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

In the Matter of	)	PDH-2014-006
	)	
CERTIFIED CONSTRUCTION, INC.,	)	HEARINGS OFFICER'S FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,	)	DECISION; EXHIBIT "A"
	)	
vs.	)	Senior Hearings Officer:
	)	David H. Karlen
DEPARTMENT OF FINANCE, COUNTY OF HAWAI'I	)	
	)	
Respondent.	)	
	)	

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

I. INTRODUCTION

Petitioner Certified Construction, Inc. ("Certified") previously appealed the Hearings Officer's decision herein filed May 8, 2014, that dismissed Certified's Request for Hearing based upon a portion of the motions filed by Respondent Department of Finance, County of Hawaii ("County"). That May 8, 2014 decision was reversed by an order of the Circuit Court of the Third Circuit filed on June 16, 2014, which order remanded the matter back to the Office of Administrative Proceedings ("OAH") for further proceedings.

The Hearings Officer's decision of May 8, 2014, did not decide all issues raised by the motions of the parties. On July 14, 2014, the Hearings Officer issued a decision on the issues remaining from the motions entitled "Order on Motions Pending After Remand." A copy of that decision is attached hereto as Exhibit "A."

As a result of that decision, an evidentiary hearing was held on July 17, 2014, concerning two issues:

1. Did the County agree to defer to a ruling by the Contractors License Board concerning the use of a C-42 specialty license, and/or whether a C-44 specialty license was necessary, on the project in question?

2. Are the gooseneck hood ventilators shown in the project drawings non-motorized prefabricated roof vents?

At this hearing, Certified was represented by Kristi L. Arakaki, Esq. Also present on behalf of Certified was its president, Mr. Kevin Simpkins. The County was represented by Jennifer D.K. Ng, Esq. Also present on behalf of the County was Mr. Brandon Gonzalez, Deputy Director of the County's Department of Public Works.

Mr. Simpkins testified on behalf of Certified. Mr. James Imanaka and Mr. Gonzalez testified on behalf of the County.

Certified's Exhibits A, B, C, D, F, G, and H, and the County's Exhibits 19, 20, 12, 25, and 26 were admitted into evidence.

At the conclusion of the evidentiary hearing, the Hearings Officer took the matter under submission. The parties had earlier been requested to file a post-hearing memorandum on the following jurisdictional question:

> Does the Office of Administrative Hearings have jurisdiction in this matter to consider Certified Construction, Inc.'s claim that the County must defer to an opinion of the Contractors License Board that was not brought to the County's attention until after the County's protest denial letter of March 21, 2014?

At the conclusion of the evidentiary hearing, the Hearings Officer allowed the parties to expand the memorandum on the jurisdictional issue to include a general post-hearing closing argument. Both parties filed such an expanded memorandum by the deadline of July 21, 2014.

Just before the close of business on July 25, 2014, Certified filed a Motion for Award of Contract. The County was allowed to file a memorandum in opposition to this Motion by

July 29, 2014. Subsequently, Certified's counsel made a request by e-mail on July 29, 2014, to file a reply brief. The parties were informed by e-mail on the morning of July 30, 2014, that Certified's request to file a reply brief was denied. Certified's Motion for Award of Contract was taken under submission at that time without oral argument.

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.

The Findings of Fact Nos. 1 through 35 contained in the Order on Motions Pending Remand, filed July 14, 2014, Exhibit "A" hereto, are hereby adopted and incorporated herein by reference. The Hearings Officer also makes the following further Findings of Fact.

36. The County decided to reroof the buildings in question due to a request from the County's fire chief to prioritize this project because the roofs were leaking. For example, due to roof leaks, tarps had to be placed over the area where electrical equipment for the County's emergency dispatch system was located.

37. Following the opening of the bids on this project, Mr. Imanaka made a courtesy call to Mr. Simpkins to inform Mr. Simpkins that Certified's bid was going to be disqualified. Mr. Simpkins memory was vague as to whether he had one or two post-bid conversations with Mr. Imanaka, and the Hearings Officer finds on the basis of Mr. Imanaka's testimony that there was only one post-bid conversation between the two men.

38. During this post-bid conversation, Mr. Imanaka wanted to explore whether Certified's bid could be considered under the idea that the work for which a C-44 license was required would qualify for the 1% exemption. This refers to an "exemption" for failing to list a subcontractor if the work involved is less than 1% of the bid amount, See HRS §103D-302(b). Mr. Simpkins was not interested in exploring this possibility.

39. Instead, Mr. Simpkins stated in this conversation that Certified would rely on the results of a bidding controversy over a previous State contract where Certified had "squashed"

another contractor's position on the licenses necessary to do that other project's work, thus defeating that contractor's bid protest.

40. As it turned out, Mr. Simpkins was referring to a project at Kalaeola on Oahu where the issue was whether the installation of flashing was incidental to the roofing work. On February 14, 2014, Mr. Simpkins sent an e-mail to Mr. Imanaka that forwarded a series of e-mails regarding the Kalaeola project. Mr. Simpkins asserted in his February 14, 2014, e-mail that "[t]he same issue came up and this email seemed to have enough information that squashed the formal protest regarding the C-42 A [sic] License we hold." See Exhibit 20.

41. Mr. Simpkins' memory of his telephone conversation with Mr. Imanaka was not clear, and the Hearings Officer cannot accept any conclusory statement by Mr. Simpkins that the net result of the conversation was that the County would defer to a ruling by the Contractors License Board at some unknown future date while the existing roofs continued to leak. The Hearings Officer finds, based on the testimony of Mr. Imanaka, that Mr. Imanaka did not state in this conversation that the County would wait for a ruling from the Contractors License Board and/or defer to a ruling of the Contractors License Board on this particular project.

42. Certified never sent a confirming communication to the County referring to any alleged County agreement to wait upon and/or defer to a ruling by the Contractors License Board. As stated in earlier findings, prior to that Board opinion Certified had never even informed the County that it was going to make, or had made, a request to the Contractors License Board for a ruling.

43. Mr. Imanaka was the project coordinator. The disqualification letter of February 14, 2014, was signed by Mr. Warren H.W. Lee, the County's Director of Public Works, not Mr. Imanaka.

44. Per Mr. Simpkins' testimony, Certified is an experienced government contractor.

45. Certified should have known that Mr. Imanaka did not have the authority to bind the County to deferring to a future Contractors License Board ruling. Even if Mr. Imanaka had

made such a statement, which the Hearings Officer finds was not in fact made, it would have been unreasonable for Certified to rely upon such a statement as the County's official final position on the matter.

46. Mr. Imanaka, a trained architect, designed this project. He believed a C-44 license was necessary for full performance of the project.

47. Mr. Imanaka did make an informal inquiry to the Department of Commerce and Consumer Affairs as to what a C-42 licensee could do. While neither counsel followed up with further questions on this subject, presumably that inquiry did not change Mr. Imanaka's mind about the need for a C-44 license on this project.

48. Sheet A-9 of the plans and detail 2 on Sheet A-13 of the plans show that there five (5) turbo ventilators to be removed and replaced as part of the project. These turbo ventilators were required by Part 2.03 of Section 07411 of the project specifications to be a specific model of a specific manufacturer (or an approved equal), i.e., "Romair Model RR-24 Turbo Ventilator, 24 gauge galvanized steel, with heavy duty ball bearings, and corresponding Model C collar base for ridge condition or other pre-approved equal." This project specification was part of Exhibit 1 to Exhibit C, Certified's submittal to the Contractors License Board.

49. Certified did not, however, submit a copy of the project plans to the Contractors License Board, so the Board never saw Sheet A-9 or Sheet A-13 of those plans before it issued its opinion.

50. Sheet A-9 of the project plans also shows two gooseneck hood ventilators that were to be removed and replaced by two new sheet metal gooseneck hood ventilators as part of the project. Detail 5 on Sheet A-13 provided more information on the gooseneck hood ventilators and stated that all measurements in the plans were for cost estimates only, with actual dimensions of the ventilators to be determined by field measurements.

51. Prior to submitting its bid, Certified had an employee visit the site to look at the buildings where project work would take place. This employee did not climb up on the roof during this visit to take field measurements for the new gooseneck hood ventilators.

52. In contrast to the turbo ventilators, the gooseneck hood ventilators were not referred to in the project specifications. Further, the project plans and specifications did not, in contrast to the turbo ventilator situation, refer to any specific manufacturer or model number of gooseneck hood ventilator as being pre-approved.

53. Certified told the Contractors License Board in Exhibit C that the project work included "all other related work as shown on the drawings" but did not submit a copy of the project drawings to the Board. Accordingly, the Board had no knowledge of the situation pertaining to the gooseneck hood ventilators.

54. If Mr. Imanaka had known that Certified had made a submission to the Contractors License Board, he would have made his own submission to the Board that would have provided a full description of the work involved as well as a copy of the project plans (drawings). This would have brought the gooseneck hood ventilator situation to the Board's attention.

55. The gooseneck hood ventilators would have cost around $400 apiece to purchase. A total of approximately $100 in labor charges would be incurred to install them.

56. Mr. Simpkins claimed that the installation of the gooseneck hood ventilators was incidental and supplemental to the roof installation.

57. The County awarded a contract for the project in question to another company on May 13, 2014.

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 Issue of Jurisdiction

The question of lack of jurisdiction can be raised at any time in these proceedings. If not raised by the parties, it can be raised by the hearings officer *sua sponte*, as jurisdiction cannot be conferred by the stipulation, agreement, or waiver of the parties. Captain Andy's Sailing, Inc. v. Department of Natural Resources, 113 Haw. 184, 193-194, 150 P.3d 833, 842-843 (2006); Koga Engineering & Construction, Inc., v. State of Hawaii, 122 Haw. 60, 84, 222 P.3d 979. 1003 (2010).

Under the Procurement Code, the hearings examiner has the jurisdiction to consider and decide a protest by Certified. Pursuant to HRS §103D-709(a), the hearings officer:

> Shall have jurisdiction to review and determine de novo, any request from any bidder, offeror, contractor, or person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.[1]

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

> The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

In other words, the hearings officer can only make a decision about the "determinations" of the chief procurement officer, and the chief procurement officer can only make "determinations" about complaints brought before that officer. The statute literally leaves no room for the hearings officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer. Order Denying Without Prejudice Department of Transportation's Oral Motion for Partial Dismissal Based on Lack

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

of Jurisdiction, pages 3-4, attached as Exhibit "B" to Kiewit Infrastructure West co. v. Department of Transportation, State of Hawaii, PCX-2011-2 and PCX-2011-3 (June 6, 2011).

In the present case, Certified did not assert as a basis for its protest that the County had agreed to defer to a decision by the Contractors License Board, and that the Board's opinion was in favor of Certified's position on the C-42 licensing issue and should be followed, until after the County had issued its protest denial letter of March 21, 2014. The County's chief procurement officer or that officer's designee never made a "determination" on either of these two claims.

Certified asserts that presentation of these two claims to the County's procurement officer is excused by the doctrine of futility. It relies upon the decision in Road Builders Corporation v. City and County of Honolulu, Department of Budget and Fiscal Services, PCY-2012-013 (April 27, 2012), as authority for its position.

In the Road Builders case, the City and County procurement officer had denied a protest as untimely. The denial letter, however, also stated in the alternative that, should the protest in fact be timely, Road Builders would not be successful on its substantive protest claims. The denial letter then concluded that if the protest was ultimately determined (by the Office of Administrative Hearings) to be timely, Road Builders would have to file another administrative protest with the City and County containing Road Builders' substantive claims.

The Hearings Officer ultimately held that Road Builders' protest was timely. The Hearings Officer then refused to accept the City and County's position that Road Builders then needed to submit another administrative protest on the substantive basis of its previously filed protest claims. The Hearings Officer found that it would be futile for Road Builders to pursue a further administrative remedy because the City and County

procurement officer had already reviewed the substantive basis of Road Builders' protest and had rejected it in the very same letter that claimed the protest was untimely. Since the City and County procurement officer had already fully decided, in writing, that the substantive basis of Road Builders' protest was meritless. There was no point in requiring Road Builders to go back to the City and County on those same points.

The authority for utilizing the doctrine of futility of exhausting administrative remedies in the procurement protest context was based on the Supreme Court's consideration of that doctrine with respect to another portion of the Procurement Code concerning contract controversies. In Koga Engineering Construction, Inc. supra, the Hawaii Supreme Court considered a claim that it would be futile to exhaust administrative remedies in a "contract controversy" even though it ultimately held that it would not be futile to exhaust administrative remedies in that particular case.

After carefully considering whether Certified can take advantage of the doctrine of futility applied to procurement protests, as was done in the Road Builders case, the Hearings Officer has concluded that Certified's position in this case cannot be sustained.

In the Road Builders case, the substantive basis of the protest had been reviewed and specifically denied in writing by the procurement officer. While that decision might have been characterized as a contingent one, i.e., it only applied if the protest was later deemed timely by a higher authority, nevertheless it was an actual decision on the grounds raised in protest. Here, however, the procurement officer has never made any decision on the two protest grounds in question because those grounds were never presented to the procurement officer.

It is instructive in this situation to review the Koga Engineering case, the case which is the basis for adopting the doctrine of futility in the first place. In that case, the contractor added a claim in its litigation with the State that had never been presented to the

procurement officer for administrative review. The statute in question precluded relief in court for claims not previously presented for administrative review. To excuse its failure to exhaust the normally required administrative remedies, Koga claimed that it would have been futile to pursue such remedies because the State was allegedly clearly not willing to agree to any portion of Koga's new claim.

The Hawaii Supreme Court made a detailed analysis of the record and concluded that Koga's position was incorrect. The parties had made some progress in administratively narrowing the issues involved in Koga's new claim, and it was not clear that they had reached an absolute impasse in that regard. Koga also complained that the State was taking too long regarding its claim, but Koga failed to take advantage of a statute providing it with the ability to definitively ask for a final decision (which would trigger Koga's ability to file a lawsuit). Thus, concluded the Hawaii Supreme Court, even though the administrative process might have been frustrating, Koga failed to establish that it would have been futile to fully pursue its administrative remedies.

The situation herein is more similar to the Koga Engineering situation than to the Road Builders situation.

1. Certified claims that the County agreed to defer to the Contractors License Board and that Certified obtained a favorable Contractors License Board decision on March 21, 2014. The County denied Certified's protest on March 21, 2014, but it did so in complete ignorance of Certified's claim or the existence of the Contractors License Board decision since neither had ever been presented to the County. Thus, unlike the Road Builders case, the County's protest denial letter never considered, much less dismissed, Certified's claim concerning the Contractors License Board opinion.

2. As in Koga, and unlike Road Builders, it is not apparent that the County would never recognize any portion of Certified's claim.

a. As Mr. Imanaka's e-mail of February 18, 2014, stated, the County would consider a Contractors License Board determination if the Board's decision was based on the facts of the County's project (as opposed to the unknown facts pertinent to some other totally unrelated project as advocated by Mr. Simpkins). Further, while Mr. Imanaka denied that he himself could agree to bind the County to accept a Contractors License Board decision, the essence of his testimony was that he could take that Board decision to the County's procurement officer who did have the authority to consider Certified's claim that the County should follow the Contractors License Board's determination.

b. While Mr. Imanaka testified that he did not commit the County to waiting for a Contractors License Board decision, the County might have waited if it had known such a decision had been requested and was "in the works." It waited from February 14, 2014, to March 21, 2014 without knowing about any proceedings before the Contractors License Board. Certified has only itself to blame for not informing the County of its application for a Contractors License Board decision.

c. While the County does not agree that the gooseneck hood ventilators can be installed by a C-42 licensee, if that was the only remaining issue after the Contractors License Board opinion, the County might have considered their installation without a C-44 license as "necessary and incidental." The County itself broached the possibility of considering some aspect of the roof installation under the 1% exemption when Mr. Imanaka spoke with Mr. Simpkins after the bids were opened. It was Certified, not the County, that rejected this approach. This demonstrates that the County was not totally inflexible when considering Certified's situation.

d. In its memoranda filed with the OAH, the County has denied the validity of Certified's claims. These denials in their filings do <u>not</u> mean the doctrine of futility applies. Especially given the short 45 day limitation on procurement protests, the County had to

defend itself in front of the OAH. As stated aptly in the Koga Engineering case, the County defending itself in litigation on claims never presented to the County administratively does not mean it would have been futile to attempt to exhaust the bypassed administrative remedies:

> The parties were already engaged in litigation, and the State's decision to defend itself against Koga on the retainage issue after it became clear that Koga would raise it before the court does not establish the "futility" of the administrative remedy in HRS §103D-703.

Koga Engineering & Construction, Inc. v. State of Hawaii, supra, 122 Haw. at 88, 222 P.3d at 1007.

Accordingly, the Hearings Officer concludes that there is no jurisdiction in this matter to consider Certified's claim that County must defer to the opinion of the Contractors License Board dated April 8, 2014.

B. The County Did Not Agree to Defer to a Ruling of the Contractors License Board

While there is no jurisdiction to consider this issue, out of an excess of caution given the protracted proceedings in this matter, the Hearings Officer would conclude, if there were jurisdiction over this issue, that the County did not agree to defer to a ruling of the Contractors License Board.

Mr. Simpkins provided only his conclusory impression of his post-bid conversation with Mr. Imanaka, never testified to precisely what words were used to signify a purported agreement by the County to defer to the Board, and demonstrated a very hazy memory of the entire conversation. Based on the above Findings of Fact, the Hearings Officer concludes that Mr. Imanaka never agreed in that post-bid conversation to wait for, and defer to, a Board opinion.

Further, Mr. Imanaka's e-mail of February 18, 2014, does not change this conclusion. The e-mail says that the materials provided from Mr. Simpkins pertained to

another project but the County did not know the scope of work on that project and thus could not rely on those materials to make a decision in the present case. The County would need a Board determination that fit the facts of this case before it could accept Certified's argument, but Certified did not provide such a determination. This is not a commitment to wait an unknown period of time to see if, perhaps, the Board would issue a favorable opinion.

C. Certified Cannot Utilize the CLB Opinion to Determine the Gooseneck Hood Ventilator Issue

Again, while there is no jurisdiction to consider this issue, out of an excess of caution the Hearings Officer sets forth the following conclusions on the issue.

The Contractors License Board's opinion is informal in nature and does not even bind the Board to honor its own opinion. A formal opinion can only be obtained through the use of a declaratory relief petition that would provide for notice to the County and an opportunity for the County to be heard by the Board. That did not happen in this case, so the Board's opinion must be considered solely as evidence of the Board's inclinations—the Board uses this type of opinion as a quick mechanism to provide some guidance to the parties so that they might take this informal opinion into account on an expedited basis not available if a declaratory relief petition were involved.

There are two problems with the application of the Board's opinion that is asserted by Certified. First, the County had no knowledge that the Board would consider the County's project and no opportunity to make a presentation to the Board. The Hearings Officer cannot conclude that the Board's informal opinion would have been exactly the same if the County had been given an opportunity to participate.

Second, the gooseneck hood ventilator situation was never presented to the Board. Based on the evidence at the July 17, 2014 hearing, the Hearings Officer concludes that the gooseneck hood ventilators shown only on the project plans were not so similar to the turbo ventilators specified by manufacturer and model number in the project specifications that the

Board's opinion on the turbo ventilators would have been extended to the gooseneck hood ventilators.

Certified has only itself to blame for this situation. If the Hearings Officer were to reach this issue, the conclusion would be that Certified has not satisfied its burden of proof to demonstrate that the Board's opinion of April 8, 2014 should also apply to the gooseneck hood ventilators.

D. Certified's Procurement Protest of February 19, 2014, Must Be Dismissed

The one procurement protest properly submitted by Certified to the County is contained in the letter of Certified's attorneys dated February 19, 2014, Exhibit B. The second ground of that protest was that the use of a sheet metal contractor with a C-44 license was not required by the bid documents. Certified has prevailed on that argument by means of the Circuit Court's decision of June 16, 2014.

The Court's decision, however, did not fully resolve Certified's protest. While Certified did not have to list a C-44 licensee in its bid, Certified itself does not have a C-44 license. It therefore must still establish that the project work can be legally performed by Certified because Certified possesses C-42 and a C-44A licenses. Indeed, that is the very first issue raised in Certified's protest letter to the County. See Exhibit B, page 2.

The Hearings Officer's Order on Motions Pending After Remand, dated July 14, 2014, established that Certified was entitled to raise this claim despite not listing itself on the LRE form and despite not listing itself in the bid documents as possessing these two specialty licenses. Accordingly, this Decision will now proceed to determine whether or not Certified should prevail on its protest based solely on its protest letter of February 19, 2014.

The first part of Certified's protest letter concerning the sufficiency of Certified's C-42 and C-44a licenses to do the project work focusses solely on the sheet metal flashings portion of the work. As the first paragraph on page 2 of Certified's letter states, "[s]heet

metal work for this Project involves installation of sheet metal flashings, which HAR Title 16, Chapter 77, Exhibit "A", expressly includes among the type of work that may be performed by a roofing contractor under a C42 specialty contracting license..."

The second paragraph on page 2 of Certified's protest letter also focusses exclusively on the installation of roof flashing. It argues that such installation is expressly allowed by the regulations defining the work allowed by a C-42 license or that it is "incidental and supplemental" to the scope of work allowed by a C-42 license. In support of this position, the letter cites the e-mail of Tim Lyons that is part of Exhibit 20.

As noted in the Findings of Fact above, the roof work included installation of two types of roof vents. That work is not roof flashing work, so the first portion of Certified's protest does not establish that a C-42 license was sufficient to enable Certified to install roof vents.

The second portion of Certified's argument is contained in the third paragraph of page 2 of protest letter of February 19, 2014, and refers solely to the installation of gutters and downspouts under Certified's C-44A specialty license. Again, it is not intended to demonstrate coverage of the installation of roof vents under Certified's specialty licenses.

The final paragraph of this section of Certified's protest letter, on page 3 of its protest letter, does pertain to the roof vents, as it states in full:

> In addition, it should be noted that installation of pre-fabricated or pre-constructed items is deemed by the Contractors License Board ("CLB") and other procurement agencies, to be work within the scope of the primary specialty contracting work. District Counsel[sic] 50 of the International Union of Painters v. Saito, 121 Haw. 182, 184, 216 P.3d 108, 110 (Haw. Ct. App. 2009).

The legal citation in this paragraph, however, demonstrates that Certified's claim here is fundamentally incorrect.

The citation refers to a portion of an Intermediate Court of Appeals opinion that is itself a description of a Contractors License Board's opinion on whether replacement of

aluminum jalousie windows normally requiring a C-22 specialty license could be performed by a C-5 cabinet, millwork, and carpentry licensee that did not have a C-22 license. In other words, and is made clear by the entire court opinion, the Board had decided that the C-5 specialty licensee could do work on the project in question outside the scope of its license under the "incidental and supplemental" principles, i.e., the work was not within the scope of its license. The only stated basis for this portion of Certified's protest (that the work was within the scope of Certified's licenses) thus demonstrates that Certified's protest contention here was meritless.

The Hearings Officer cannot rewrite the text of Certified's protest to transform it into something that is more legally correct, or, at least, more legally debatable. HAR §3-126-4; Alii Security Systems, Inc. v. Department of Transportation, State of Hawaii, PCY-2012-002 (February 24, 2012), at page 9.

The Hearings Officer, however, does make two observations if, for some reason, this portion of Certified's claim is considered as one that asserts that the installation by Certified of the gooseneck hood ventilators (as well as the turbo ventilators) was allowable because it was "incidental and supplemental" to work allowed under Certified's C-42 license. This was the claim made by Mr. Simpkins at the July 17, 2014 evidentiary hearing.

The "incidental and supplemental" concept has its basis in HRS §444-8(c) and is explained at length in District Council 50 of the International Union of Painters and Allied Trades v. Lopez, 129 Haw. 281, 298 P.3d 1045 (2013). Any assertion by Certified that the installation of the ventilators was incidental and supplemental to its roofing work is an admission that installation of the ventilators was not covered by Certified's C-42 license. It is an admission that the County was correct with respect to the ventilators and that a C-42 license was not sufficient to allow Certified to legally install the ventilators (unless there was some exception). Certified relies on the "incidental and supplemental" exception.

Certified's Request for Hearing, however, does not contain any claim that the "incidental and supplemental" exception allows Certified to install the ventilators on this particular project under its C-42 license. No "request" (see HRS §103D-709(a)) having been timely made on this issue, there is no basis for the Hearings Officer to make a ruling here in Certified's favor.

For the reasons stated above, therefore, Certified has failed to establish entitlement to relief on its protest claims relating to the ventilators even if it would otherwise prevail on its claims regarding the flashings and the gutters. Certified has thus failed to demonstrate entitlement to relief in this proceeding.

E. Certified's Motion for Award of Contract Must Be Denied

Because Certified's Request for Hearing is being dismissed, its Motion for Award of Contract must necessarily be denied.

IV. DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, as well as the Order on Motions Pending After Remand, the Hearings Officer finds, concludes, and decides as follows:

a. Certified Construction, Inc.'s Request for Hearing herein is dismissed with prejudice.

b. The cash or protest bond of Certified Construction, Inc., shall be deposited into the general fund.

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

DATED: Honolulu, Hawaii, July 30, 2014.

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

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

In the Matter of CERTIFIED CONSTRUCTION, INC., Petitioner, vs. DEPARTMENT OF FINANCE, COUNTY OF HAWAI'I Respondent.	PDH-2014-006 ORDER ON MOTIONS PENDING AFTER REMAND Senior Hearings Officer: David H. Karlen

ORDER ON MOTIONS PENDING AFTER REMAND

I. INTRODUCTION

Petitioner Certified Construction, Inc. ("Certified") previously appealed the Hearings Officer's decision herein filed May 8, 2014, that dismissed Certified's Request for Hearing based upon a portion of the motions filed by Respondent Department of Finance, County of Hawaii ("County"). That May 8, 2014 decision was reversed by an order of the Circuit Court of the Third Circuit filed on June 16, 2014, which order remanded the matter back to the Office of Administrative Proceedings ("OAH") for further proceedings.

As will be set forth in detail below, the Hearings Officer's decision of May 8, 2014, did not decide all issues raised by the motions of the parties. The decision herein therefore covers all previously undecided issues raised by the parties in their motions.

Shortly after OAH was notified of the Court's remand decision, the parties were notified that OAH would proceed on an expedited schedule based, by analogy, on the forty-

EXHIBIT A

five day time limit for an original OAH proceeding mandated by HRS §103D-709(b). In the absence of a clear direction from the statute or the courts, OAH would take the conservative view that a new forty-five day time limit started on the date of the Court's remand decision. Concluding the proceeding with that second forty-five period would preclude inadvertently penalizing any party due to a later court decision that jurisdiction had been lost because the remand proceeding took longer than forty-five days.

Accordingly, an evidentiary hearing has been scheduled for July 17, 2014, should the decision on the previously filed motions not lead to a complete resolution of this case.

Because of the multiplicity of motions with multiple issues, a detailed description of the procedural aspects of this case is presented below.

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. By letter dated February 14, 2014, the County notified Certified that Certified's bid for the project was disqualified.

2. The County's letter stated that "[t]his project required a C-44 - Sheet metal contractor, noted in the Special Notice to Bidders and the Proposal sections of the bid specifications." Certified's bid, however, "fails to list a C-44 sheet metal subcontractor or to describe an alternate means and methods by which the work required of this project covered by this license class would otherwise be legally executed."

3. The County's letter further stated that the failure to list a subcontractor when required rendered its bid nonresponsive

4. On February 19, 2014, Certified, through its attorneys, submitted a letter to the County protesting Certified's disqualification. This protest letter contained the following assertions:

a. All work for the project involving sheet metal can be performed by Certified under its own C-42 roofing or C-44a gutters specialty licenses.

b. The bid specifications did not require a sheet metal contractor with a C-44 license.

5. Certified's letter of February 19, 2014, was explicitly denominated a protest under HRS §103D-701(a), and Certified therefore invoked the terms of the automatic stay under HRS §103D-701(f).

6. On March 21, 2014, the County sent a letter to Certified responding to Certified's protest letter of February 19, 2014, denying Certified's protest, and upholding the disqualification of Certified's bid as being non-responsive. In summary, the letter stated as follows:

a. Certified's bid was non-responsive because it failed to satisfactorily address four of the five specialty contractor classifications set forth in the Listing of Responsible Entities ("LRE") section of the bid specifications. It did not list subcontractors in those specialty areas (including the C-19, C-33, and C-48 specialty areas as well as the previously identified C-44 specialty area) and did not describe the work it would do itself. Further, Certified did not provide a written description of the means/methods of accomplishing the work so that the County could evaluate a proposed alternative that did not include contractors or subcontractors possessing the aforesaid four specialty licenses.

b. CCI's argument that a C-42 and C-44(a) licenses were sufficient to perform the work was untimely because the first time this alternative was proposed was after bid opening and after Certified's bid was disqualified. Because Certified failed to properly propose the change in specialty licenses in its bid documents, its bid was non-responsive. (The letter further asserted that the County had the discretion to accept or reject any alternative even if Certified had followed the requirement to submit an alternative plan in its bid proposal.)

Finally, the County's letter stated that Certified's bid documents were inconsistent with its post disqualification argument that it intended to perform all required work itself (other than electrical work requiring a C-13 license) because it did not submit required documentation for apprenticeship trades Certified would employ to do that work.

7. On March 11, 2014, Certified, through its attorneys, submitted a request for a ruling to the Contractors License Board ("CLB"). A ruling was sought "clarifying that the installation of a metal roof with the appurtenant and incidental metal flashing and roof vents

may be performed by a contractor holding (1) a "B" General Building License, (2) a "C-42" Roofing License, and (3) a "C-44A" Gutters License."

8. Certified did not contemporaneously provide the County with a copy of this March 11, 2014, letter, and neither Certified nor the CLB notified the County that Certified had made the aforesaid request for a ruling.

9. The Certified request for a ruling by the CLB was placed on the Board's agenda for its March 21, 2014 meeting. Certified's vice president and Certified's attorney appeared at this meeting.

10. The County had no notice of this meeting and did not appear at this meeting.

11. At its March 21, 2014, meeting, the CLB apparently expressed on oral opinion that a C-44 license was not required for this project if those entities doing the work possessed other specified licenses. No written ruling or opinion was issued at that time.

12. It was purely a matter of coincidence that the County's letter denying Certified's protest was issued on the same day as the CLB meeting on Certified's request to the Board. The County had no knowledge at that time that Certified had even made a request for a ruling to the Board much less that the Board was meeting on that day to consider Certified's request.

13. On March 28, 2014, Certified filed its Request for Hearing ("RFH") with OAH. In summary, Certified's RFH asserted as follows:

a. The County waived its right to raise issues other than the C-44 specialty license issue. The failure to list a C-44 licensed subcontractor was the only ground for disqualification listed in the County's disqualification letter of February 14, 2014. The County should be precluded from relying on any new grounds for disqualification that are contained in its bid protest denial letter of March 21, 2014. RFH, pages 5-8.

b. Certified's bid was responsive.

1. Certified's bid was in full compliance with the statutes, administrative rules, and the Okada Trucking decision regarding the listing of all subcontractors and joint contractors. There was no requirement to use a C-44 licensed contractor or subcontractor on this project because of a ruling by the Contractors License Board.

In addition, there is no legal requirement that Certified list itself as a contractor in the LRE form in its own bid submission. RFH, pages 8-11.

2. The County's reliance on Certified's alleged failure to properly complete the LRE section of the bid proposal is a new argument made after the Contractors License Board ruling in favor of Certified. Further, the LRE is ambiguous and confusing. RFH, pages 11-12.

3. Certified's bid is responsive because its failure to list itself is a nonsubstantial nonconformity that does not affect the responsiveness of the bid. RFH, pages 12-16.

4. The County should waive any mistake by Certified or allow Certified to correct its bid proposal. RFH, pages 16-20.

14. On April 8, 2014, the CLB issued a letter regarding its determination of the license classifications required for the project. This determination was based "solely" upon Certified's submissions and was explicitly stated to be "for information and explanatory purposes only. It is not an official opinion or decision, and thus is not binding on the Board."

15. The CLB's letter of April 8, 2014, was not sent to the County. The County did not receive a copy of that letter until it was provided as Exhibit 1 to Certified's Motion for Summary Judgment dated April 11, 2014.

16. Certified filed a Motion for Partial Summary Judgment to determine whether the instant bid protest concerned a matter greater than $10,000 as required by HRS §103D-709(d)(1).

17. The County filed a Motion to Dismiss Certified's RFH for lack of jurisdiction. The motion, dated April 11, 2014, asserted several grounds.

a. Certified failed to timely object to the contents of the bid solicitation documents prior to bid opening. More specifically, the County asserted that the bid solicitation documents required a C-44 specialty contractor classification to perform part of the work, so Certified's objection to the C-44 specialty contractor classification was an objection to the contents of the solicitation that was required to be made no later than the opening of bids pursuant to HRS §103D-701(a).

b. Certified failed to timely object to the allegedly "ambiguous and confusing" LRE form in the bid solicitation documents prior to bid opening.

c. Certified failed to timely object, prior to bid opening, that it did not have to follow the requirement that bidders list themselves in the LRE.

d. Certified also failed to follow the directions in the bid specifications regarding time limits on objections to the County's determination regarding required specialty licenses.

18. On April 16, 2014, Certified filed its Memorandum in Opposition to the County's Motion to Dismiss Certified's RFH. Certified asserted that the bid specifications did not require a C-44 specialty license. Therefore, according to Certified, its protest did not attack the content of the bid solicitation and thus was timely—it did not have to be submitted before bid opening. Further, whether Certified's nonlisting of itself in the LRE form is a mistake subject to correction is alleged to not be a protest issue that must be submitted prior to bid opening.

19. The County also filed a Motion for Summary Judgment in addition to its aforesaid Motion to Dismiss. In summary, the County's Motion for Summary Judgment, dated April 11, 2014, asserted as follows:

a. Certified's bid was non-responsive because it failed to list a C-44 specialty licensed contractor.

b. Certified's bid was non-responsive because it failed to properly complete the LRE because it did not list itself as the responsible entity for specifically enumerated specialty license areas of work and failed to provide any alternate means or methods as required by the specifications.

c. Assuming for purposes of argument that Certified's protest is timely, the requirement of a C-44 specialty contractor classification in the invitation for bids is valid.

d. Certified's error in failing to list responsible entities in the LRE is not a mistake that must be waived or excused.

20. Certified's Memorandum in Opposition to the County's summary judgment motion, dated April 16, 2014, asserted, in summary, as follows:

a. Certified's bid was responsive because a C-44 license is not required.

b. A C-42 license, which Certified possesses, is sufficient to do the work on this project.

c. The County is estopped from raising the new argument that Certified's bid must be rejected for failure to comply with specific LRE form instructions.

d. Certified's failure to list itself on the LRE was a mistake that must be waived or excused.

21. Certified filed its own Motion for Summary Judgment, dated April 11, 2014, asserting, in summary, as follows:

a. The County is precluded from raising issues other than the C-44 license issue. The County is limited to the reasons stated in its disqualification letter of February 14, 2014. The County cannot rely on new grounds asserted after the Contractors License Board ruled in Certified's favor.

b. Certified's bid was in full compliance with HRS §103D-302(b) and HRS §3-122-21(8).

1. A C-44 sheet metal license is not required for this project. The Contractors License Board has ruled that a C-44 license was not required and that the work in question could be performed under a C-42 roofing license. The Contractors License Board ruling actually encompasses all of the work the County contends was not covered by Certified's application to the Contractors License Board.

2. Because a C-44 license was not required to perform the work on the project, Certified was not required to list such a licensee in its bid. Further, Certified was not required to list itself on the LRE.

22. The County filed a Memorandum in Opposition to Certified's summary judgment motion. Dated April 16, 2014, it asserted, in summary, as follows:

a. Certified is attempting to distract attention from its untimely and meritless protest by focusing on alleged communications after bid opening and misrepresents conversations concerning the Contractors License Board. The County's denial of Certified's protest met the allegations raised in Certified's protest.

b. Certified is in error in its belief that a C-44 license was not required for the project. Certified purposely limited the information provided to the Contractors License Board, and the Board's opinion has limited utility because it does not address one of the specific reasons for the County selecting the C-44 license for the project. Further, Certified has misinterpreted the Board's written opinion.

c. The County had the authority to require that bidders indicate themselves on the LRE form or indicate an alternate means or method when applicable.

23. On May 8, 2014, Hearings Officer Sheryl Lee A. Nagata issued her decision in this matter concerning the various motions set forth above. In summary, Ms. Nagata's decision held as follows:

a. As Certified and the County agreed that the amount in controversy is greater than $10,000.00, Certified's Motion for Partial Summary Judgment regarding that issue is moot even though the parties disagreed on how to calculate the amount in controversy.

b. The County's proposal required a C-44 specialty contractor license.

c. Certified's failure to object to this requirement prior to bid opening made Certified's protest untimely, and the DCCA did not have jurisdiction to hear this matter.

d. In light of the above, the Hearings Officer declined to discuss or make determinations on other issues raised by Certified.

e. The County's Motion to Dismiss was granted. The County's and Certified's motions for summary judgment were rendered moot by this decision.

24. Certified appealed this decision to the Circuit Court of the Third Circuit. On June 16, 2014, that Court issued an Order Granting Petitioner-Appellant Certified Construction, Inc.'s Application for Judicial Review of the Hearing Officer's Findings of Fact, Conclusions of Law and Decision ("Court's Decision"), which concluded as follows:

a. The Hearings Officer's finding that the County's Proposal or Solicitation required a C-44 specialty contractor license for the project was clearly erroneous;

b. The Hearings Officer therefore erroneously concluded that Certified's protest had to be submitted prior to bid opening;

c. Certified's protest of the disqualification of its bid was timely submitted; and

d. OAH had jurisdiction to review Certified's timely protest of the disqualification of its bid.

25. The Court's Decision therefore reversed the decision of the Hearings Officer and "remanded [the matter] to the Hearings Officer for further proceedings consistent with this opinion."

26. Certified provided a copy of the Court's Decision to OAH on June 20, 2014. On that day, the undersigned sent a letter by facsimile to all counsel setting a telephone status conference for June 25, 2014.

27. In this letter, the parties were informed that it was the practice of the Office of Administrative Hearings to proceed on a remanded case as it were subject to a new 45 day jurisdictional limitation starting with the date of the Court's Decision.

28. A telephone status conference was held by the undersigned on June 25, 2014. A letter dated June 27, 2014, and summarizing the result of that status conference, was sent to the parties by facsimile. The letter confirmed the following:

a. Because of scheduling concerns, the matter had been reassigned to the undersigned until further notice.

b. Not all issues raised in the parties' motions were decided by Hearings Officer Nagata. The parties agreed that the remaining issues should be decided and that the issues were ripe for decision without any further oral argument.

c. The County was allowed until July 3, 2014, to file and serve an additional written argument concerning the effect of the Court's Decision on the remaining issues in the motions. Certified was allowed until July 8, 2014, to file and serve a written response to any such County filing.

29. On July 2, 2014, Certified requested the ability to file and serve an additional written argument concerning the effect of the Court's Decision on the remaining issues in the motions.

30. Over the County's objection that Certified had previously waived the ability file such an argument, the undersigned allowed Certified to file and serve an additional written argument on July 3, 2014, and allowed the County until July 8, 2014, to file and serve a written response to any such Certified filings.

31. On July 3, 2014, both parties filed and served additional written arguments.

32. The County's additional written argument asserted, in summary, as follows:

a. Certified's bid was non-responsive because it failed to provide an alternate means or method to the work being done by a contractor with a C-44 specialty license; and

b. Certified's error in failing to submit an alternate means or method in its bid is not a mistake that must be waived or excused.

33. Certified's additional written argument asserted that the following arguments in the County's motion for summary judgment are no longer viable or valid:

a. Certified's bid was non-responsive because it failed to list a C-44 specialty licensed contractor. This argument is no longer viable in light of the Court's Decision.

b. Certified's bid is non-responsive because it failed to properly complete the LRE form and provide any alternate means or method. This argument was been waived by the County (and/or the County is estopped from raising it) because of the failure to raise this argument in the February 14, 2014 disqualification letter.

c. Certified's error in failing to list responsible entities in the LRE is not a mistake that must be waived or excused. This argument fails because the alleged errors were not material. Further, any requirement that the bidding contractor list itself as an entity performing work on the contract has now been omitted by the County from its recent bid solicitations.[1]

34. On July 8, 2014, the County replied to Certified's supplemental argument as follows:

a. Certified's estoppel argument is without merit and fails to justify Certified's non-responsive bid.

b. Certified's reference to a subsequent and unrelated procurement is irrelevant and has no bearing on the present procurement protest.

35. On July 8, 2014, Certified replied to the County's supplemental argument as follows:

a. Certified was not required to state its intent to use or provide a detailed plan describing an alternate means or method because it was going to perform all project work according to the precise specifications of the solicitation. There was no alternative means or methods for Certified to describe.

b. Even if Certified was required to list itself as an entity performing work under its C-42 and C-44a licenses, such failure was a mistake that must be either waived or allowed to be corrected.

[1] The Hearings Officer notes that the last two arguments by Certified are not in compliance with the requirement that the memorandum filed July 3, 2014 be concerned with the effect of the Court's decision on the remaining issues in the case.

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. Summary of Remaining Issues

As summarized in Finding of Fact No. 17, the County's Motion to Dismiss raised four issues. The first—failure to timely object to the bid solicitation documents' requirement of the use of a C-44 specialty license contractor—was an integral basis of Hearings Officer Nagata's decision that is no longer viable in light of the Court's Decision.

The same result holds for the fourth ground of the County's Motion to Dismiss. The alleged failure to timely object to the County's determination of the required specialty licenses is no longer viable in light of the Court's Decision that the specifications did not require a C-44 specialty license.

The following issues raised by the County's Motion to Dismiss (as identified in Finding of Fact No. 17) still remain to be decided:

b. Certified failed to timely object to the alleged "ambiguous and confusing" LRE form in the bid solicitation documents prior to bid opening.

c. Certified failed to timely object, prior to bid opening, that it did not have to follow the requirement that bidders list themselves in the LRE.

Similarly, not all of the issues raised by the County's Motion for Summary Judgment were covered by the Court's Decision. The County's first and third arguments, as enumerated in Finding of Fact No. 19 above, are no longer viable. However, the following issues raised by that motion still remain to be decided.

b. Certified's bid was non-responsive because it failed to properly complete the LRE because it did not list itself as the responsible entity for specifically enumerated specialty license areas of work and failed to provide any alternate means or methods as required by the specifications.

d. Certified's error in failing to list responsible entities in the LRE is not a mistake that must be waived or excused.

Finally, the following issues, as enumerated in Finding of Fact No. 21, remain from Certified's Motion for Summary Judgment:

a. The County is precluded from raising issues other than the C-44 license issue. The County is limited to the reasons stated in its disqualification letter of February 14, 2014. The County cannot rely on new grounds asserted after the Contractors License Board ruled in Certified's favor.

b. Certified's bid was in full compliance with HRS 103D-302(b) and HRS 3-122-21(8):

1. As a practical matter, a C-44 sheet metal license is not required for this project. The Contractors License Board has ruled that a C-44 license was not required and that the work in question could be performed under a C-42 roofing license. The Contractors License Board ruling actually encompasses all of the work the County contends was not covered by Certified's application to the Contractors License Board.

2. Because a C-44 license was not required to perform the work on the project due to there being an alternative license acceptable to the Contractors License Board, Certified was not required to list such a C-44 licensee in its bid. Further, Certified was not required to list itself on the LRE.

To some extent, the remaining issues listed above overlap or are otherwise closely connected. The following discussion will cover all of the remaining issues but will not necessarily be set forth in the same sequence as presented by the various motions.

B. <u>Certified's Bid Did Not List Itself on the LRE Form</u>

At pages 10-11 of its Motion to Dismiss, the County argued that Certified was required to list itself on the LRE form and its failure to do so made its bid nonresponsive. The same argument is made on page 13 of the County's Motion for Summary Judgment.

The County is correct in its reading of the Proposal. The LRE form states in relevant part:

> Where work is to be performed by the Prime Contractor (Builder) it shall list itself accordingly as the responsible entity.

In addition, the Special Notice to Bidders ("SNTB") provides in relevant part:

> In the circumstance where the Bidder is licensed in one or more specialty contractor classifications required of the project (whether automatically as a general engineering contractor "A", general building contractor "B", or outright) and it intends to perform all or some of the work of those classifications using its own workforce, the Bidder shall, in its Proposal, list itself accordingly and in consideration of the balance of the instructions herein provided.

It is undisputed that Certified failed to list itself on the LRE form and thus also failed to list the C-42 and C-44A specialty licenses it possessed which would allegedly cover the work otherwise requiring a C-44 specialty license.

Certified's response to the County's Motion to Dismiss, dated April 16, 2014, failed to come to grips with this issue. Its five page memorandum dealt exclusively with the issue of whether a C-44 specialty license was required. Only the last substantive sentence of the memorandum refers to the issue presently under consideration, where Certified states:

> Whether [Certified's] nonlisting of itself in the LRE Form is a mistake subject to correction under HAR §3-122-31, is not a protest issue that must be submitted prior to bid opening because the bidder obviously does not know ahead of time what immaterial mistake it is going to inadvertently make on its bid.

This is essentially an admission that Certified's bid did not conform to the bid's requirements plus a cursory and inadequate response that Certified's error was not sufficiently material to make Certified's bid fatally nonresponsive.

As noted above, however, the County raised the same issue in its Motion for Summary Judgment dated April 11, 2014. Certified's Memorandum in Opposition to this motion, dated April 16, 2014, at pages 7-12, did contain a non-cursory argument that Certified's bid was responsive even though it did not list itself on the LRE form. The Hearings Officer will consider that argument as also responding to the County's Motion to Dismiss.

1. <u>Certified's argument that the County is estopped from raising this issue.</u>

Certified's first argument, at page 7 of its Memorandum in Opposition, is that the County is estopped from raising this issue because the County failed to raise the argument in

its disqualification letter of February 14, 2014. To flesh out this argument, Certified incorporates the argument made at pages 5-8 of its RFH.

Certified's estoppel argument, however, is not viable. The County's disqualification letter of February 14, 2014, was not limited to the argument, now determined to be untenable, that the project required a C-44 sheet metal specialty license. It also stated that Certified failed "to describe an alternate means and methods by which the work required of this project covered by this license class would otherwise be legally executed." Since Certified's proposal did not state that Certified would do the work and did not state that Certified itself had C-42 and C-48a specialty licenses, the disqualification letter's statement that Certified failed to describe an alternate means and methods implicitly includes a statement that Certified failed to identify itself as the alternate means and methods of accomplishing the work. If a bidder does not list any entity with an appropriate specialty license (whether a C-44 or some other license), it certainly does not list itself as doing the work under that specialty license. The County was under no obligation to do research on its own to discover what specialty licenses Certified possessed that might possibly be relevant to this project.

Certified first provided written notice to the County that Certified would do the work in question in its attorney's letter of February 19, 2014. There, Certified made an explicit answer to the implicit statement in the disqualification letter described above, and, for the first time, identified itself as the party doing the work.

The County then made explicit in its bid protest denial letter of March 21, 2014, that Certified's failure to list itself on the LRE made Certified's bid non-responsive. As noted above, this argument is part and parcel of the argument that Certified failed to list an alternate means and methods (which argument was raised in the County's original disqualification letter). Prior to the disqualification letter, the County could not have

responded to Certified's bid in this manner because Certified had not informed the County that Certified itself would the work under a specialty license of any kind.

In addition, any argument by Certified that the County did not proceed in good faith because of the concurrent proceeding before the Contractor License Board is not valid. The County did not know of the application to the CLB, was not given an opportunity to participate before the CLB, and did not know the CLB had issued any opinion until well after the County's bid protest denial letter of March 21, 2014, was issued.

The Hearings Officer concludes that the County is not estopped from raising the argument in question.

2. Certified's argument that the County's position promotes form over substance

Certified argues here, at pages 8-9 of its Memorandum in Opposition, that the County's position is a "rigid and unsound interpretation of the solicitation," as evidenced by the fact that none of the other bidders on the project listed themselves as the entity responsible for performing the general contracting work required by the project.

The Hearings Officer agrees with the following statement at page 9 of Certified's Memorandum in Opposition that "reason and common practice dictate that where a bidder has not listed another contractor to perform specific work, it will be performing the work itself."

What Certified is really saying here (see Certified's RFH at pages 12-16) is that the failure of Certified to list itself in the LRE as doing the work not done by the one subcontractor that was listed in the LRE was not a material nonconformity significant enough to require Certified's bid to be rejected as nonresponsive.

The Hearings Officer agrees that, under the particular circumstances of this case, the nonconformity of Certified's bid in failing to list itself was not so material as to render its bid nonresponsive. As explained in Okada Trucking Co., Ltd v. Board of Water Supply, 97

Haw. 544, 556, 40 P.3d 946, 958 (Haw. App. 2001), not every nonconformity in a bid requires the bid to be rejected as nonresponsive.[2]

The real issue here is not Certified's failure to list itself on the LRE. The real issue is the effect of Certified's failure to include in its proposal alternate means and methods to accomplish the work of the specialty licenses listed in the bid specifications. That will be discussed in a later section of this Order.

3. Certified's argument that its failure to list itself in the LRE is a mistake that must be waived or excused

Because of the Hearings Officer's conclusion above that Certified's failure to list itself in the LRE does not, in and of itself, render Certified's proposal nonresponsive, there is no need to consider this last argument by Certified at pages 9-12 of its Memorandum in Opposition.[3]

C. Certified's Bid Failed to Provide Any Alternate Means or Methods as Required by the Specifications.

Guided by the terms of the specifications and the Court's decision, it has been established that the specifications did not have an iron-clad requirement that the bidders possess a C-44 specialty license. However, as previously noted as part of Hearings Officer Nagata's Finding of Fact No. 2, the Special Notice to Bidders did provide as follows:

> In the circumstance where a specialty contractor classification license listed in the above table may be deemed unnecessary by the Bidder due to its intent to employ a plausible alternative means or method, the bidder shall in its Proposal clearly state such intent and provide a detailed plan that meets the satisfaction of the Director. The

[2] In coming to this conclusion, the Hearings Officer does not rely in any way on the "newly discovered" evidence attached to Certified's letter of July 3, 2014. Attempting to introduce such new evidence by means of that letter was improper. The scope of the letter was limited in advance by the Hearings Officer to arguing how the Court's Decision affected the issues remaining on the parties' respective motions. Further abbreviated evidence from subsequent procurements is irrelevant to the issue of whether the nonconformity was critical with respect to this procurement.

[3] Similarly, there is no need to consider Certified's argument that the LRE form was ambiguous and confusing with regard to the bidder listing itself. It should be noted, however, that if the failure to list itself was a material nonconformity, the Hearings Officer would agree with the County's argument that any such argument that compliance was excused because the LRE form was ambiguous and confusing was untimely because it goes directly to the terms of the solicitation but was not made before bid opening. Further, there is no need to consider Certified's apparent argument that there is no legal requirement that it list itself in the LRE as the general contractor.

> Director reserves the sole discretion and right to determine whether the Bidder's proposed justification for not listing the required license is acceptable. (Emphasis supplied)

The C-44 specialty contractor license was one of the specialty licenses "listed in the above table." In Certified's view, that C-44 specialty contractor license was "deemed unnecessary by the Bidder." In that circumstance, the Special Notice to Bidders required Certified to "clearly state" its intent to use contractors with other licenses in a "plausible alternative means or method" and provide in its bid "a detailed plan that meets the satisfaction of the Director."

It is undisputed that Certified's proposal did not set specifically forth any "plausible alternative means or method" as part of "a detailed plan" to accomplish the work without utilizing a contractor or subcontractor with a C-44 specialty license.

The County raised this argument in its Motion for Summary Judgment separate and apart from its argument that a C-44 specialty license was absolutely required. See page 14 of the County's Motion:

> Similarly, it is undisputed that [Certified] failed to propose its plan to use its C-42 and C-44A licenses to perform the work of the C-44 license. The IFB permitted bidders to submit any proposed alternate means and methods within its bid so that [the County] could review and evaluate any proposed alterations to its IFB. [Certified's] failure to properly complete the LRE form as stated above constituted a material nonconformity because its bid did not obligate it to perform the work covered by the C-44 license, which was required by the IFB. Because [Certified], at bid opening, failed to list a contractor for each specialty contractor classification and provide an alternate means or method, [the County] could not determine how [Certified] would perform the work covered by the C-44 license. Thus, [Certified's] bid contained a material nonconformity and must be rejected as "nonresponsive. (Citations omitted).[4]

This argument was adverted to in Hearings Officer Nagata's decision but did not form the basis of that decision, and it was not the subject of the subsequent Court decision.

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[4] This argument is contained in a section of the Motion starting at the bottom of page 12 entitled "CCI's Bid is Non-Responsive Because it Failed to Properly Complete the LRE and Provide Any Alternate Means or Methods." Cf. the section of the Motion starting at page 10: "CCI's Bid Was Non-Responsive Because It Failed to List a C-44 Specialty Licensed Contractor."

Certified claims in its own Motion for Summary Judgment that the sole basis for its bid being disqualified was the failure to list the holder of a C-44 license on its LRE form. See, e.g., page 5 of its Motion: "The County cited only a single ground for its disqualification of [Certified's] bid proposal." This is not accurate. The disqualification letter said more than just the lack of a C-44 specialty license was the basis of the County's decision. The disqualification letter was phrased in the alternative. One basis for disqualification was failure to list a C-44 sheet metal subcontractor. The other alternative basis for disqualification was the failure to describe an alternate means and methods to legally accomplish the work if a contractor or subcontractor on the project did not have a C-44 specialty license. Accordingly, the issue has properly been preserved for a decision in this present proceeding.

Certified's Memorandum in Opposition to the County's Motion for Summary Judgment Motion never quite comes to grips with the substance of the County's argument. The Memorandum focusses on the argument that a C-44 specialty license was not required (an argument on which Certified eventually prevailed) and on the argument that it did not have to list itself on the LRE (on argument on which it prevails above), but it does not focus on the argument that Certified had to describe an alternate means and methods to do the work if it was not going to use a contractor with a C-44 specialty license. While it is implicit in Certified's bid that Certified would do the work itself, it was not explicit or implicit in Certified's bid that Certified had C-42 and C-44a specialty licenses and that Certified could show that these licenses were sufficient to do the work.

While the Court's Decision establishes that the County did not absolutely require a C-44 license on this project, there is nothing in the Court's decision from precluding the County insisting that the bid specification say, in effect, "a C-44 license would be sufficient, but if you don't have a C-44 license you must include in your bid a description of alternate

means and methods to accomplish the work that could otherwise be accomplished under a C-44 license." Indeed, such a reading of the bid specifications appears to be a critical underpinning of Certified's own argument, as well as the Court's Decision, that a C-44 license was not a mandatory requirement in the bid specifications.

Certified did argue in its July 8, 2014 response to the County's July 3, 2014 supplemental argument that its bid was in conformity with the alternate means and methods requirement of the solicitation because Certified was not going to employ any alternate means or methods. It was going to perform exactly the work required and set forth in the specifications.

The Hearings Officer cannot completely accept this argument. The bid specifications allowed bidders to perform the work if a C-44 licensed contractor or subcontractor were utilized. They also allowed bidders to perform the work if a C-44 license contractor or subcontractor were not utilized as long as the bidder described how work allowed under a C-44 specialty license could be accomplished by a contractor or subcontractor with some other type of license. This is the alternate means and methods that had to be described, i.e., what alternative to using a C-44 licensed entity would be employed. This was a legitimate question for which the County could require an answer.

The County was entitled to know how the work was to be legally accomplished if the contractor and/or a subcontractor did not have a C-44 specialty license. Further, it was entitled to require bidders, at the time of their bid, to provide this information so that: (a) the County could evaluate a proposed alternative means or methods (as well as compare it to other proposed alternatives that might be submitted); and (b) all bidders would be treated on an equal basis and those whose proposals included a C-44 licensee would not be disadvantaged by a bidder who proposed the details of an alternative after the bids were opened.

However, this is not a design-build type of procurement where the ultimate construction objective could be accomplished by a variety of means and methods that the County needed to evaluate. Here, assuming that Certified had the necessary licenses at the time of its bid, the question for the County was more a question of responsibility rather than responsiveness. Certified was not seeking to add, after bid opening, a subcontractor with a C-42 license—that would clearly and impermissibly give Certified a material advantage over other bidders. Instead, Certified is asserting that it had the appropriate licenses at the time of the bid opening, and its qualifications can be analyzed as of that date. The only thing Certified was initially asking for was the ability to demonstrate its qualifications with information available on the bid opening date but which Certified did not list on its bid. See Certified's letter to the County dated February 19, 2014, responding to the County's disqualification letter of February 14, 2014.

There is a very extensive discussion of "responsiveness vs. responsibility" regarding the qualifications of bidders in the decision after remand in Safety Systems and Signs Hawaii, Inc. v. Department of Transportation, State of Hawaii, PDH 2013-012 (March 10, 2014), that is incorporated herein. Based upon the legal discussion therein, and the particular facts of this case, the Hearings Officer concludes that Certified's failure to list its own C-42 and C-44a licenses on its bid, even though it possessed those licenses at the time of its bid, did not make its bid materially nonresponsive.

D. A C-44 Specialty License is Still Required to Perform the Contract Work

Allowing Certified to assert that an ability to use its C-42 and C-44a specialty licenses on this project to excuse a non-material nonconformity with the bid specifications and, in addition, to demonstrate its responsibility, does not fully resolve all of the issues raised in the motions. There is still a considerable debate over whether those two specialty

licenses are sufficient to perform all of the work or whether a C-44 specialty license is still required to perform some of the work.

Certified argues that the County agreed to defer to a decision by the CLB, that the CLB's decision completely supports Certified's position that the C-42 and C-44a specialty licenses were sufficient to perform the work on this project, and that the County must accept this CLB decision and award the contract to Certified. The County, on the other hand, asserts that it did not agree to defer to a decision by the CLB, that the CLB decision (obtained without the County's knowledge or participation) does not cover all of the work on the project, that work not covered by the CLB's decision still requires a C-44 specialty license, and thus that the County still has the discretion to reject Certified's proposed alternate means and methods.

The Hearings Officer concludes that there are disputed issues of material fact created by the witness declarations submitted by the parties as to whether post-bid conversations between the County and Certified, as well as a post-bid e-mail from the County to Certified, amount to an agreement that the County would defer to the CLB. In addition, the Hearings Officer concludes that the arguments of the respective attorneys, which are not referenced in any witness declarations, that certain work not brought to the attention of the CLB requires a C-44 specialty license cannot be resolved without an evidentiary hearing.

The parties were therefore notified by a letter dated July 10, 2014, and sent by facsimile that day, that an evidentiary hearing on the above two issues would be held on July 17, 2014. That letter additionally required the parties to submit written memoranda on the jurisdictional question potentially involved in the bid protest being decided on the basis of a CLB decision not brought to the County's attention until after the County had issued its letter denying Certified's bid protest.

IV. DECISION

As a result of the Court's Decision and the discussion above, the Hearings Officer concludes as follows:

1. The County's Motion to Dismiss is denied as to the first, third, and fourth arguments. The second argument in that motion has been rendered moot by decisions on the other motions.

2. The County's Motion for Summary Judgment is denied. However, the County's argument that, assuming that Certified's protest is timely, the requirement of a C-44 specialty contractor classification in the performance of the work is still valid—will be a subject of the upcoming evidentiary hearing.

3. Certified's Motion for Summary Judgment is granted to the extent that it asserts that the specifications did not themselves require a C-44 licensee be listed in the bid and that Certified was not required to list itself on the LRE. However, the motion is denied insofar as it asserts that the CLB has definitively ruled that a C-42 specialty license is sufficient and that the County is bound by that ruling. Those assertions will be a subject of the upcoming evidentiary hearing.

DATED: Honolulu, Hawaii, July 14, 2014.

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