

A pre-hearing conference was held on March 3, 2014. BISM was represented by Craig T. Kugisaki, Esq., and the County was represented by Amy G. Self, Esq.

On March 4, 2014, HMP, Inc., dba Business Services Hawai'i ("HMP") filed a Motion to Intervene. By Order filed March 6, 2014, the HMP Motion to Intervene was granted.

Motions in this case were scheduled to be heard on March 11, 2014. The evidentiary hearing in the matter, if necessary, was scheduled to be held March 13, 2014.

On March 5, 2014, BISM filed its Motion for Summary Judgment. On March 7, 2014, BISM filed its Supplemental Memorandum in support of its previously filed Motion for Summary Judgment.

On March 10, 2014, HMP filed its Memorandum in Opposition to BISM's Motion for Summary Judgment as well as HMP's Cross Motion for Summary Judgment.

On March 10, 2014, BISM filed its Reply Memorandum Supporting Its Motion for Summary Judgment. On that day, BISM also filed its Memorandum in Opposition to HMP's Cross Motion for Summary Judgment.

On March 10, 2014, the County filed its Opposition to BISM's Motion.

On March 11, 2014, the County filed its Response to BISM's RFAH.

The motions came on for hearing on March 11, 2014. BISM was represented by Craig T. Kugisaki, Esq., and the County was represented by Amy G. Self, Esq. Ted H.S. Hong, Esq., represented HMP and participated in the hearing by telephone.

Due to unforeseen emergency scheduling problems, the matter was reassigned to Hearings Officer David H. Karlen, who heard the motions on March 11, 2014. At the conclusion of oral argument on the motions, they were taken under advisement. Further, the evidentiary hearing, if necessary, was continued to March 17, 2014.

On March 13, 2014, the undersigned Hearings Officer notified the parties by facsimile and e-mail that the conclusion had been reached that it was “important that we have an evidentiary hearing in this case.”

The evidentiary hearing was held on March 17, 2014. Craig T. Kugisaki, Esq., represented BISM. Also present on behalf of BISM were James Nutter and Michael Allen. Amy G. Self, Esq. represented the County. Also present on behalf of the County was Greg Goodale. Ted H.S. Hong, Esq., represented HPM. Also present on behalf of HPM was Margaret Pahio and Shon Pahio.

BISM called James Nutter, Michael Allen, and Steven Chang (pursuant to subpoena) as witnesses. Greg Goodale testified on behalf of the County. Nick Garofalo and Shon Pahio testified on behalf of HPM.

BISM’s Exhibits 1, 2, 2-A through 2-H, 3, 3I through 3K, and 4 through 7 were admitted by stipulation.

The County’s Exhibits 1 through 25, and 27 were admitted by stipulation.

Just prior to the evidentiary hearing, BISM filed a motion in limine concerning the County’s proposed Exhibits 28 and 29. The Hearings Officer reserved decision on that motion until there was an attempt to introduce those exhibits into evidence during the course of the hearing.

The Hearings Officer eventually allowed the County’s Exhibit 26 into evidence over the objections of BISM.

In addition, over the objections of BISM, the Hearings Officer allowed the County’s Exhibit 28 into evidence, but only for the limited purpose of showing that on November 11, 2013, HMP applied for a modification of its Solid Waste Management Permit.

At the conclusion of the evidentiary hearing, the matter was taken under advisement. The parties were afforded the opportunity to file closing briefs, and all parties did file closing briefs on March 24, 2014.

II. FINDINGS OF FACT

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

1. On or about October 24, 2013, the County issued Invitation for Bid No. 2997, Price Agreement for Removal, Hauling, Processing and Recycling of Mixed Scrap Metal, Department of Environmental Management, County of Hawaii (“IFB”).

2. The IFB sought a contractor to remove mixed scrap metal that the County had accumulated at its two landfill sites—in Hilo and in West Hawaii—between March 27, 2013, and August 30, 2013, when the County did not have a recycling contractor for mixed scrap metal.

3. Pertinent specifications of the IFB include the following sections:

1.0 DEFINITIONS

1.1 **Mixed Scrap Metal.** May include but not be limited to: Ferrous and nonferrous metals such as tin roofing material, fencing, wrought iron. White goods such as washing machines, dryers, water heaters, stoves/ovens, refrigerators and freezers of which may contain CFC refrigerants and spent propane tanks.

3.0 QUALIFICATIONS (in relevant part)

All bidders and sub-contractors bidding on the mixed scrap metal shall have a minimum of two (2) years experience in metal recovery, recycling and scrap yard operation or the like.

4.0 REQUIRED INFORMATION

4.1 The following items shall be submitted to the Solid Waste Division, Department of Environmental Management, County of Hawai'i as specified:

* * *

d. **SUBCONTRACTORS.** Bidders who intend to utilize their subcontractors from the start of the contract period shall include with their bid a list of subcontractors to be used along with a copy of the subcontractor's applicable permits.

* * *

f. **PERMITTED SCRAP METAL FACILITY.** All bidders shall include with their bid the name and location of the permitted scrap metal facility intended to be used to carry out the terms of this contract. This facility must be permitted by the Hawai'i State Department of Health (DOH) with a solid waste management permit to operate a metals processing and recycling business that processes, stores and ships white goods, metals and associated items. A copy of the solid waste management permit shall be submitted with the bid.

5.0 GENERAL REQUIREMENTS OF THE CONTRACTOR

5.2 The Contractor shall submit an operations plan with its bid submittal. The County may reject the bid or require modifications to the plan if the operations plan is incomplete or is deemed impractical or otherwise contrary to the best interests of the County as determined in the sole discretion of the Director of the Department of Environmental Management. At a minimum, the plan shall include:

1. The number and descriptive function of each piece of equipment or vehicles for the operation.
2. The number of employees on site intended for the operation.
3. General description of the means of removal of the mixed scrap metal from the County sites.
4. Indicate whether the removal of Freon will be on County property or off-site.
5. If awarded both locations, collection and hauling operations must commence at the south Hilo Sanitary Landfill first.

5.4 The Contractor shall accept and process all items listed herein. All materials collected and hauled away by the Contractor shall become its property and responsibility. The Contractor is not responsible to collect and haul away any trash (normal garbage, green waste and tires) that may be found at the [sic] either of County mixed scrap metal locations.

5.5 The Contractor may process the removal of refrigerants at the location sites with the prior approval of the County. **Further processing of the mixed scrap metal such as shearing, cutting, bailing/crushing or the like is strictly prohibited on County property. All processing shall be done off site at the Contractors/Sub-Contractors permitted facility.** (Emphasis in original)

* * *

5.7 The Contractor shall provide the County with a copy of a State of Hawai'i Solid Waste Management Permit of the permitted scrap metal facility to be used to carry out the terms of this contract. This facility need not be located within the County of Hawai'i, but it must be permitted by the State of Hawai'i Department of Health to operate a metals processing and recycling business that processes, stores, and ships white goods, metals, and associated items.

* * *

8.0 PREPARATION

8.1 All mixed scrap metal accepted under this contract shall be recycled in some legal and properly permitted manner and shall not be land filled.

8.2 The Contractor or Sub-Contractor shall be responsible for the removal of any residual fuel and stem valves from all propane tanks collected. All propane tanks shall be properly processed as scrap metal in accordance to all applicable County, State and Federal rules, regulations and laws. **Processing of the propane tanks is strictly prohibited on County property. All processing shall be done off site at the Contractors/Sub-Contractors permitted facility.** (Emphasis in original)

8.3 It shall be the Contractor's responsibility to have a licensed and certified Freon removal technician to collect all Freon from refrigerators and other Freon containing appliances. The Contractor shall handle all Freon containing appliances appropriately in a manner complying with all applicable County, State and Federal regulations and laws before final disposal.

8.4 The Contractor shall be responsible for hazardous liquids and/or materials, oils, batteries, mercury switches and other items regulated by the State Department of Health normally found within appliances and other similar mixed metal items. Such materials shall be handled and disposed in a manner complying with all applicable County, State and Federal rules, regulations and laws. Should any other hazardous liquids and/or materials be encountered or discovered, the Contractor shall be responsible for isolating and identifying such materials. Thereafter such wastes shall become the responsibility of the Contractor. The County reserves the right to request a report by way of hard copy and electronically the type of hazardous materials removed, weight of materials and final disposition of materials removed from the delivered scrap metal.

9.0 SUBCONTRACTOR

9.1 Contractor shall not sub-contract out any portion of the job without the County's prior written consent and approval of the proposed Sub-Contractor. After such approval is given, the Sub-Contractor shall be subject to all the terms and conditions of the contract. The Contractor shall be responsible for making sure the sub-contractor meets the contract requirements and has the proper insurance. The Contractor shall be secondarily liable for all work carried out by a Sub-Contractor.

To expedite the approval process when the need to sub-contract occurs, the Contractor is encouraged to provide a list of potential Sub-Contractors that they may request to use during the contract period within five (5) business days upon the notice of intent to award. Subcontractors identified in the Bidder's proposal shall be considered approved by the County upon award and execution of contract; any subsequent changes in subcontractors require the County's prior written consent and approval.

11.0 CONTRACTOR LOCATION

11.1 The Contractor's permitted processing facility need not be located within Hawai'i County, but it must be located within the State of Hawai'i.

4. The mixed scrap metal contained both contaminated materials and uncontaminated materials. The mixed scrap metal was piled up at the County's two landfill sites in an unsorted manner.

5. The original deadline for receipt by the County of sealed bids was November 8, 2013. This deadline was subsequently extended by Addendum No. 1 to November 12, 2013.

6. Two parties submitted bids. HMP bid \$76,720.00, and BISM bid \$152,000.00.

7. HMP's bid listed two subcontractors:

a. "Snitzer[sic- should be Schnitzer] Steel will be used as a subcontractor to accept and process all Steel material that isn't allowed in Business Services Hawaii's [HMP] scrap metal permit."

b. "Kelvin Kubo has been retained to handle all Freon removal procedures."

8. On November 14, 2013, the County sent a letter to HMP requesting clarification of HMP's proposal. For the processing of materials at the County's West Hawaii landfill, the County wanted to know if HMP would truck items to its Shipman facility

or was its intent to take containers directly to Kawaihae Harbor for shipping to metal markets and to Schnitzer Steel on Oahu.

9. Later on November 14, 2013, HMP replied to the County that the items HMP's recycling permit does not allow it to accept at its Shipman facility would be shipped directly to Schnitzer Steel through the port at Kawaihae. The items its permit did allow it to accept at the Shipman facility would be hauled in roll off containers to the Shipman facility.

10. On November 15, 2013, the County sent HMP a second request for clarification. For items not allowed to be accepted at HMP's Shipman facility, the County wanted to know if items from both the Hilo and West Hawaii landfills would be shipped out of Kawaihae Harbor.

11. Later on November 15, 2013, HMP replied to the County that items shipped directly to Schnitzer Steel from the County's Hilo facility would be shipped from the port at Hilo, items shipped directly to Schnitzer Steel from the County's West Hawaii facility would be shipped from the port at Kawaihae, and all items hauled to HMP's Shipman facility would be shipped to Schnitzer Steel from the port at Hilo.

12. By letter dated November 18, 2013, the County requested that HMP submit a clarified operations plans based on the information submitted in response to the County's two previous requests for clarification.

13. On November 20, 2013, HMP submitted its revised Operations Plan in response to the aforesaid request from the County.

14. The HMP revised Operations Plan called for HMP to load uncontaminated scrap metal at the two County landfill sites into roll off bins and transport this uncontaminated scrap metal to its Shipman facility. (The Hearings Officer understands that roll off containers are usually large open top dumpsters with wheels of some sort to facilitate rolling them into place.)

15. Under the terms of HMP's Solid Waste Management Permit ("SWMP") for its Shipman facility, HMP could accept uncontaminated scrap metal at that facility, but it could not accept contaminated scrap metal at that facility.

16. At the time of contract award, HMP's SWMP for its Shipman facility did not allow HMP to process the uncontaminated scrap metal that it accepted there.

17. At its Shipman facility, HMP would not sort, bale, strap together, or shred any of the uncontaminated scrap metal. Instead, it would merely unload the uncontaminated scrap metal transported from the County's facilities in roll off containers and then load that material into shipping containers and send by shipping vessel to Schnitzer Steel on Oahu for processing.

18. HMP planned to utilize this procedure, instead of sending the uncontaminated scrap metal directly from the County's facilities to Schnitzer Steel, because of problems with loading the scrap material into shipping containers at the County's facilities (which lacked the necessary ramps while the Shipman facility already had an appropriate ramp), and because this would get the material out of the County's sites as quickly as possible (which was what the County was requiring).

19. HMP would not sort out or separate different kinds of uncontaminated scrap metal (e.g., ferrous vs. non-ferrous) at its Shipman facility before shipment to Schnitzer Steel. It would send all of the scrap material, unsorted, to Schnitzer Steel. Schnitzer Steel has large scale machinery that would shred the uncontaminated scrap metal received from the Shipman facility and sort out the different kinds of materials received.

20. From reviewing the HMP bid submissions, the County understood that HMP would merely take the scrap material delivered from the County's two sites to HMP's Shipman facility and "loose pack" it in containers for shipment to Schnitzer Steel.

21. Simply taking the uncontaminated scrap metal at the Shipman facility and putting it into containers for shipping to Oahu is not “processing,” within the meaning of the State of Hawaii’s solid waste regulations, and the DOH is not concerned about it. (Testimony of Steven Chang)

22. When loading the scrap metal at the County’s facilities, HMP’s revised Operations Plan called for it to sort out white goods, items containing Freon, propane tanks, and other contaminated scrap metal—all items that could not be accepted at HMP’s Shipman facility. Those items that could not be accepted at HMP’s Shipman facility would be shipped directly from the County’s two facilities to the Schnitzer Steel facility on Oahu.

23. Prior to shipping the contaminated scrap metal from the County’s two facilities directly to Schnitzer Steel, the HMP revised Operations Plan called for HMP to separate the refrigerators from the piles of scrap metal at the County’s two landfill sites, and then, through its subcontractor who had the proper permits, drain the Freon from these refrigerators while they were still at the two County facilities. The County viewed allowing this procedure to take place at the County’s facilities to be a measure that would protect the environment. The DOH told the County that it concurred with this train of thought.

24. BISM’s proposed Operations Plan also called for the separation of the refrigerators from the pile of scrap metal at the County’s two landfill sites and then the draining of the Freon from the refrigerators while they were still at the County’s facilities.

25. Neither HMP nor BISM planned to process at the County’s landfill facilities any propane tanks found there. Instead, the propane tanks would be separated from the rest of the mixed scrap metal at the County’s two sites and shipped specially, e.g., on pallets, to be processed off-site.

26. A Solid Waste Management Permit (“SWMP”) is specific to a particular site. HMP has an SWMP, with certain conditions, for its Shipman facility. BISM has an SWMP

for its own facility. Neither HMP nor BISM had permits to process solid waste at the two County landfill sites. In addition, the County did not have an SWMP for either of its two landfill sites.

27. On November 29, 2013, the County awarded the contract for the work described in the IFB to HMP. The notice of award was posted by the County on the same day.

28. By letter dated December 6, 2013, BISM submitted to the County BISM's protest of the award to HMP. The letter was transmitted by BISM to the County on December 6, 2013, and received by the County on December 9, 2013. BISM contended that HMP was neither a responsible nor responsive bidder for the following reasons:

a. HMP was not currently authorized to process uncontaminated ferrous and non-ferrous scrap metal.

BISM asserted that HMP's Operations Plan provided that uncontaminated materials would be hauled to HMP's Shipman facility for processing and further shipment to "metals markets." BISM further asserted that HMP's SWMP showed that HMP was not currently authorized to process uncontaminated ferrous or nonferrous scrap metal at its Shipman facility, and that this lack of an appropriate permit was contrary to the terms of the IFB. BISM further asserted that HMP did not have two years of experience legally processing scrap metals, as required by the IFB, due to limitations on HMP's permit.

b. HMP's SWMP does not authorize HMP to operate a solid waste management system at the County's Hilo and West Hawaii landfill facilities

According to BISM, HMP's SWMP allowed HMP limited activities, and those limited activities were only authorized at the Shipman facility. HMP's Operations Plan called for sorting of contaminated materials (that could not be accepted by HMP's Shipman facility) to take place at the County's two landfill facilities. The materials HMP could not

accept would then be shipped directly from the County's facilities to HMP's subcontractor on Oahu, Schnitzer Steel, and further processed there. BISM alleged that neither HMP nor Schnitzer had permits allowing them to sort, load, and ship scrap material from the County's two sites.

c. HMP is not permitted to accept or process contaminated ferrous and non-ferrous scrap metal.

HMP's permit did not allow it to accept, much less process, contaminated ferrous and non-ferrous scrap metal. BISM asserted that this situation was in violation of the terms of the IFB that the contractor accept and process all contaminated scrap metal. To BISM, it made no difference that HMP's subcontractor Schnitzer had the authority to accept and process the contaminated materials at its Oahu site because Schnitzer was not permitted to accept any such material on the Island of Hawaii.

d. HMP is not permitted to remove refrigerants from white goods

HMP's Operations Plan stated that white goods would be drained of Freon at the two County facilities and then shipped directly to Schnitzer Steel on Oahu to be processed. A certified technician acting as subcontractor to HMP would remove the Freon. HMP's permit for its Shipman facility did not allow such activity at that site. BISM asserted that this restriction also applied to any location without a proper permit, i.e., the two County facilities, where HMP would operate to remove the Freon.

e. HMP is not permitted to accept or process propane tanks

HMP's permit does not allow it to accept propane tanks. HMP's Operations Plan called for the sorting out of propane tanks to be done at the County's two facilities. The tanks would be stored at the County facilities until shipped from there to Schnitzer Steel on Oahu. BISM asserted that HMP's permit did not allow them to do this kind of work at the

County's facilities. Further, Schnitzer's own permit did not allow it to process propane tanks.

f. HMP is not permitted to handle batteries and other hazardous waste in the mixed scrap metal at the County's facilities.

BISM asserted that batteries and other hazardous wastes are often encountered in junked equipment and white goods. HMP's permit prohibited it from handling such hazardous materials.

29. Schnitzer Steel's SWMP allows it to accept propane tanks at its Oahu facility and store them there for up to 75 days, but the Schnitzer Steel SWMP does not allow it to decommission the propane tanks. Until the County received and reviewed BISM's protest letter of December 6, 2013, the County was not aware that Schnitzer Steel's SWMP did not allow it to decommission propane tanks.

30. Schnitzer Steel had a subcontract type arrangement with Refrigerant Recycling for the latter to decommission propane tanks received by Schnitzer Steel. After decommissioning by Refrigerant Recycling, the tanks would be returned to Schnitzer Steel for processing (which, at that stage, Schnitzer Steel was authorized to do under its SWMP). While the County did not find out about this arrangement until after the contract was awarded to HMP, the arrangement was in existence at the time of the contract award.

31. On January 3, 2014, BISM submitted to the County a supplement to its procurement protest. The following additional information was submitted to the County:

a. On August 26, 2013, the State of Hawaii Department of Health ("DOH") sent a cease and desist order to HMP prohibiting it from processing scrap metal until certain conditions were met. The basis for this letter was an inspection in late May of 2013 that determined HMP had been accepting and processing uncontaminated and contaminated scrap metal, as well as baling junked automobiles, at its Shipman facility in violation of the terms

of its permits. BISM alleged that HMP thereafter submitted a request to modify its permit but had not provided evidence of compliance with the conditions of the DOH's warning letter.

b. BISM believed that HMP continued to accept and process scrap metal in December of 2013 and January of 2014 in violation of the terms of its permit.

c. HMP continued to advertise that it was capable of accepting and processing all types of scrap metal, which would be in violation of the terms of its permit.

d. HMP's bid submission constituted an intentional misrepresentation of its permit status and was submitted in bad faith.

32. On January 9, 2014, the County sent BISM, by e-mail to BISM's attorney, a copy of HMP's revised Operations Plan submitted to the County on November 20, 2013.

33. On January 17, 2014, BISM sent to the County a second supplement to BISM's protest letter. This letter commented on the revised Operations Plan submitted by HMP on November 20, 2013. In this letter, BISM asserted the following:

a. The IFB specifications required the bidder's facility to have an SWMP to process, store and ship white goods, metals and associated items. HMP's permit, however, prohibits the processing of both uncontaminated and contaminated scrap metal. In addition, the DOH letter of August 26, 2013, ordered HPM to cease and desist from processing scrap metal.

b. The updated Operations Plan called for HMP to accept at their Shipman facility the materials they were allowed to accept at that facility. The materials their permit did not allow them to accept were to be shipped directly from the County's facilities to Schnitzer. This acknowledged that HMP could not accept contaminated materials at its Shipman facility.

c. The updated Operations Plan does not state what will happen to uncontaminated materials once they are accepted at HMP's Shipman facility. BISM asserted that HMP's statement that it would prepare the metal for shipping necessarily requires processing (which was not allowed by HMP's permit).

d. HMP's Operations Plan and some other factors evidenced HMP's intent to process material at its Shipman facility in violation of the terms of its permit.

e. At the time the Notice of Award was posted on November 29, 2013, HMP did not have the capability to perform the contract requirements because it did not have a permit for processing uncontaminated materials that would be hauled to its Shipman facility.

f. The statement in HMP's updated Operations Plan that it would "prepare" the materials prior to shipping was intentionally misleading because HMP failed to disclose that HMP was legally prohibited from "processing" the materials at the time of bid submission.

g. The letter concluded with allegations that HMP's omission of material facts constituted a material misrepresentation regarding its responsibility as a bidder, that the omission was intentional, knowing and deceptively made for the purpose of inducing the County to award the contract, and that HMP's bid was submitted fraudulently or in bad faith.

34. On February 18, 2014, the County sent a letter to BISM denying the BISM protest of the award to HMP. The letter stated that the County had considered the December 6, 2013 protest letter as well as the January 3, 2014, and January 17, 2014 supplements. With regard to the "reasons for protest" stated in the December 6, 2013 letter, the County responded as follows:

a. HMP's Operations Plan does not propose to do any processing that is not authorized by its SWMP. While HMP is not currently allowed to process uncontaminated scrap metal, they are permitted to accept, temporarily store, and load uncontaminated scrap metal into shipping containers (as per its Operations Plan). Further, both HMP's resume and

Schnitzer's permit indicate they meet the requirement of having more than two years of experience operating a recycling and materials recovery facility for scrap metals.

b. SWMPs are specific to a given facility, and there are currently no SWMPs in place to operate a recycling facility at the County's two landfill locations. Because the IFB limits the work at the landfill sites to removal and hauling of an existing stockpile, and no processing is allowed on site, no SWMP for the site was required. The County noted that removal of refrigerants at the sites, with prior approval of the County, was authorized by the IFB.

c. The direct shipment of contaminated material to Schnitzer's Oahu facility from the two County landfill sites meets the requirement of the IFB because no processing of contaminated materials is proposed to occur at the County's sites.

d. HMP listed a licensed subcontractor to remove the Freon from refrigerators and other appliances, with the removal work to be accomplished at the County's facilities. This complies with the terms of the IFB.

e. No permit is needed to load contaminated material at the County's facilities for direct shipment to the Schnitzer facility on Oahu. The County has confirmed that Schnitzer Steel uses a properly permitted subcontractor to remove the valves from propane tanks.

f. In terms of handling hazardous materials, the bid specifications allow for the use of subcontractors and do not require bidders to submit an EPA identification for the bidder or its subcontractors.

g. There was no substance to the claim that HMP misrepresented its permit status and represented that it had a permit to process uncontaminated scrap metal at its Shipman facility. HMP's submittal clearly indicated that it was not currently allowed to

process uncontaminated scrap metal, and HMP made no representation that it had applied for or received any approvals from DOH beyond what was stated in its SWMP.

35. On August 26, 2013, the State of Hawaii Department of Health (“DOH”) issued a Warning Letter to HPM regarding a “potential permit violation.” This warning letter was the result of a DOH site inspection conducted May 29, 2013, after the DOH received a complaint from BISM. The letter noted several areas of non-compliance with HMP’s SWMP (termed “potential violations” in the letter):

- a. Acceptance of white goods and waste vehicles
- b. Processing of scrap metal and waste vehicles without prior DOH approval of HMP’s proposed operations and operation controls.
- c. Failure to store scrap metal in designated storage areas.
- d. Failure to operate the facility in accord with the site plan due to storage of plastic material in an incorrect location.

36. The DOH letter required correction of the listed areas of noncompliance and further stated:

Corrective actions shall include:

1.
2. Immediately cease and desist processing scrap metal, including but not limited to waste vehicles until you (1) submit the information regarding your proposed scrap metal acceptance and processing procedures, and proposed environmental controls; and (2) obtain DOH approval to include this operation.

37. The letter was signed by Steven Y.K. Chang, P.E., Chief of the Solid and Hazardous Waste Branch of the DOH’s Environmental Management Division.

38. This warning letter and its cease and desist provision were directed only at the activities HMP should not have been doing and only addresses the activities regarding waste vehicles and white goods that were the subject of the DOH investigation. HMP did not have to shut down its permitted business at the Shipman facility. (Testimony of Steven Chang).

39. On February 25, 2014, BISM filed its RFAH with the Office of Administrative Hearings.

III. CONCLUSIONS OF LAW

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

A. The BISM and HMP Motions for Summary Judgment are Denied

Summary judgment is appropriate when the record shows that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, are viewed in the light most favorable to the non-moving party. Koga Engineering & Construction, Inc. v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

Several procurement protests in recent years have been decided on the basis of summary judgment motions. In this case, however, the Hearings Officer concluded that, as stated in the letter of March 13, 2014, it was important to have an evidentiary hearing. In the Hearings Officer's opinion, the motion for summary judgment involved important questions of DOH interpretations of solid waste regulations, the DOH interpretation of the warning letter of August 26, 2013, and details of the operations plans of both HMP and BISM such that a more complete record was necessary in order to properly analyze and decide the case.

Accordingly, the summary judgment motions of BISM and HMP taken under advisement at the conclusion of the hearing on March 11, 2014 are hereby denied. Even in the absence of issues of disputed fact (and this Decision does not constitute an opinion on that question with respect to the motions that were filed), the Hearings Officer has the power

to deny summary judgment when, as here, there is reason to believe that the better course of action would be to conduct a full hearing with a full development of the record. See, e.g., Lind v. United Parcel Service, Inc., 254 F.3d 1281, 1285 (11th Cir. 2001); Virgil v. Time, Inc., 527 F.2d 1122, 1131 n.15 (9th Cir. 1975).

B. HMP's SWMP Does Not Prohibit the Work Described in its Operations Plan¹

1. Work at the County's Two Landfill Sites

The first portion of BISM's claim asserts that SWMPs are necessary for the work HMP planned to do at the County's two landfill sites. BISM Post-Hearing Brief at pages 2-5. According to BISM, the loading of uncontaminated scrap metal at the County's sites, the transportation of the uncontaminated scrap metal from the County's sites to the Shipman facility, the separation out at the County's sites of the contaminated scrap metal, the removal of Freon at the County sites, and the storage of contaminated scrap metal (e.g. propane tanks) until they are shipped to Schnitzer Steel are all activities that require an SWMP.

BISM correctly points out that neither HMP's nor Schnitzer's SWMPs are transferable to the two County facilities.

With respect to this argument, it should be noted that, under BISM's theory, BISM's Operations Plan would also involve activities that require an SWMP for the County's facilities. BISM planned to separate out the Freon-containing appliances and the propane tanks from the piles of mixed scrap metal at the County's facilities before any of the scrap metal was loaded at the County's two facilities for transport to BISM's facility for processing. It should also be noted that, due to the site-specific nature of SWMPs, BISM's SWMP for its facility was also not transferable to the County's two facilities.

¹ This discussion follows the order of the topics in BISM's Post-Hearing Brief filed March 24, 2014.

BISM further alleges that while the County may have some type of SWMPs to cover its two landfill facilities, the County's SWMPs do not cover the above-described activities.

BISM's argument concludes that HMP is required by Specification Section 4.1 to have an SWMP for the facilities where the work is to be done and that it is illegal under the permitting system established by HRS Chapter 342H for the work to be done at the County's facility.

If in fact such work is not allowed at the County's two facilities, it would be impossible for HMP, BISM, or any other bidder to carry out the contract work in compliance with the State's solid waste permitting laws. The operations plans of both HMP and BISM required that both of them separate out the Freon containing appliances and the propane tanks from the piles of mixed scrap metals before any transportation of the scrap metal off-site could be accomplished. The evidence was convincing that such contaminated goods cannot be thrown into a container or truck along with the rest of the pile where they were located and transported in an undifferentiated mass of metal to a recycling facility. They need special handling and transportation methods that cannot be accomplished without sorting them out from the pile where presently located.

What BISM is really saying here is that it would be illegal under the State's solid waste permitting law to perform this contract. BISM adverts to this in its post-hearing brief at page 5, footnote 7, when it argues:

It is important to note that the County has SWMP's for the two landfill sites at issue, but the County has not and does not contend that the work specified in its IFB is permitted or authorized under the County's SWMPs. In fact, the County's SWMPs for the landfill sites do not even permit the storage of the mixed scrap metal that is the object of the IFB. This explains the County's "urgency" in having the mixed scrap metal removed from its landfill sites. Such an "urgency" however, is no justification for ignoring State environmental laws and disregarding the permitting system established in HRS Chapter 342H.

BISM also adverted to this in part of its earlier argument with respect to its summary judgment motion.

There are two problems with BISM's arguments here. First, if the IFB called for, or permitted, activities that were illegal at the County's sites, BISM's argument is with the terms of the solicitation. HSR §103D-701(a) requires that type of protest to be filed no later than the date set for receipt of the bids. An argument that the terms of the solicitation allow illegal activity is therefore untimely.

Second, the evidence established that the Department of Health did not consider HMP's activities planned to take place at the County's two facilities as ones that required SWMP permits for those facilities to specifically cover those activities. The County discussed with the DOH its plan to allow Freon to be removed at the County's two sites, and the DOH had no problem with that. Further, Steven Chang, a witness called by BISM who has been head of the DOH's Solid and Hazardous Waste Branch for about 20 years, testified that the kinds of processing the DOH would be concerned about are higher level types of activities such as baling, strapping together, and shredding, none of which would be engaged in at the County's facilities under HMP's revised Operations Plan.

If, therefore, BISM had filed a complaint with the DOH against its rival firm because of the nature of the activities involved in carrying out the instant project at the County's two landfill sites, the DOH would not find it necessary to take action against HMP (in contrast to the situation culminating in the August 26, 2013 DOH letter). An agency's interpretation of its own rules is entitled to deference unless plainly erroneous or inconsistent with the underlying legislative purpose. Lee v. Elbaum, 77 Haw. 446, 457, 887 P.2d 656,667 (Haw. App. 1993). BISM has not demonstrated that the DOH's opinions, most of which BISM itself elicited during the hearing, should not be followed.

2. Acceptance of Mixed Scrap Metal by HMP at the County's Facilities

BISM argues that Specification Section 5.4 requires the Contractor to “accept” all of the mixed scrap metal at the County’s facilities. It then argues that HMP’s SWMP does not allow it to accept contaminated material at HMP’s Shipman facility. It then concludes that since HMP cannot accept contaminated material at its Shipman facility, it cannot accept contaminated material at the County’s facilities. BISM Post-Hearing Brief at pages 5-6.

BISM does not provide any citation of authority for its proposition that what cannot be accepted at one location (Shipman) necessarily cannot be accepted at a totally different location. BISM’s argument is necessarily flawed because it ignores the undisputed fact, and the law, that an SWMP is site-specific. What an SWMP says about what can or cannot be done at one facility is not controlling of, or connected to, what an SWMP for another facility says about that other facility.

Further, as noted above, the DOH does not consider the HMP’s segregation of contaminated and uncontaminated materials at the County’s facilities to be a matter of DOH concern. Such segregation necessarily implies the concept that HMP first accepted the material it then will segregate, so such acceptance is similarly not a matter of DOH concern.

3. Processing of Contaminated Scrap Metal at the County’s Facilities

This argument, set forth at pages 6-7 of BISM’s post-hearing brief, is similar to the one above concerning acceptance of contaminated materials at the County’s facilities. BISM argues that, under HMP’s Operations Plan, HMP will be sorting out contaminated materials, including white goods containing Freon, propane tanks, and other contaminated items, at the County’s two landfill sites, and that this constitutes “processing” of contaminated materials which HMP is not allowed to do.

BISM does not provide any citation of authority for its proposition that what cannot be processed at one location (Shipman) necessarily cannot be processed at a totally different location. BISM’s argument is necessarily flawed, as it was above, because it ignores the

undisputed fact, and the law, that an SWMP is site-specific. What an SWMP says about what can or cannot be done at one facility is irrelevant to what an SWMP for another facility says about that other facility.

Further, as also noted above, the DOH does not consider the HMP's segregation of contaminated and uncontaminated materials at the County's facilities to be a matter of DOH concern. That is the case even if such segregation necessarily implies the concept that HMP is "processing" the contaminated materials in connection with its segregation of those materials, so such "processing," if it indeed is actually processing, is similarly not a matter of DOH concern.

4. Removal of Refrigerant at the County's Facilities Does Not Constitute Prohibited "Processing" of Contaminated Scrap Metal

BISM presents a variation on the argument discussed immediately above when it focuses on the removal of refrigerants at the County's two facilities rather than off-site. HMP's Post-Hearing Brief at page 7.

BISM does not provide any citation of authority for its proposition that an inability to process refrigerants at one location (Shipman) means refrigerants cannot be processed at a totally different location. BISM's argument is necessarily flawed, as it was above, because it ignores the undisputed fact, and the law, that an SWMP is site-specific. What an SWMP says about what can or cannot be done at one facility is irrelevant to what an SWMP for another facility says about that other facility.

Further, the processing of refrigerants at the County's facilities is specifically allowed by the IFB specifications. That means the County did not require HMP to have a permit for its Shipman facility that would allow processing of refrigerants there because the refrigerants did not have to be processed at the Shipman facility. The DOH, in addition, had no problem with the County's specifications regarding removal of refrigerants on-site at the County's facilities.

C. Processing of Propane Tanks

The IFB recognizes that propane tanks present special problems. For example, while the specifications allow Freon to be removed at the County's two facilities, Specification Section 8.2 expressly prohibits any processing of propane tanks on County property. Accordingly, when complying with Specification Section 4.2f that required identification of permitted scrap metal facilities, a facility that could process propane tanks needed to be identified.

It is undisputed that HMP could not process propane tanks at its Shipman facility and was always planning to ship them to Schnitzer Steel. It is also undisputed that the Schnitzer Steel facility had an SWMP that prohibited it from decommissioning or processing propane-containing cylinders at Schnitzer's Oahu facility. Thus, Schnitzer had to send the propane tanks out to be decommissioned at another, properly permitted, facility, and the Schnitzer facility could only process the propane tanks after they had been decommissioned by some other facility and then returned to Schnitzer.

While Schnitzer could not decommission the propane tanks, Refrigerant Recycling did have a permit to do that work. The County and HPM argue that having a properly permitted sub-subcontractor satisfies the IFB's requirements both in terms of responsiveness and responsibility. They further argue that sub-subcontractors did not need to be listed. BISM counters this argument by asserting that the IFB required all subcontractors to be listed, the HMP and its listed subcontractors had to be capable of performing all aspects of the work, and, since Refrigerant Recycling was not listed as subcontractor, HMP's bid was neither responsive nor responsible because HMP and the companies it listed could not perform the full scope of work under the contract.

The County and HMP argue that a second tier subcontractor such as Refrigerant Recycling did not have to be listed. They rely on the decision of Frank Coluccio

Construction v. City and County of Honolulu, PCH-2002-7 (August 2, 2002). The Hearings Officer concludes, however, that their reliance on this decision is misplaced.

First, the decision interprets HRS §103D-302(b), a statute that requires the listing of subcontractors if the invitation for bids is for construction. The primary purpose of the statute was to prevent bid shopping and bid peddling by general contractors insofar as subcontractors are concerned. Since it was the subcontractor, rather than the general contractor, that engaged the sub-subcontractor, requiring a listing of sub-subcontractors did not advance the purpose of a statute directed only at general contractors. Accordingly, the statute was interpreted as not requiring sub-subcontractors to be listed.

In the present case, however, a construction project is not involved in the IFB, concerns about bid shopping and bid peddling by the general contractor do not appear to be present, and the parties have not pointed to any statute requiring subcontractors to be listed. Rather, the subcontractor listing is required only by some of the specifications, so these must be examined in order to properly analyze BISM's claim.

First, Specification Section 4.1d requires a list of subcontractors, but only from bidders "who intend to utilize subcontractors from the start of the contract period." In that case, the bidder would also have to submit a copy of the subcontractor's "applicable permits."

Second, all subcontractors had to be approved by the County pursuant to Specification Section 9.1. Those subcontractors identified in the bid were to be considered approved by the County upon award and execution of the contract. Otherwise, subcontractors identified later or those the general contractor potentially might use in the future had to be specifically approved by the County before they could be used.

Third, with specific regard to propane tanks, Specification Section 8.2 prohibits processing of propane tanks on County property and requires that “all processing shall be done off site at the Contractors/Sub-Contractors permitted facility.”

This combination of factors leads to the conclusion that the subcontractor listing requirement is one of responsibility. Responsibility is defined as the “capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance.” HRS §103D-104. The County wanted to be assured that all contract activities requiring permits were covered either by the Contractor’s permit or the permits of the subcontractors. There were not to be any gaps in coverage, and to be sure of that the permits of the contractor and subcontractors had to be submitted with the bid. Further, a properly permitted contractor or subcontractor with regard to processing propane tanks was specifically required (presumably due to the danger of explosion from an improperly handled propane tank). On the other hand, subcontractors could be changed or added after bid opening (with no waiting period), as long as they were approved by the County, so considerations of bid shopping are not involved here.

The leading OAH decision on the question of determining whether a claim is one involving responsiveness versus one involving responsibility is In the Matter of Walter Y. Arakaki General Contractor, Inc. v. State of Hawaii, Department of Accounting and General Services, PCH-96-8 (June 23, 1997). That case involved a procurement to replace swimming pool chlorination systems at various schools. The bid specifications required a statement of the bidder’s qualifications and experience regarding swimming pool chlorination systems. The bid submitted by Walter Y. Arakaki General Contractor did not have any statement of its qualifications and experience as required by the specifications, and the bid was rejected by the State as nonresponsive. Further, the State did not allow the contractor to submit, post-

bid, additional or supplemental information as to its qualifications and experience or the qualifications and experience of the contractor's swimming pool system subcontractor.

On appeal by the contractor of the procuring agency's denial of its protest, the Hearings Officer held that the matter was one of responsibility, not responsiveness, because it pertained to the bidder's "ability and will to perform the subject contract as promised." Responsibility concerns how a bidder will accomplish performance and its performance capabilities. It can involve an inquiry into the bidder's financial resources, experience, management, performance history, and integrity. Further, responsibility is determined not at bid opening but at any time prior to award and can be based on information submitted up until the time of the award.

The Hearings Officer then adopted a test from Bean Dredging Corp., 22 Cl. Ct. 519, 523 (1991)² to determine how to categorize information to be submitted in a bid:

[w]hen information or data is required to be submitted with the bid, the Comptroller General will consider the purpose for which the data or information is to be used when determining whether it is a matter of responsiveness or responsibility. Thus, if descriptive data is to be used to determine a bidder's ability or capacity to perform, the matter will be one of responsibility, and failure to submit information with the bid will have no adverse effect on the bidder.

PCH 96-8 at page 5.

Applying this test to the swimming pool system solicitation, which required the bidder to submit a statement of qualifications and an experience list "with bid," the Hearings Officer concluded that the information required was for the purpose of evaluating the bidder's experience and qualifications "and was therefore a matter of responsibility." PCH 96-8 at page 6. Accordingly, the bidder was entitled to submit the statement of qualifications and experience after the opening of the bids even though the solicitation stated the

² This case is incorrectly cited as 2 Cl. Ct. 519 on page 4 of the Hearings Officer's decision

submission should be “with bid.” A matter of responsibility cannot be turned into a matter of responsiveness by the terms of the solicitation. PCH-98-6 at page 7.

This analysis was not challenged on appeal by the State. The contractor appealed to the Hawaii Supreme Court, but only challenged the Hearings Officer’s selection of a remedy after finding that the State had improperly prohibited the contractor from establishing its responsibility with submissions after bid opening. The Supreme Court reversed the Hearings Officer on the issue of what remedies were available in this situation and held that the Hearings Officer could remand the case to the procuring agency so that it could consider the post-bid opening submissions of the contractor and thus reconsider its decision denying award of the contract to the contractor. While the substantive decision of the Hearings Officer in that case—the matter was one of responsibility and the contractor could submit additional information on that matter after bid opening even though the specifications stated that experience information should be submitted “with bid”—was not at an explicit issue before the Hawaii Supreme Court, the undersigned takes that Supreme Court decision as an implicit vindication of the Hearings Officer’s substantive decision. The Supreme Court would not have ordered a remand to the procuring agency for reconsideration of material submitted after bid opening if the Hearings Officer had not correctly decided that the matter was one of responsibility and not responsiveness.

Based upon the specifications cited above and the Arakaki analysis, the Hearings Officer concludes that listing of subcontractors and the requirement of providing a copy of their permits with the bid, along with the ability to later propose other subcontractors, is a matter of responsibility even though the listing might be required to be made in the bid.

At the time of the award herein, the listed subcontractor Schnitzer Steel did not have a permit to decommission propane tanks, but it had a sub-subcontractor which did have the appropriate permit. Even though this sub-subcontractor was not specifically listed, the goal

of the specifications requiring subcontractor listings—to insure qualified permittees covered all aspects of the recycling operations—was achieved. Similarly, the fact that the County initially missed this point and only found out about Refrigerant Recycling after the contract award was made does not detract from achieving the goal of the specifications—at the time of contract award, there were in fact qualified permittees who would cover all aspects of the recycling operations.

On this basis, BISM’s protest based on the failure to list a permittee who could decommission propane tanks should be denied.

D. Processing of Uncontaminated Scrap Metal at the Shipman Facility

BISM’s next argument is that HMP planned to process uncontaminated scrap metal at its Shipman facility in violation of the terms of its SWMP and/or the August 26, 2013 DOH warning letter. BISM Post-Hearing Brief at pages 12-17.

1. HMP Did Not Submit a Plan that Violated the Terms of its SWMP

At the time of the bid opening as well as the time of the contract award, HMP’s SWMP for its Shipman facility allowed the acceptance of uncontaminated scrap metal but it did not allow the processing of such uncontaminated scrap metal. As stated in the relevant part of Special Condition 1 of that permit: “Uncontaminated ferrous and non-ferrous scrap metal may also be accepted, but may not be processed unless the leachate collection and management system described in PART II- RECYCLING SPECIAL CONDITIONS, Item 9 is accepted by the DOH.” It is undisputed that no such leachate collection and management system was in place at any time prior to the award of the contract.

At times during these proceedings, BISM has tried to maintain that the DOH warning letter of August 26, 2013 prohibited HMP from even accepting uncontaminated ferrous and

non-ferrous scrap metal that it would otherwise be entitled to accept under the terms of its SWMP. However, Mr. Steven Chang of the DOH, the senior DOH manager who signed that letter, testified that the letter was directed solely at the activities that gave rise to the investigation and did not pertain to normally permitted activities under HMP's SWMP. The Hearings Officer accepts this testimony and concludes that the warning letter did not prohibit HMP from accepting uncontaminated ferrous and non-ferrous scrap metal at its Shipman facility.

Since acceptance of the uncontaminated scrap metal was allowed at the Shipman facility, BISM next argues that HMP was going to "process" that uncontaminated scrap metal in violation of the terms of its SWMP. BISM appears to also rely on the August 26, 2013 warning letter as an additional prohibition on the processing of scrap metal at the Shipman facility, but, based upon Mr. Chang's testimony, that letter was not directed towards the scrap metal that HMP could accept at the Shipman facility pursuant to the terms of its SWMP. Thus, the question boils down to whether HMP's revised Operations Plan involved processing of uncontaminated scrap metal in violation of the terms of its SWMP.

The County understood HMP's plan to be to "loose pack" the uncontaminated scrap metal in containers and ship it to the Schnitzer Steel facility for processing. BISM argues that this ignores an HMP "admission" that it must "prepare the metal" before shipment. BISM Post-Hearing Brief at page 12. This is a selective quotation from HMP's revised Operations Plan.

The full statement in that plan was: "BSH [HMP] will prepare the metal according to their Recycling Permit specifications, and load them into shipping containers to be shipped to metals markets." This statement must also be read in conjunction with the statement in HMP's bid that Schnitzer Steel would be used as a subcontractor to "process all Steel material that isn't allowed in Business Services Hawaii's [HMP] scrap metal permit."

The Hearings Officer concludes that HMP did not state a plan to process scrap metal in violation of its permit. To the contrary, it stated a plan to comply with its permit. What it could not process according to its permit at that time, i.e., all uncontaminated scrap metal, would be sent to Schnitzer for processing. If HMP did install a DOH-approved leachate collection and management system in the future, then it could process material at its Shipman facility in accord with the terms of its permit as modified by approval of its new system.

BISM attempts to extend the word “prepare” to automatically include all the processing activities necessary to process the uncontaminated scrap metal into the size necessary before it would be accepted for purchase by a mill. Mr. Nutter testified fairly extensively on what needed to be done in order to ship the uncontaminated scrap metal directly to a mill so that it would be accepted and paid for by the mill. However, when the word “prepare” is put into the entire context of HMP’s bid, it is apparent that it does not mean all the extensive processing activities described in Mr. Nutter’s testimony. HMP did not submit a plan that violated the terms of its SWMP.

2. HMP Would Not Be Processing the Uncontaminated Scrap Metal at its Shipman Facility

The next section of BISM’s argument contains an extensive discussion of what is involving in the recycling industry when uncontaminated scrap metal is sent to its ultimate customers, i.e., mills that feed the scrap material into their smelting equipment. BISM Post-Hearing Brief at pages 13-14. None of those processing activities (including shearing, crushing, and shredding material to get it to a reduced size that is acceptable by the mills), however, were not going to be done at the Shipman facility. They were to be done at the properly permitted Schnitzer facility.

Mr. Steven Chang testified without any contrary evidence from BISM that simply putting uncontaminated scrap metal into a container for shipment (here, to Schnitzer Steel) is not processing and does not require a processing permit.

The Hearings Officer accepts his expert opinion as an accurate statement of the law as applied in this situation and concludes that HMP did not need any permit authority greater than it already had for its Shipman facility in order to use that facility to accept uncontaminated scrap metal and ship it to Schnitzer Steel.

3. BISM's Challenges to the Credibility of Mr. Pahio's Testimony are Not Accepted

The last section of this portion of BISM's argument is that the testimony of Mr. Shon Pahio, general manager of HMP, lacks credibility and that HMP really plans to process uncontaminated scrap metal at its Shipman facility. BISM Post-Hearing Brief at pages 15-17. This argument is unconvincing.

BISM first tries to make a point that it makes no sense that HMP would truck uncontaminated scrap metal from the County's West Hawaii facility to HMP's Shipman facility, there to dump it on the ground and then load it onto containers to be shipped from Hilo to Schnitzer Steel on Oahu. However, whether or not this was a more costly way to do things, as compared to shipping it directly from West Hawaii to Oahu through the port at Kawaihae, is irrelevant—the IFB does not require any particular way of doing this or even that HMP do anything in the least costly manner (since this is not a cost plus type of contract). Further, BISM only argues, but does not demonstrate with evidence, that Mr. Pahio's testimony about better loading facilities at Shipman are important to HMP's plans should be disregarded. In addition, the argument does not challenge at all Mr. Pahio's testimony that the County's accelerated timetable meant he believed he needed to get the uncontaminated scrap metal off of the County's sites quickly and that his plan was best suited for doing so.

Mr. Pahio's alleged "demeanor" during part of his testimony does not change the situation. Being defensive or having a slight "attitude" while on the witness stand during some of the cross-examination by BISM's counsel does not carry any weight here. Since

BISM was the company that reported HMP to the DOH, resulting in the August 26, 2013, warning letter, the company that won the recycling contract for mixed scrap metal received by the County after August 30, 2013, and the company that was trying to take away this subject contract from HMP, it would be understandable that some resentment towards BISM would be expressed in some manner during Mr. Pahio's testimony. The Hearings Officer has reviewed the recording of this proceeding. There was nothing that approached anywhere near any misconduct by Mr. Pahio or any grounds to disregard his testimony.

Finally, BISM falls back on taking the word "prepare" or the words "metal markets" out of their context in HMP's revised Operations Plan, ignoring that part of the statement about doing things in compliance with their permit as well as HMP's statement in its bid about the role of Schnitzer Steel as a subcontractor. BISM offers, without hard evidence, what it terms "a more plausible explanation," decries "fabricated testimony," and spins the one warning letter of August 26, 2013 into "a history of disregarding the limitations imposed by its SWMP." The Hearings Officer declines to accept BISM's rhetorical assertions.

E. BISM Failed to Exhaust its Administrative Remedies with Respect to its Claim that HMP had Actual Knowledge that its Bid was Non-Responsive at the Time of Submission is Not Persuasive

The first basis of this claim, found in BISM's Post-Hearing Brief at pages 17- 20, is that HMP allegedly knew its SWMP did not permit it to process uncontaminated material on the ground or inside its warehouse facility at the time of its bid submittal on November 12, 2013. According to BISM, this is why HMP applied the day before, November 11, 2013 to modify its SWMP to allow it to process uncontaminated material inside its warehouse building.

The second, and "more important" basis of this claim according to BISM, was that HMP allegedly knew Schnitzer Steel was not permitted to process all of the contaminated material HMP would ship to it from the County's landfill sites. At the time of bid

submission, Schnitzer Steel's permit did not allow it to process scrap contaminated with fluids, and BISM's Post-Hearing brief specifically focusses at page 19 on refrigerator compressors that had not been drained of oil.³

In summarizing BISM's claim in this regard, it becomes apparent that BISM did not include this argument in its initial protest to the County of December 6, 2013,

its supplemental protests of January 3, 2014, and January 17, 2014, or its RFAH of February 25, 2014. Furthermore, the claim was not made in BISM's Motion for Summary Judgment filed March 5, 2014. Because of all of these omissions, neither the County nor HMP could anticipate the need to address this claim in their post-hearing briefs (which were filed on the same day as BISM filed its post-hearing brief).

It is a fundamental principle of Hawaii's procurement code that the hearings officers do not have unlimited jurisdiction to review every claim raised in an RFAH. The hearings officers can only make decisions about matters that were previously the subject of a protest and determination thereon by an agency's chief procurement officer. See, e.g., Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii, PCX 2011-2 (June 6, 2011), Exhibit B at pages 3-4. Accordingly this portion of BISM's claim is dismissed for lack of jurisdiction.

IV. DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

- a. The Big Island Scrap Metal, LLC, Motion for Summary Judgment is denied
- b. The HMP, Inc. Motion for Summary Judgment is denied

³ At page 18 of its Post-Hearing Brief, BISM cites testimony about residual contaminants in vehicles, but

c. The Big Island Scrap Metal, LLC, Request for Administrative Hearing is dismissed with prejudice.

d. The protest bond deposited by Big Island Scrap Metal, LLC, shall be forfeited to the general fund. In the event of a timely application for judicial review of the decision herein, the disposition of the bond shall be subject to determination by the court.

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

DATED: Honolulu, Hawaii, APR 10 2014.



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