 psf and therefore, meet the specified project requirements.⁵³³

Rodney Kanno of MAI rejected all of ACK's submittals on June 18, 2013, for various reasons, some not even associated with the documentation for the corresponding submittal.⁵³⁴ However, Kanno's main reasoning for MAI's rejections were that the windows provided and installed did not meet the project specifications, MAI required documentation from the manufacturer or an independent testing laboratory establishing that the windows met the wind and exposure code requirements, and ACK needed to establish that the reduced glazing thickness of the installed windows, compared to the manufacturer's specifications, did not affect the AAMA Performance Grade Rating of the windows. Also by email, Gary Nakatsuka, MAI, informed Robert Yamada, SSFM, that MAI was not going to issue a revised specification to match the "lower-grade windows" because MAI had not yet received data on the window product and full code compliance.⁵³⁵

Finally, Robert Yamada of SSFM sent a letter to Maynard Young on September 3, 2013, approximately one month after the completion of the Project.⁵³⁶ Yamada recommended that UH-OCI accept the installed Marlin Windows as they do meet the Hawaii County Building Code.⁵³⁷ While the Marlin Commercial Windows used in the Project might not have met MAI's design specifications for the Heavy Commercial Window, the Marlin Commercial Window resulted in a savings of \$278,793 and was necessary to keep the Project under budget.⁵³⁸ Yamada also reiterates that MAI did originally approve of the windows as meeting the Building Code requirements and approved shop drawings

⁵³³ 6/3/13 Submittal 181 from Matthew Kugiya with a 5/31/13 Letter from WJE to Brian Niitani, SSFM p. 4233. Exhibit 191.

⁵³⁴ 6/18/13 Shop Drawing Reviews for submittals 109r01, 178, 181, SSFM p. 4231, 4232, and 4233. Exhibit 191.

⁵³⁵ 7/16/13 Email from Gary Nakatsuka to Robert Yamada. Exhibit 191.

⁵³⁶ 9/3/13 Letter from Robert Yamada, SSFM, to Maynard Young, UH-OCI, SSFM p. 4226. Exhibit 191.

⁵³⁷ 9/3/13 Letter from Robert Yamada, SSFM, to Maynard Young, UH-OCI, SSFM p. 4226. Exhibit 191.

⁵³⁸ 9/3/13 Letter from Robert Yamada, SSFM, to Maynard Young, UH-OCI, SSFM p. 4226. Exhibit 191.

allowing ACK to order the windows.⁵³⁹ Yamada concludes that SSFM and ACK relied on MAI's assurances that the alternate window design was acceptable, ACK provided substantial data to satisfy the Building Code requirements, and that it was MAI's over-specifications which resulted in the need to value engineer the windows because of cost.⁵⁴⁰

David Yamamoto, County of Hawai'i Building Department, Branch Chief, stated that the County was unaware of any problem with the windows until MAI raised the issue.⁵⁴¹ Yamamoto further stated that he had reviewed the information submitted by SSFM and ACK concerning the installed windows and, even if you extrapolate the test data submitted by the manufacturer on a different size window from what was installed, the determination of the impact resistance is inconclusive on whether it meets the 105 mph requirement.⁵⁴² Yamamoto forwarded his findings to his administration to address since the occupancy permit has already been issued and the dorms are in use.⁵⁴³ The Department defers to the County of Hawaii's determination on whether or not the installed windows meet its code requirements and to OCI to resolve the acceptance of the used windows.

Although MAI continues to complain about the use of the Marlin Windows, the evidence suggests that MAI gave its initial approval of the windows, believed the windows would meet the code requirements and agreed to revise its specifications in conformance. Further, when asked for more information on its allegations that the Project's windows that did not meet the code requirements and that OCI intentionally and fraudulently obtained the certificate of occupancy, neither Gary Nakatsuka, any other MAI personnel, nor MAI's attorney responded to provide any information supporting these serious allegations.

⁵³⁹ 9/3/13 Letter from Robert Yamada, SSFM, to Maynard Young, UH-OCI, SSFM p. 4226. Exhibit 191.

⁵⁴⁰ 9/3/13 Letter from Robert Yamada, SSFM, to Maynard Young, UH-OCI, SSFM p. 4226. Exhibit 191.

⁵⁴¹ Investigator's Report. Exhibit 188.

⁵⁴² Investigator's Report. Exhibit 188.

⁵⁴³ Investigator's Report. Exhibit 188.

E. Spray Painting

In a February 27, 2013 letter to then Chancellor Donald Straney, Mitsunaga alleges ACK “Blatantly” informed SSFM and MAI that it intended to spray paint both the interior and exterior of the buildings.⁵⁴⁴ Mitsunaga claims spray painting is against UH policy and is banned from use for “obvious quality, environmental and liability reasons.”⁵⁴⁵ Mitsunaga also states that the contract specifications prepared by MAI clearly forbid the use of spray painting and requires brush, rolled, or brush and rolled.⁵⁴⁶

The technical specifications stated that spray painting was not allowed on the Project.⁵⁴⁷ The specifications further instructed application of paints and coatings to be “by brush, roller, or other applicators according to manufacturer’s written instructions.”⁵⁴⁸ ACK received five painting bids.⁵⁴⁹ WE Painting’s bid, which was based on spray painting, was accepted.⁵⁵⁰ As part of RFI 121, a Spray Painting Plan was submitted to MAI requesting a change in its specs to allow for spray painting.⁵⁵¹ The Plan addressed the hazards of spray painting, including health concerns and possible outsprays, and how WE Painting would address such hazards.⁵⁵² MAI’s Rodney Kanno rejected the Plan saying the Plan was incomplete and unclear, that more information on overspraying remedies was needed, along with clarification on what areas would be spray vs. non spray painted and if the spray paint was for the interior only.⁵⁵³

⁵⁴⁴ 2/27/13 Letter to Chancellor Straney from Mitsunaga. Exhibit 192.

⁵⁴⁵ 2/27/12 Letter to Chancellor Straney from Mitsunaga. Exhibit 192.

⁵⁴⁶ 2/27/12 Letter to Chancellor Straney from Mitsunaga. Exhibit 192.

⁵⁴⁷ Technical Specifications, Painting. Exhibit 192.

⁵⁴⁸ Technical Specifications, Painting. Exhibit 192.

⁵⁴⁹ 12/5/12 ACK Subcontract and Material Quotation for Pavement Marking, Pedestrian Traffic Coating, Sealants, and Painting. Exhibit 192.

⁵⁵⁰ WE Painting, Inc. Bid, attached to ACK Subcontract and Material Quotation. Exhibit 192.

⁵⁵¹ SSFM RFI-121 and attached Submitted Spray Painting Plan. Exhibit 192.

⁵⁵² 2/14/13 Spray Painting Plan. Exhibit 192.

⁵⁵³ 2/14/13 Spray Painting Plan. Exhibit 192.

A Revised Spray Plan was then submitted.⁵⁵⁴ MAI's Nakatsuka took no action on the submittal but commented that MAI's contract specifications clearly prohibit airless spray and spray painting on the Project.⁵⁵⁵ Nakatsuka further stated that "MAI does not have the authority to change the University's standing policy about not allowing spray painting on all of their campuses. Please be informed that MAI will not review or approve your REVISED Spray Plan submittal."⁵⁵⁶

In a March 5, 2013 email to OCI's Young, SSFM's Yamada requested UH approve spray painting for the Project.⁵⁵⁷ Yamada specified that although the painting subcontractor qualified its bids as spray, the subcontractor was actually back brushing and rolling over the spray.⁵⁵⁸ In a February 2013 RFI, the no airless spray requirement in specification 09901 1.10 was removed.⁵⁵⁹

There is conflicting evidence as to whether or not spray painting was allowed on the UHH campus. OCI's Young believes the spray painting ban is not set in concrete.⁵⁶⁰ Additionally, in an email from MAI's Shimabuku to ACK's Young, Shimabuku states the following: "Per Tuesday's (10/23/2012) Construction OAC meeting, MAI received directive from SSFM to revise specs to allow for spray painting. MAI is not aware of any UHH requirement that does not allow for spray painting."⁵⁶¹ However, in the same email thread, SSFM's Yamada wrote, "UH has a standing policy about not allowing spray painting on all of their campuses. However, request for deviation from this policy can be reviewed if the contractor provides both a narrative on what their preventive measures will be to prevent overspray and damages to UH property and personal vehicle property"⁵⁶²

⁵⁵⁴ 2/26/13 Revised Spray Plan. Exhibit 192.

⁵⁵⁵ 3/1/13 Shop Drawing Review of Revised Spray Plan. Exhibit 192.

⁵⁵⁶ 3/1/13 Shop Drawing Review of Revised Spray Plan. Exhibit 192.

⁵⁵⁷ 3/5/13 Email from Robert Yamada to Maynard Young. Exhibit 192.

⁵⁵⁸ 3/19/13 Email from Robert Yamada to Miles Nagata and Maynard Young. Exhibit 192.

⁵⁵⁹ SSFM RFI-156, OCI p. 4681. Exhibit 192.

⁵⁶⁰ 5/17/12 Maynard Young Interview. Exhibit 192.

⁵⁶¹ Investigator's Report. Exhibit 188. 2/21/13 Email from Robert Yamada to Brian Niitani. Exhibit 192.

⁵⁶² Investigator's Report. Exhibit 188. 2/21/13 Email from Robert Yamada to Brian Niitani. Exhibit 192.

The aforementioned email thread shows a contradiction on whether or not a policy prohibiting spray application of paint exists. Subsequent interviews with UHH employees and OCI, further confirms it is unclear whether a policy prohibiting spray application of paint exists. None of the UH personnel could cite or provide a copy of such a policy.

Additionally, although MAI refused to alter its specifications to allow spray painting on the Project, MAI's specifications on other projects contained no prohibitions on spray painting, instead specifying testing for thickness requirements or for adhesion.⁵⁶³ Although MAI's design specifications may have called for brush and roll instead of spray painting, spray painting was a value engineered item that had been approved by OCI.⁵⁶⁴ In the absence of a UH policy or code banning spray painting, and due to the remote location of the Project there was little chance of overspray onto cars or other buildings, the use of spray painting was not egregious here. Furthermore, no significant spray painting related incidents were reported to the Investigative Team.

F. Corridor Paint⁵⁶⁵

In a subsequent letter from MAI's Nakatsuka sent to SSFM's Yamada, Nakatsuka again complains of spray application of paint but in this instance of the paint finish of the interior corridors.

According to ACK's Brian Niitani, the finish of the corridors was value engineered to a level 4 gypsum board finish (with level 5 being the highest). At a level 4 finish, the seams of the gypsum boards would be noticeable through the paint. Niitani further relayed that WE Painting tried different paint finishes (semi-gloss, matte, eggshell, additional primer) and none of the different finishes hid the seams of the gypsum boards.

⁵⁶³ 3/5/13 Email from Theodore Miller, SSFM to Miles Nagata, Maynard Young, Robert Yamada, Brian Hill, Alika Toledo and Nicholas Bassis. Exhibit 192.

⁵⁶⁴ 5/22/13 Robert Yamada, SSFM, Interview.

⁵⁶⁵ Investigator's Report. Exhibit 188.

The end result was that although the specifications only required a level 4 finish, as a matter of pride, contractor WE Painting finished the corridors to a level 5 at no additional cost to the Project. Niitani estimated the increase in costs were between \$3,000-\$4,000 and the corridors were finished to the highest level.

G. Moisture Test

In his written testimony regarding House Bill 114, Mitsunaga states, “MAI has yet to see any moisture content reports from SSFM to verify that the wood studs in the dormitory wings were sufficiently dried before the gyp board walls were installed”⁵⁶⁶ The issue was also raised in a subsequent letter dated May 16, 2013 from MAI’s Nakatsuka SSFM’s Yamada.⁵⁶⁷

SSFM issued the Moisture Readings Report to Maynard Young on May 15, 2013.⁵⁶⁸ Nicholas Bassis, Project Coordinator with SSFM, emailed the Report to MAI on the same day.⁵⁶⁹ All moisture readings were within the required specifications.⁵⁷⁰

H. Hollow Core Doors

In his February 27, 2013 letter to Chancellor Straney, Mitsunaga complains of the change to the interior doors from solid core to hollow core.⁵⁷¹ Mitsunaga states, “[a]lthough hollow core doors are normally used in the interior of homes, we felt that solid core doors, although more costly initially, would be less susceptible to damage by the students. Minaai overrode our professional judgment and allowed the downgrade.”⁵⁷²

⁵⁶⁶ Investigator’s Report. Exhibit 188. 4/22/13 Mitsunaga Testimony on HB114. Exhibit 193.

⁵⁶⁷ 5/16/13 Letter from Nakatsuka to Robert Yamada. Exhibit 193.

⁵⁶⁸ 5/15/13 Moisture Readings Report Letter from SSFM to Maynard Young. Exhibit 193.

⁵⁶⁹ 5/15/13 Email from Nicholas Bassis, SSFM, to MAI. Exhibit 193.

⁵⁷⁰ 5/15/13 Moisture Readings Report Letter from SSFM to Maynard Young; 5/20/13 Maynard Young Interview. Exhibit 193.

⁵⁷¹ 2/27/13 Letter from Mitsunaga to Chancellor Straney. Exhibit 194.

⁵⁷² 2/27/13 Letter from Mitsunaga to Chancellor Straney. Exhibit 194.

Due to constraints on the budget, the proposal for hollow core doors instead of solid core doors arose was introduced as a proposed VE item.⁵⁷³ UHH Director of University Housing Miles Nagata agreed a solid core door has its advantages, but is costly and not required for the Project.⁵⁷⁴ The VE log estimated a \$53,227 savings by using hollow core doors.⁵⁷⁵ Subcontractor Timberland Hawaii's original proposal for solid core doors was \$198,139, and the VE to use hollow core doors reduced the cost to \$144,912.⁵⁷⁶

The use of hollow core doors for the shower and toilet rooms was a VE item discussed at a July 12, 2012 meeting with UHH and OCI, but Miles Nagata rejected the item.⁵⁷⁷ ACK's Niitani stated the decision to use hollow core doors was the result of back and forth discussions with MAI.⁵⁷⁸ After the design was changed from solid core to hollow core doors, MAI changed the specifications in the design and selected a particular model of "Institutional" doors.⁵⁷⁹ However, the pocket door model selected by MAI was an older model door that was no longer in production.⁵⁸⁰ As such, ACK recommended the newer model of "Institutional" brand hollow core doors to MAI, but MAI insisted that MAI's specifications be followed.⁵⁸¹ The back and forth discussion with MAI further delayed ordering and installing the pocket doors for the bathroom and shower in the units.⁵⁸²

As a result of the delay and the accelerated construction schedule, Timberland Hawaii could not supply the "Institutional" brand hollow core doors within the available time frame, and so provided

⁵⁷³ 5/20/13 Maynard Young Interview.

⁵⁷⁴ 5/22/13 Miles Nagata Interview.

⁵⁷⁵ 8/29/12 (Revised 9/19/12) 50% CD VE Log; ACK's 9/19/12 Subcontract and Material Quotation for Doors/Frames. Exhibit 194.

⁵⁷⁶ Timberland Bid. Exhibit 194.

⁵⁷⁷ 7/14/12 Email from Kaiemi Shimabuku to Michael Young, RLB p. 5455. Exhibit 194.

⁵⁷⁸ Investigator's Report. Exhibit 188. Brian Niitani, ACK, Interview.

⁵⁷⁹ Investigator's Report. Exhibit 188. Brian Niitani, ACK, Interview; 10/19/12 Email from Lynn Spangler of Timberland Hawaii to Chase Kutara, Michael Young, and Brian Minaai stating the revised bid included upgraded institutional hollow core doors in lieu of standard hollow core doors. Exhibit 194.

⁵⁸⁰ Investigator's Report. Exhibit 188. Brian Niitani, ACK Interview; 2/27/13 Shop Drawing Review, SSFM pp. 3454-3456. Exhibit 194.

⁵⁸¹ Brian Niitani, ACK Interview; 2/27/13 Shop Drawing Review. SSFM pp. 3454-3456. Exhibit 194.

⁵⁸² Investigator's Report. Exhibit 188. Brian Niitani, ACK Interview.

solid core doors instead at no additional cost to the Project.⁵⁸³ The decision made by Timberland Hawaii was purely to assist UH in meeting its accelerated construction schedule and was unrelated to Mitsunaga's complaint.⁵⁸⁴

Minaai approved the use of hollow core doors as a VE cost item.⁵⁸⁵ ACK's Young stated the cost reduction to be approximately \$21,000, and the savings were returned to the Project budget for use on other cost items.⁵⁸⁶ Young also stated the budget initially included solid core doors, so technically they could have gone to the budget for the money for solid core doors.⁵⁸⁷ However, based on the accelerated schedule, the money was likely already allocated to another project expense.⁵⁸⁸

The evidence indicates the actions and decision to approve the substitution of hollow core doors instead of solid core doors does not amount to any criminal or unethical behavior.

I. Tile Design

In his May 16, 2013 letter to SSFM's Yamada, MAI's Nakatsuka claimed SSFM endorsed ACK's overpricing for the installation of floor tiles.⁵⁸⁹

Relying on the original MAI design specifications, ACK sent requests for bids to contractors and received three quotes.⁵⁹⁰ Kahului Carpet & Drapery, Inc. had the lowest quote at \$241,837.⁵⁹¹ The original design was a checker board pattern, but both Miles Nagata and Luoluo Hong preferred a

⁵⁸³ Investigator's Report. Exhibit 188. 3/18/13 Timberland Hawai'i transmittal message; 3/19/13 Email from Maynard Young to Robert Yamada approving the use of solid core doors if no additional costs to UH. Exhibit 194.

⁵⁸⁴ Investigator's Report. Exhibit 188. Brian Niitani, ACK Interview.

⁵⁸⁵ 5/17/13 Maynard Young Interview.

⁵⁸⁶ Investigator's Report. Exhibit 188. Michael Young Interview.

⁵⁸⁷ Investigator's Report. Exhibit 188. 9/27/13 Michael Young, ACK Interview.

⁵⁸⁸ Investigator's Report. Exhibit 188. 9/27/13 Michael Young, ACK Interview.

⁵⁸⁹ 5/16/13 Letter from Nakatsuka to Yamada. Exhibit 195.

⁵⁹⁰ Investigator's Report. Exhibit 188. 11/29/12 ACK Subcontract and Material Quotation, Resilient Flooring and Carpet. Exhibit 195.

⁵⁹¹ Investigator's Report. Exhibit 188. 11/29/12 ACK Subcontract and Material Quotation, Resilient Flooring and Carpet; Kahului Carpet & Drapery Products, Inc. Quote. Exhibit 195.

diamond pattern in the dormitory rooms.⁵⁹² Due to this preference, ACK's Kugiya contacted Kahului Carpet & Drapery, Inc. to request the estimated cost for the change.⁵⁹³

Raymond Anguay, Senior Estimator at Kahului Carpet & Drapery Products, Inc. gave Kugiya a rough estimate of an additional \$126,396 (52%) increase in the initial bid for the diamond pattern.⁵⁹⁴ Anguay explained the original checkerboard pattern takes no more time than a single color.⁵⁹⁵ However "the new pattern would have to be laid out and every installer would have the plan to follow. We also have to offset each room to match the full size tile against each room wall."⁵⁹⁶ Additionally, laying a diamond pattern while meeting the schedule would require Kahului Carpet & Drapery Products to bring in more men from Maui, where the company is based.⁵⁹⁷

The change in pattern would result in a dramatic increase in cost. However, at the time the design change was being requested, all cost increases due to based on aesthetic changes already were being automatically disproved, and the change to the floor tile design was not explored further.⁵⁹⁸ On the November 1, 2012 100% CD Estimate Spreadsheet, cost for Resilient Flooring and Carpet has a committed price of \$241,837, the same as the accepted quote from Kahului Carpet for the original checkerboard pattern.⁵⁹⁹ There is no evidence that the floor tiles were overpriced or that SSFM endorsed any overpricing of the floor tiles.

⁵⁹² Investigator's Report. Exhibit 188. 4/18/13 Email from Miles Nagata to Rodney Kanno and Kaiemi Shimabuku.

⁵⁹³ Investigator's Report. Exhibit 188.

⁵⁹⁴ Investigator's Report. Exhibit 188. 4/22/13 Emails between Rodney Kanno, MAI, and Robert Yamada, SSFM, and others.

⁵⁹⁵ Investigator's Report. Exhibit 188. 4/22/13 Email from Raymond Anguay to Matthew Kugiya. Exhibit 195.

⁵⁹⁶ Investigator's Report. Exhibit 188. 4/22/13 Email from Raymond Anguay to Matthew Kugiya. Exhibit 195.

⁵⁹⁷ Investigator's Report. Exhibit 188.

⁵⁹⁸ Investigator's Report. Exhibit 188.

⁵⁹⁹ 11/1/12 100% CD Estimate Spreadsheet. Exhibit 195.

J. Landscaping

1. Landscape and Hardscape

During an interview, MAI's Shimabuku and Nakatsuka claimed the landscaping was changed to grass only because of the VE and that trees are required in parking lots.⁶⁰⁰

Landscaping was included in the original budget and in the conceptual estimate.⁶⁰¹ The initial landscaping estimate was \$200,000, but on May 7, 2012, Minaai emailed ACK and RLB asking them to increase the landscaping allowance to \$750,000.⁶⁰² The increase was reflected in the Executive Summary of Changes.⁶⁰³ However, on the August 29, 2012 50% CD estimate, based on subcontractor quotes, the landscaping budget had been reduced to \$500,000.⁶⁰⁴ On the second August 29, 2012 (9/13/12 Revised) 50% CD estimate, the landscaping budget had been reduced to \$100,000.⁶⁰⁵ The August 29, 2012 (Revised 9/19/12) 50% CD VE Log shows the acceptance of the option to reduce the scope of landscaping to only grass at a target budget of \$100,000.⁶⁰⁶ The deletion of all courtyard hardscape was also an approved VE item.⁶⁰⁷

ACK requested landscaping bids and received two responses.⁶⁰⁸ Resort Management Group, LLC ("RMG") had the lowest bid of \$192,512.16⁶⁰⁹ plus a \$27,080 rain garden allowance for a total of \$219,592.⁶¹⁰ In the 100% CD estimate, landscaping became a committed cost of \$219,592.⁶¹¹ Robert

⁶⁰⁰ 6/25/13 Kaiemi Shimabuku and Gary Nakatsuka Interview.

⁶⁰¹ 6/25/13 Kaiemi Shimabuku and Gary Nakatsuka Interview; 1/30/12 Conceptual Estimate Spreadsheet. Exhibit 196.

⁶⁰² 5/7/12 Email from Minaai to Michael Young and Kevin Mitchell. Exhibit 196.

⁶⁰³ 5/8/12 Executive Summary of Changes for 100% SD. Exhibit 196.

⁶⁰⁴ 9/29/12 50% CD Estimate Spreadsheet; 8/29/12 Executive Summary of Changes for 50% CD Estimate. Exhibit 196.

⁶⁰⁵ 8/29/12 (9/13/12 Revised) 50% CD Estimate Spreadsheet; 8/29/12 (9/13/12 Revised) Executive Summary of Changes for 50% CD. Exhibit 196.

⁶⁰⁶ 8/29/12 (Revised 9/19/12) 50% CD VE Log. Exhibit 196.

⁶⁰⁷ 8/29/12 (Revised 9/19/12) 50% CD Estimate Spreadsheet, p. 5. Exhibit 196.

⁶⁰⁸ 11/29/12 ACK's Subcontract and Material Quotation for Landscaping. Exhibit 196.

⁶⁰⁹ \$192,512.16 is a result of \$17,866.89 in VE savings when the top soil was decreased from 6" to 4" and the Kou tree was decreased from 25 gallon to 15 gallon. Exhibit 196.

⁶¹⁰ 11/29/12 ACK's Subcontract and Material Quotation for Landscaping; RMG's Proposal. Exhibit 196.

⁶¹¹ 11/1/12 100% CD Estimate Spreadsheet. Exhibit 196.

Yamada confirms that the landscape was reduced to grass with some trees around the parking lot.⁶¹² Further, a photo of the Project showing a section of the parking lot does show at least one tree.⁶¹³ However, the Department has no further evidence as to the exact landscaping items received or placed on the Project.

Section 25-4-59 of the Hawai‘i County Zoning Code’s General Development Regulations for Off Street Parking and Loading requires the following: “parking lots with more than twelve parking stalls shall provide one canopy form tree with a minimum of two-inch caliper for every twelve parking stalls or major fraction thereof and having a planting area or tree well no less than thirty square feet in area.”⁶¹⁴ The code further requires that trees be evenly distributed to provide shade throughout the parking lot.⁶¹⁵ “Xeriscape and native Hawaiian plant species shall be encouraged.”⁶¹⁶

However, the Hawai‘i County Zoning District Regulations for Multiple-Family Residential Districts, which provides for medium and high density residential uses, require landscaping be provided on a minimum of 20% of the total land area of any building site.⁶¹⁷ Parking areas are not included within the area required for landscaping.⁶¹⁸

Based on a review of these codes, it appears the code requiring trees in parking lots does not apply to the Project, and if it does, the evidence shows the Project could be in compliance with such requirement. However, the Department defers to the County of Hawai‘i’s determination on whether or not the Project met the required landscaping requirement and to OCI for its acceptance of the VED landscaping.

⁶¹² 2/13/14 Email from Robert Yamada. Exhibit 196.

⁶¹³ Investigator’s Report attachment Photo 15: Depicting courtyard between Buildings B and C.

⁶¹⁴ Hawaii County Code § 25-4-59.3(a). Exhibit 196.

⁶¹⁵ Hawaii County Code § 25-4-59.3(a). Exhibit 196.

⁶¹⁶ Hawaii County Code § 25-4-59.3(d). Exhibit 196.

⁶¹⁷ Hawaii County Code §§ 25-5-30 to 25-5-37, 25-5-40 to 25-5-47. Exhibit 196.

⁶¹⁸ Hawaii County Code §§ 25-5-37, 25-5-47. Exhibit 196.

2. Security Fencing

A November 1, 2012 revised 100% CD Executive Summary of Changes includes an entry for metal fencing (\$94,000).⁶¹⁹ The 100% CD VE Log also includes a proposal to delete the decorative metal fence and gates for a savings of \$158,700; however, this option was later rejected in the revised 100% CD VE Log.⁶²⁰

Around this time, ACK was also seeking bids for FF&E.⁶²¹ Minaai claims the budget could cover either furniture or security fencing and UHH was given the options.⁶²² UHH admitted fencing can be added later.⁶²³ Although a security fence would have been a beneficial addition, the removal of a security fence from the project was not criminal, especially considering the constraints on the budget.

K. LEED REQUIREMENTS

Hawaii Revised Statute § 196-9 states the following:

- (a) Each agency is directed to implement, to the extent possible, the following goals during planning and budget preparation and program implementation.
- (b) With regard to buildings and facilities, each agency shall:
 - (1) Design and construct buildings meeting the Leadership in Energy and Environmental Design silver or two green globes rating system or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system, except when the guideline, standard, or system interferes or conflicts with the use of the building or facility as an emergency shelter.⁶²⁴

Additionally, a construction project incorporating energy and environmental design building standards is provided priority permit processing.⁶²⁵

The target LEED qualification for the Project was silver.⁶²⁶ The LEED certification requirement was later deleted by Minaai for lack of funding, specifically, the cost of monitoring, but

⁶¹⁹ 11/1/12 100% CD Executive Summary of Changes. Exhibit 196.

⁶²⁰ 11/1/12 100% CD VE Log; 11/1/12 Revised 100% CD VE Log. Exhibit 196.

⁶²¹ 12/5/12 ACK's Subcontract and Material Quotation for Furniture, Fixtures and Equipment. Exhibit 196.

⁶²² 9/10/13 Minaai Interview; see also 11/5/13 Maynard Young Interview.

⁶²³ 8/28/13 Miles Nagata Interview; see also 11/5/13 Maynard Young Interview.

⁶²⁴ HRS § 196-9(a)-(b)(1). Exhibit 197.

⁶²⁵ HRS § 46-19.6(a). Exhibit 197.

⁶²⁶ 8/27/12 OAC Meeting, p. 2861. Exhibit 184.

OCI claims LEED procedures were to be followed as much as possible.⁶²⁷ OCI also claims that LEED certification is a goal (to the extent possible), but is not a requirement.

Conversely, MAI claims that it was fully prepared to attempt to obtain LEED certification but for the fact that OCI determined that it could not be achieved.⁶²⁸ MAI also plans to return remaining funds paid under its contract, if any, that were earmarked for LEED certification.⁶²⁹

Further, while priority permit processing would have been beneficial to the already full timeline, there is no evidence that the Project timeline suffered as a result of a delay in receiving any permits. Finally, there is no evidence of criminal activity involving LEED certification occurring during the Project.

IV. CONCLUSION

Based on a review of the allegations, documents supplied to the AG, and interviews, the investigation has not discovered any issues regarding contractor selection, design changes and value engineering that violate any law or amount to improper behavior. Virtually all of the design, construction and value engineering changes were made to meet the Project's goal of constructing a 300 bed facility by August 2013 and keeping the Project's costs within the budget. Based on the information the AG has been able to discover and review during the course of this investigation, the approval of the changes by Minaai and OCI appear to have been reasonable under the circumstances. The allegations in this matter appear to be based on the personal preferences and opinions of the alleging parties. Without compelling supporting evidence they remain unfounded and are not statements of factual criminal or unethical behavior.

⁶²⁷ 9/4/12 OAC Meeting, p. 2882. Exhibit 184. 5/17/13 Maynard Young Interview; 9/24/13 Minaai Interview; 11/5/13 Maynard Young Interview. The consensus was that without air conditioning, the ability to establish the necessary requirements to obtain LEED status would have been difficult.

⁶²⁸ MAI Interview 11/18/13.

⁶²⁹ MAI Interview 11/18/13.

It does appear, however, that greater oversight of the Project by OCI and other University departments should have been exercised. Among other things, greater importance should have been given in processing contracts, tailoring contract language to meet the time frames for a Design-Assist Project, and planning the Project to give all parties involved more time to meet the opening deadline.

Furthermore, it appears that the design-assist process did not work the way it was ideally designed in that on several occasions design changes were dictated to MAI without MAI's involvement in the cost saving value engineering. Mitsunaga's and MAI's allegations understandably appear to arise from resentment and hard feelings experienced as their original designs transformed into a project that was considerably different from what they envisioned, especially since it did not have much substantive input into the ultimate value engineering changes. Nevertheless, the University, through its OCI, was within its authority to exercise and make discretionary business decisions involving the design and construction of the Project.

TIMELINE OF SIGNIFICANT EVENTS

The significant events as they relate to the Project and the allegations of misconduct.

Project Funding

- February 2009 BOR authorizes the issuance and sale of \$100 million Series 2009A Revenue Bonds.
- Supplemental Resolution is issued with the Revenue Bonds and allocates \$20 million to University of Hawai‘i, Hilo (“UHH”) for acquisition of apartment complexes for student housing purposes.
- January 2010 \$3 million of the \$20 million of the Revenue Bonds allocated to UHH are reallocated to a College of Pharmacy project.
- The remaining \$17 million of the Revenue Bonds are reallocated from the acquisition of apartments for students, to the design and construction of new or renovated student housing facilities and to the acquisition of land and/or facilities that could be converted to or used for student housing.
- October 2011 University of Hawai‘i (“UH”) Board of Regents (“BOR”) unanimously approves a request to designate the University Village, Student Housing Project, Phase I, as a project to be funded by the Revenue Bonds.
- November 10, 2011 UH Associate Vice President for Capital Improvements Brian Minaai (“Minaai”) submits a memorandum to Governor Neil Abercrombie, through Kalbert K. Young, Director of Budget and Finance, requesting the release of \$16,000,000 in General Obligation Bonds funds approved by the Legislature in Act 164, Part IV, § 36(G)(93), Session Laws of Hawaii 2011, for Student Housing Developments, Phase I, at UHH.

Procurement Policies

- May 6, 2010 Governor Abercrombie signs into law, Act 82, Session Laws of Hawaii (“SLH”) 2010, which exempts UH from most of the Hawaii Public Procurement Code, Hawaii Revised Statutes (“HRS”) chapter 103D, and authorizes the BOR to develop internal policies and procedures for the procurement of goods, services, and construction (except for design professional services furnished by licensees under HRS chapter 464).
- June 2010 UH develops its Interim Procurement Policies (“IPP”) which is approved by the BOR.
- July 1, 2010 Act 82, SLH 2010, takes effect. IPP takes effect.

July 1, 2012 Act 82, SLH 2010, sunsets (automatically repealed), requiring UH to again comply with requirements of the Hawaii Public Procurement Code.

Site Development and Project Contracts

January 2011- The UH Office of Capital Improvements (“OCI”), following IPP, selects Wesley R. Segawa & Associates, Inc. (“Segawa”) to devise a site development plan for the 33-acre lot at UHH, known as the University Village Parcel.

July 2011 Segawa submits a fee proposal and negotiations begin.

OCI posts a notice soliciting statements of qualifications from professional firms and individuals interested in providing UH with any professional service for the upcoming fiscal year.

OCI begins seeking a design consultant.

August 3, 2011 OCI enters into a contract with Segawa for site design services and issues Segawa a Notice to Proceed (“NTP”).

August 2011 OCI selection committee interviews design firms, including Mitsunaga & Associates, Inc. (“MAI”), to provide design services for the Project. MAI, with its sub-consultant, the DLR Group, is the top ranked firm.

November 22, 2011 OCI determines the Project is to be completed under the IPP’s “Design Assist” process. OCI posts on its website, a request for letters of interest for pre-construction and construction services.

January 2012 OCI selection committee completes its review of qualified candidates interested in providing pre-construction and construction services.

March 2012 OCI awards a contract to ACK to provide pre-construction services and construction services.

March 8, 2012 MAI submits its initial fee proposal.

April 2012 OCI evaluates and selects SSFM to provide project and construction management services.

OCI evaluates and selects Rider Levett Bucknall (“RLB”) to provide cost estimations and analyses regarding the reasonableness of costs and prices related to the Project.

MAI’s sub-consultant, the DLR Group, leaves the Project.

May 2012	UH and ACK execute a Pre-construction services Contract.
	UH and ACK execute a Construction Contract.
June 15, 2012	An advance NTP is sent to ACK.
June 22, 2012	Groundbreaking ceremony is held.
June 28, 2012	Comptroller certifies funds are available for the ACK's Pre-construction Contract.
June 29, 2012	Comptroller certifies funds for ACK's Construction Contract.
August 21, 2012	ACK is sent a copy of the executed Pre-construction Contract.
September 10, 2012	ACK is sent a copy of the executed Construction Contract.
September 18, 2012	UH and SSFM execute a Project and Construction Management Contract.
	An NTP is sent to SSFM.
September 19, 2012	UH and MAI execute a Design Contract.
	An NTP is sent to MAI.
September 24, 2012	MAI and Segawa execute a sub-consultant agreement.
October 10, 2012	UH and RLB execute a Cost or Price Reasonableness Contract.
	An NTP is sent to RLB.

Project Estimates and Value Engineering

January 30, 2012	ACK's first conceptual estimate is for a total of \$27,314,915.
	The value engineering ("VE") log presents options to replace concrete masonry with wood.
February 29, 2012	The #1 50% Schematic Design ("SD") estimate is \$27,079,540.
	The VE log suggests reduction of the parking stall ratio, reduction of the space for residential life, composition shingle roof, reduction of the number of elevators, and reduction of the width of corridors.
March 13, 2012	The #2 50% SD estimate is \$26,904,266.

May 8, 2012	The #1 100% SD estimate is \$26,883,948.
May 29, 2012	Minaai sends an email to Michael Young of ACK and OCI's Maynard Young and Carroll Takahashi requesting a guaranteed maximum of \$28,105,828 for the Construction Contract price.
	The #2 100% SD estimate is \$26,939,630.
July 11, 2012	The #1 100% Design Drawing ("DD") estimate is \$27,860,322.
	The VE log suggests the use of Plygem Vinyl Windows, a deletion of exhaust vents in bathrooms, and a reduction of landscape lighting.
July 20, 2012	The #2 100% DD estimate is \$27,860,322.
August 29, 2012	The #1 50% Construction Drawing ("CD") estimate is \$29,660,978.
September 13, 2012	The #2 50% CD estimate is \$27,953,435.
	The accepted VE is \$351,019.
September 26, 2012	RLB reviews the 50% CD estimate #2.
October 26, 2012	The revised 50% CD and "total committed value" is \$20,956,874.
November 1, 2012	The # 1 100% CD estimate is \$28,354,814.00, and a revised 100% CD estimate is \$28,258,618.
December 27, 2012	RLB reviews and recommends for approval, ACK's pricing of the 100% CD estimate.
January 2013	RLB reviews and recommends for approval, ACK's pricing of the revised 100% CD estimate.
Project Completed	August 9, 2013.