



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of)	PDH-2014-013
)	
CERTIFIED CONSTRUCTION, INC.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,)	DECISION
)	
vs.)	Senior Hearings Officer:
)	David H. Karlen
DEPARTMENT OF ACCOUNTING AND)	
GENERAL SERVICES, STATE OF HAWAII)	
)	
Respondent.)	
)	

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

I. INTRODUCTION

Petitioner Certified Construction, Inc. ("Certified") filed a Request for Administrative Hearing ("RFAH") in this matter on October 15, 2014. At the same time, Certified filed a procurement protest bond in the amount of \$2,000.00.

By Notice of Hearing and Pre-Hearing Conference filed October 17, 2014, by Hearings Officer Sheryl Lee A. Nagata, a pre-hearing conference was set for October 23, 2014, and a hearing was set for November 5, 2014.

Respondent Department of Accounting and General Services, State of Hawaii ("DAGS") filed its Response on October 22, 2014.

The pre-hearing conference was held on October 23, 2014. Kristi L. Arakaki, Esq., appeared on behalf of Certified. Deputy Attorney General Patricia Ohara, Esq., appeared on behalf of DAGS. A Pre-Hearing Order was filed October 24, 2014, which provided for the

filing of motions for summary judgment by both parties and scheduled the hearing on those motions for November 7, 2014.

DAGS filed its Motion for Summary Judgment on October 31, 2014. Certified also filed its Motion for Summary Judgment on October 31, 2014.

DAGS filed its Memorandum in Opposition to Certified's Motion on November 5, 2014. Certified also filed its Memorandum in Opposition to DAGS' Motion on November 5, 2014.

Thereafter, on November 6, 2014, DAGS filed its Exhibits to its Memorandum in Opposition to Certified's Motion.

Due to scheduling considerations, the matter was reassigned to the undersigned Hearings Officer for further proceedings.

A hearing before the undersigned Hearings Officer on the DAGS and Certified Motions for Summary Judgment was held on November 7, 2014. Certified was represented by Kristi L. Arakaki, Esq., and Jeffrey W. Juliano, Esq. DAGS was represented by Deputy Attorney General Patricia Ohara, Esq.

At the conclusion of argument on the two Motions, the Hearings Officer took the matter under advisement.

This Decision, based on the record as of the conclusion of oral argument on November 7, 2014, is the formal order with respect to the aforesaid Motions.

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. The construction project in question is entitled "Waimano Ridge – Uluakupu Reroof, D.A.G.S. Job No. 12-20-2669."
2. Certified submitted a bid of \$860,320 for this project.

3. Accompanying Certified's bid was a Bid Bond dated May 1, 2014, in the amount of five percent (5%) of Certified's bid. Certified is identified on the Bid Bond as the Offeror, and Travelers Casualty and Surety Company of America is identified on the Bid Bond as the Surety.

4. The Bid Bond was for the benefit of the Owner, and the Owner was identified on the Bond as: "State of Hawaii, Department of Education, Procurement and Contracts Branch, 94-275 Mokuola St., Waipahu, Hawaii 96797."

5. The bid covered by the Bid Bond was identified as a bid dated June 19, 2014, for "Waimano Ridge Uluakapu-Reroof, Job No. 12-20-2669."

6. The Department of Education of the State of Hawaii has no role in, and no connection with, the construction project in question.

7. By letter dated July 7, 2014, from its Public Works Administrator, Mr. James K. Kurata, DAGS notified Certified that its bid on the project was being rejected because it listed the owner as "State of Hawaii, Department of Education, Procurement and Contracts Branch, 94-275 Mokuola St., Waipahu, Hawaii 96797."

8. By letter dated July 14, 2014, from its attorneys, Certified protested DAGS' decision to rejected Certified's bid as expressed in DAGS' letter of July 7, 2014.

9. In summary, Certified's letter of July 14, 2014, stated as follows:

A. Certified's Bid Bond was in substantial conformity with the requirements and instructions of the bid solicitation. It properly identifies the State of Hawaii as the Owner. DAGS has not cited any provision in the bid solicitation with which Certified did not comply, and DAGS did not establish that the Department of Education would retain any payments on the bond or refuse to remit such payments to DAGS,

B. The alleged omission or mistake in the bid bond is immaterial and/or nonsubstantial and subject to correction

10. By letter dated October 8, 2014, from its Public Works Administrator, Mr. James K. Kurata, DAGS denied Certified's protest. In summary, this DAGS letter stated as follows:

A. The Bid Bond submitted by Certified named an incorrect owner, so DAGS had no option but to reject the bid as non-responsive for its failure to be accompanied by a bid bond.

B. As written, the Bid Bond names the State Department of Education as the Owner and not the State of Hawaii as required by the sample surety bid bond in the Appendix of the 1999 Interim General Terms and Conditions.

C. The Bid Bond provides no protection to the State of Hawaii—the State cannot rely on the bond and be assured the surety would honor the bond if requested to do so by DAGS.

D. Failure to submit a proper bid bond makes the bid nonresponsive unless the problems with the bid bond are nonsubstantial. However, there are only a very limited set of circumstances set forth in Hawaii Administrative Rules (“HAR”) §3-122-223(d), that could define problems with the bid bond as nonsubstantial, and Certified’s situation does not fit within any of the instances set forth in that administrative rule.

11. Certified then filed its RFAH on October 15, 2014, appealing the decision made in the DAGS letter of October 8, 2014.

12. By letter to the State of Hawaii dated October 30, 2014, Travelers Casualty and Surety Company of America expressed its opinion that, had conditions for payment on the bond been satisfied, it would have been legally obligated to pay the bond amount to the State of Hawaii or its Department of Education regardless of whether the Department of Education or any other State department or unit was the procuring agency for the project in question.

13. There is a sample “Surety [Bid][Proposal] Bond” in the Appendix of the 1999 Interim General Terms and Conditions which is incorporated by reference in the solicitation in question in Section 0700 Item 1.01A of the project specifications.

14. This sample bond specifies the “State of Hawaii” as the Owner to whom the surety’s obligations on the bond are owed. The words “State of Hawaii” are preprinted on the sample bond. Unlike other information needed on the bond, the sample bond does not include a blank space where the identity of the Owner can be entered or changed. See Exhibit D to Certified’s Motion for Summary Judgment.

15. The project specifications provide for several alternatives to a bid bond from a surety that include, for example, cash and various types of certificates or checks. Insofar as non-cash alternatives are concerned, they are required to be payable to the State of Hawaii as stated on page 00410-7 of the solicitation:

A certificate of deposit, share certificate, or cashier's, treasurer's teller's or official check drawn by, or a certified check accepted by, and payable on demand to the State by a bank, a savings institution, or credit union insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration.

Exhibit F to Certified's Motion for Summary Judgment (emphasis supplied).

16. PER, Inc., submitted the second lowest bid on the project when it bid \$932,916.

17. The bid bond of PER, Inc., named the "State of Hawaii, Department of Accounting and General Services" as the Owner. Exhibit B to DAGS' Memorandum in Opposition to Certified's Motion.

18. DAGS has decided that the bid bond of PER, Inc., with "State of Hawaii, Department of Accounting and General Services" as the Owner, contains an acceptable designation of the Owner.

III. CONCLUSIONS OF LAW

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

A. General Considerations

1. Standards for Summary Judgment Motion

Summary judgment is appropriate if the record herein shows that there is no genuine issue 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, must be 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).

Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact. *Reed v. City & County of Honolulu*, 76 Haw. 219, 225, 873 P.2d 98, 104 (1994).

In the present case, there are no factual disputes, and the matter can be determined on the parties' cross-motions for summary judgment.

2. Scope of Review

Under the State Procurement Code, the Hearings Officer engages in a *de novo* review of the claims in the RFAH. HRS §103D-709(a) states:

The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) 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.

B. There is Jurisdiction to Consider Certified's RFAH

DAGS' Motion for Summary Judgment, filed October 31, 2014, did not argue that there were any jurisdictional problems with Certified's RFAH. However, in its Memorandum in Opposition to Certified's Motion, filed November 5, 2014, DAGS argues (at pages 2-4) for the first time that Certified "lacks standing" because it fails to meet the minimum amount in controversy requirement for procurement protests.

Because the administrative rules governing procurement protests do not provide for reply memoranda, ordinarily a claim challenging the RFAH and brought up for the first time

in a memorandum in opposition to a motion would not be considered because the opposing party would not have an opportunity to respond to this new argument.

Claims of jurisdictional defects, however, cannot be considered “ordinary” objections to an RFAH. 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).

Despite DAGS’ ability to raise a claim of lack of jurisdiction at any time in these proceedings, Certified is entitled to notice and an adequate time in which to prepare arguments against DAGS’ position on jurisdiction. Kiewit Infrastructure West Co., v. Department of Transportation, State of Hawaii, PCX-2011-2 (June 6, 2011), Exhibit B at page 5. At oral argument on the Motions on November 7, 2014, Certified did present arguments to counter DAGS’ claim of lack of jurisdiction. In addition, Certified did not request a continuance so that it could submit an additional memorandum on the jurisdiction question. Accordingly, the Hearings Officer concludes that the issue of the alleged lack of jurisdiction is ripe for a decision without the need to provide additional time for any further briefing.

Hawaii Revised Statutes (“HRS”) §103D-709(d) requires a minimum amount in controversy before an RFAH can be initiated. For contracts with an estimated value of less than \$1,000,000, there is jurisdiction only if “the protest concerns a matter that is greater than \$10,000.” HRS §103D-709(d)(1) In this case, with Certified’s low bid and PER, Inc.’s second lowest bid both under \$1,000,000, the minimum amount in controversy in the present case must therefore be greater than \$10,000.

DAGS asserts that the amount in controversy is determined by calculating the difference between Certified's bid bond and the next lowest bidder's bid bond because the issue here is allegedly the validity of Certified's bid bond and DAGS' acceptance of the next lowest offer. Because that difference is less than \$4,000, then, according to DAGS, the amount in controversy is less than \$10,000 and Certified's RFAH must be dismissed.

The issue of determining the amount in controversy in a particular procurement protest has been the subject of three published decisions by the Office of Administrative Hearings. The most recent of those decisions, GreenPath Technologies, Inc. v. Department of Finance, County of Maui, PDH-2014-002 (March 20, 2010), at pages 18-25, summarizes the law as set forth in all of the decisions.

With particular relevance to the case herein, the previous decisions have focused on the "matter" in issue in the protest, e.g., the mistake allegedly made by the low bidder or by the procuring agency. The "matter" in issue is not based on comparing the two bids. Similarly in this case, comparing the two bid bonds, with only one of them allegedly defective, is not an appropriate way of determining the amount of the matter in issue.

The "matter" in issue here is the validity of Certified's bid bond. The protest "concerns a matter" that, at a minimum, is valued at \$43,016 (5% of Certified's bid), which value is above the jurisdictional minimum amount.

Accordingly, the Hearings Officer finds and concludes that DAGS' claim of lack of jurisdiction is not correct and that there is jurisdiction to consider Certified's RFAH.

C. The Procurement Code Required that a Bid Bond for the Benefit of the State of Hawaii be Submitted with Certified's Bid

The Procurement Code sets forth the basic requirements for a bid bond in the present situation. HRS §103D-323(a) states in relevant part:

Unless the policy board determines otherwise by rules,¹ bid security shall be required only for construction contracts to be awarded pursuant to sections 103D-302 and 103D-303 and when the price of the contract is estimated by the procurement officer to exceed \$25,000...Bid security shall be a bond provided by a surety company authorized to do business in the State, or the equivalent in cash, or otherwise supplied in a form specified in rules.

A bid bond is “bid security” within the meaning of HAR §3-122-221(a) and is given for the benefit of the State, as HAR §3-122-221(b) states:

Bid security protects the State against the failure or refusal of an offeror to execute the contract for the work bid or to supply the necessary performance and payment bonds, as required. (Emphasis supplied)

Accordingly, except for a limited number of exceptions, the failure to provide proper security with a bid makes the bid nonresponsive. HAR §3-122-223(c) states:

If a contractor fails to accompany its offer with the bid security when required, the offer shall then be deemed nonresponsive in accordance with the definition of “responsive bidder or offeror” in section 3-120-2, except as provided by subsection (d).

This conclusion of nonresponsiveness facilitates implementation of the requirements of HRS 103D-323(c) that “[u]nless, pursuant to rules, it is determined that a failure to provide bid security is nonsubstantial, all bids required to be accompanied by bid security shall be rejected when not accompanied by the required bid security.”

The Hawaii Administrative Rules also provide for the form of a bid bond, as HAR §3-122-228(a) states in relevant part:

The required bond forms for bid security...shall be in conformity with sections 3-122-221, 3-122-222, ...and shall be as specified by the procurement policy board and issued by procurement directive.

Thus, to be in conformity with HAR §3-122-221, the bond form must specify the State of Hawaii as the Owner because that section requires the bond to protect the State.

In furtherance of this requirement, the sample bid bond form in the Appendix of the 1999 Interim General Terms and Conditions, which form is incorporated by reference in the

¹ The parties have not asserted any exceptions to the bid bond requirements in this case.

solicitation at issue, states that the “State of Hawaii” is the Owner to whom the surety is bound. See Exhibit D to Certified’s Motion for Summary Judgment. Certified’s argument that this form is only a sample and possibly subject to change cannot contradict the fact that there is no evidence the sample has been changed since 1999 and that its 1999 form was incorporated by reference into the solicitation in question.

Certified argues in its Motion for Summary Judgment, at pages 5 through 8, that nothing in the solicitation identified the “correct” or rightful owner to be listed on the bid bond. However, the solicitation read, as it must be, in conjunction with the relevant statute and administrative rules discussed above, identifies the owner to be listed on the bid bond as the State of Hawaii.

DAGS took the position in its October 8, 2014 letter denying Certified’s protest that the Owner on the bid bond should have been the State of Hawaii. This position was repeated on page 2 of DAGS’ memorandum in support of its Motion for Summary Judgment. On page 3 of that Memorandum, DAGS appeared to be arguing that DAGS should also have been identified as the Owner on the bid bond. DAGS asserted that the bid bond of PER, Inc., which identified the Owner as “State of Hawaii, Department of Accounting and General Services,” was a correct and acceptable bid bond.

However, the Hearings Officer has found nothing in the relevant statute, regulations, or provisions in the solicitation to require the “Department of Accounting and General Services” to be listed in conjunction with the “State of Hawaii” in order to sufficiently and correctly identify the owner on the bid bond.

Therefore, after consideration of the positions of the parties, the Hearings Officer concludes that the “State of Hawaii” must be identified as the owner on the bid bond. The Hearings Officer further concludes that such identification of the “State of Hawaii” is

sufficient and that the procuring agency for the solicitation in question need not be identified as the owner on the bid bond.

D. Certified's Bid Bond Substantially Conforms to Applicable Requirements and Adequately Identifies the State of Hawaii as Owner. The State of Hawaii Can Enforce Certified's Bid Bond

The question then becomes: does the identification of the "Department of Education" as part of the "State of Hawaii" constitute mere surplusage that does not interfere with the State's ability to enforce the bid bond, or does it render the bid bond fatally ambiguous such that it cannot be enforced by the State?

Certified correctly asserts that the bid bond is a "statutory bond." The principles applicable to statutory bonds are commonly accepted.

In instances where a bond is mandated by statute, the provisions of the statute are to be read into the bond. Speir v. United States, 31 App. D.C. 476, 483 (D.C. Cir. 1908)(holding that statutory conditions "must be considered as read into and made a part of the bond"). In addition, the bond must be construed in light of the purpose of the statute. United States v. American Surety Co., 200 U.S. 197, 205, 26 S. Ct. 168, 50 L. Ed. 437 (1906)(holding that the bond must be read in light of "the declared purpose of the statute")

Cooper v. The Hartford Financial Services Group, Inc., 2005 WL 1378907 at *1 (D.D.C. 2005).

As stated by the Arizona Supreme Court in upholding trial court rulings against a bonding company:

The language of the bonds themselves would appear to support the bonding company's view. In the case of a bond required by statute, however, the obligation of a bonding company is determined by the statute, and not by the wording of the bond.

Royal Indemnity Company of New York v. Business Factors, Incorporated, 393 P.2d 261, 262 (Ariz. 1964).

Another example of this principle is this statement from the Idaho Court of Appeals:

The obligation of a surety on a bond required by statute is determined by the provisions of the statute. Thus, such bonds are construed in the light of the statute creating the obligations secured and of the purposes for which the bond is required, as

expressed in the statute. It is presumed that the intention of the parties was to execute a bond such as the law required.

Bryant Motors, Inc. v. American States Insurance Companies, 800 P.2d 683, (Id. Ct. App. 1990) (Emphasis supplied)

In attempting to apply these principles to the current controversy, Certified first relies on Speir v. United States. 31 App. D.C. 476 (App. D.C. 1908). In that case, the statutory bond was a payment bond issued in connection with a federal construction contract. The construction contract mistakenly named the Board of Commissioners of a soldier's home, instead of the United States, as the contracting party, and the performance bond therefore also named the Board of Commissioners, instead of the United States, as obligee. Since this was a statutory bond, and not a private contract, the mistaken omission of the United States as obligee was no impediment to enforcement of the bond. Accordingly, the statutory bond principles applied to enforcement of a statutory bond naming an incorrect obligee even if the bond might not have been enforceable if it had been a private contract.

In the Speir case, the party suing on the bond was a subcontractor that had not been paid. The United States was not itself bringing an action on the bond. However, in In re Good, 26 Haw. 626 (Haw. 1922), the statutory bond principle was extended to cover a situation where the obligee that should have been named on the bond was claiming it could not enforce a statutory bond naming an incorrect party as the obligee

In that case, at the beginning of the proceeding, the petitioner was required to put up a statutory bond in the sum of \$1,500 to guarantee performance if he was found at the conclusion of the proceeding to be liable for child support payments. When the petitioner was in fact found liable for those payments, he was ordered to post a second bond in the amount of \$5,000, and he was imprisoned for failure to post this second bond.

In petitioning for habeas corpus, the petitioner asserted that his pre-judgment bond was valid and, consequently, it was unlawful to require a second bond. The Territory of

Hawaii, on the other hand, asserted that the first bond was invalid because the obligee was “Henry Smith, Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, and his successors in office,” instead of the “Territory of Hawaii” as required by statute. The Supreme Court of the Territory of Hawaii ruled in favor of the petitioner. Where a statutory bond is involved, the incorrect naming of the obligee is not an impediment to enforcement by the correct obligee, i.e., the real beneficiary.

The situation here is, in essence, similar to that involved in In re Good. The State in this case, and the Territory in that case, asserted a statutory bond was invalid because it did not technically correctly name the obligee. There, as here, there was no question that the bond was given pursuant to a statute and intended to cover the precise situation involved in the relevant statute. In this case, the bond specifically names the project in question, i.e., “Waimano Ridge Uluakapu-Reroof Job No. 12-20-2669.” The fact that it does not say “D.A.G.S.” Job No. 12-20-2669 does not make its reference to a particular job unclear. Further, In re Good held the statutory bond valid even though the bonding company was not a party to the case. Similarly, in this proceeding the Hearings Officer may decide the statutory bond to be valid and for the benefit of the State of Hawaii without the participation of the surety in the motions under consideration. The State of Hawaii could successfully collect and/or sue to collect on this bid bond without the Department of Education collecting any bond proceeds or being named in any lawsuit on the bond.

Based upon the federal case of The Scotsman Group, B-245634. January 13, 1992. 92-1 CPD P 57, DAGS argues that it should not be required to interpret and rely upon an ambiguous bid bond. That case, however, involved a discrepancy between the named bidder and the principal named in the bid bond. It did not involve any alleged problems with the name of the obligee on the bid bond, and the opinion is not concerned with the ramifications of the principles of statutory bonds.

DAGS has itself, to some degree, validated Certified's position by asserting that the bid bond of PER, Inc., listing "State of Hawaii, Department of Accounting and General Services" as the obligee is a valid bid bond. Because it is a statutory bond, the obligee is the correct statutory obligee, i.e., the "State of Hawaii." The presence of "Department of Accounting and General Services" within the name of the obligee as stated in the bond does not make the bond invalid.

In this connection, it should be noted that there is no evidence that the Department of Accounting and General Services has itself, in fact, any right to the bond proceeds from a bond for the benefit of the "State of Hawaii," i.e., the general fund of the State of Hawaii. There was no basis presented to the Hearings Officer that the bid bond required by statute is for the benefit of the procuring agency rather than the State as a whole.

In that regard, it should be noted that the performance bond on a State public works contract is for the specific benefit of the procuring agency, but such a situation occurs only because of a special mandate by statute, namely HRS §103D-703.5, which states:

Settlement of default by contractor. Upon default of a contractor, the purchasing agency may accept moneys in satisfaction of the contractor's obligation on a contract whether the moneys are realized from the performance surety's obligation on its bond, an insurer's obligation on the contractor's policy or any other source of moneys paid to satisfy a contractor's default. Such moneys shall be deemed to be trust moneys and shall be deposited into a trust account with and under the control of the purchasing agency. These moneys and the interest earned thereon shall be used for the completion of such contract. Upon completion of the contract, any excess moneys shall be deposited in the general fund unless otherwise restricted.

Prior to passage of this statute, originally in 1997, the purchasing agency was not entitled to the proceeds on a performance bond. See, e.g., Senate Committee Report 1193, 1997 Senate Journal, page 1347:

The purpose of this administrative measure is to allow a purchasing agency to accept moneys in satisfaction of the performance surety's obligation on the bond when the contractor defaults, and to deem such moneys as trust moneys to be used for completion of the contract.

In contrast, however, there is no statute authorizing payment on a bid bond to be made to the purchasing agency to be used by that purchasing agency, e.g., to cover costs associated with the failure of a low bidder to timely enter into a contract.

Accordingly, if the designation of the owner in the PER, Inc., bid bond is “State of Hawaii, Department of Accounting and General Services” is taken absolutely literally, this bid bond would be defective because it could be interpreted as made out for the benefit of a specific state agency that is not defined by statute and regulation as the “Owner” and is not authorized to receive any bond proceeds. It would not merely be clarifying information that the Owner is “the State of Hawaii.” The Hearings Officer, however, cannot accept such a conclusion because the principles pertaining to statutory bid bonds cited above preclude the naming defect on the PER, Inc., statutory bid bond from making that bid bond fatally defective. Similarly, under the undisputed facts in this case, the Hearings Officer cannot accept a conclusion that the naming defect on Certified’s statutory bid bond makes that bid bond fatally defective.

In coming to the legal conclusions herein, the Hearings Officer has not taken into account the surety’s letter of October 30, 2014. DAGS correctly asserts that responsiveness must be determined based upon the materials submitted with the bid and facts available to the government at the time of bid opening. The surety’s letter does not belong to either category.

The parties have presented well-briefed arguments over whether the bid bond situation herein is a mistake that can be corrected or an error that must be waived pursuant to HAR §3-122-31, or whether the provisions of HAR §3-122-323(d) provide the exclusive means for an improper bid bond to be accepted (which regulation sets forth limited conditions not present in this case). It should be noted that arguments under both regulations were considered on their merits in GP Roadway Solutions, Inc. v. Glenn Okimoto as Director of the Department of Transportation, State of Hawaii, PCH-2011-15 and PCH-2011-16

(January 27, 2012), but there is no indication that the State argued in that case that HAR §3-122-323(d) was the exclusive remedy. Given the ruling herein, however, there is no need for the Hearings Officer to reach those arguments.

IV. ORDER

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

- a. Certified's Motion for Summary Judgment is granted.
- b. DAGS' Motion for Summary Judgment is denied.
- c. DAGS' denial of Certified's procurement protest, in DAGS' letter of October 8, 2014, is vacated. Certified's procurement protest is sustained.
- d. The matter is remanded to DAGS for consideration of Certified's bid.
- e.. Certified's \$2,000.00 protest bond shall be returned to Certified upon the filing and service of a declaration by Certified attesting that the time to appeal to Circuit Court has lapsed and that no appeal has been timely filed. 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 Circuit Court.
- f. The parties shall bear their own attorney's fees and costs incurred in this matter.

NOV 21 2014

DATED: Honolulu, Hawaii, _____ .



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