



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2013 AUG 15 A 11: 32

HEARINGS OFFICE

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

In the Matter of)	PDH-2013-007
)	
JBH, LTD.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,)	DECISION
)	
vs.)	
)	
WILLIAM AILA, JR., in his capacity as)	
Chairman and Contracting Officer of DIV.)	Senior Hearings Officer:
OF FORESTRY AND WILDLIFE, DEPT.)	David H. Karlen
OF LAND AND NATURAL RESOURCES,)	
)	
Respondent.)	
)	

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

I. INTRODUCTION

On July 3, 2013, Petitioner JBH, Ltd. ("JBH") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PDH-2013-007. Respondent was William Aila, Jr., in his capacity as Chairman and Contracting Officer of the Division of Forestry and Wildlife, Department of Land and Natural Resources ("DLNR"). Concurrent with the filing of its RFAH, JBH filed a \$2000.00 cash protest bond.

A prehearing conference was held in this matter on July 17, 2013. John G. Horak, Esq., appeared on behalf of JBH. Also present on behalf of JBH was Mr. John B. Hinton.

Deputy Attorney General Daniel A. Morris, Esq., appeared on behalf of DLNR. Also present on behalf of DLNR was Ms. Emma Yuen.

JBH filed a Motion for Summary Judgment on July 17, 2013. DLNR also filed a Motion for Summary Judgment on July 17, 2013. On July 26, 2013, both parties filed memoranda in opposition to the other party's motion for summary judgment.

Both motions came on for hearing on July 29, 2013. John G. Horak, Esq., appeared on behalf of JBH. Also present on behalf of JBH was Mr. John B. Hinton. Deputy Attorney Generals Daniel A. Morris, Esq., and Cindy Y. Young, Esq., appeared on behalf of DLNR. Also present on behalf of DLNR was Ms. Emma Yuen.

At the conclusion of the oral argument on both motions, the Hearings Officer took both motions under submission. An evidentiary hearing was conducted immediately thereafter.

During the evidentiary hearing, Mr. John B. Hinton testified on behalf of JBH, and Ms. Emma Yuen testified on behalf of DLNR.

During the evidentiary hearing, JBH's Exhibits 1, 3, 4, 5, and 8 were admitted without objection from DLNR. In addition, during the evidentiary hearing, DLNR's Exhibits 1 through 5 as well as Exhibits B and C to the DLNR's Memorandum in opposition to JBH's motion for summary judgment were admitted into evidence without objection from JBH.

Also on July 29, 2013, the Hearings Officer approved and filed a stipulation between the parties for return to JBH of its \$2,000.00 cash protest bond. As stated in the stipulation, per the decision of In the Matter of Soderholm Sales & Leasing, Inc. v. Department of Budget and Fiscal Services, City and County of Honolulu, PDH-2012-005, a protest bond was not required for the type of protest raised in the RFAH filed by JBH.

Both parties filed closing briefs on August 5, 2013.

II. FINDINGS OF FACT

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

1. On or about May 31, 2013, DLNR published its Invitation for Bid (“IFB”) for Job No. POA-1 requesting competitive sealed bids for Installing Ungulate-Proof Fence in the Poamoho Section of the Ewa Forest Reserve and Vicinity (“Poamoho” project).

2. Construction of the Poamoho project would take place exclusively on the island of Oahu.

3. According to the IFB, sealed bids were to be submitted no later than 2:00 p.m. on July 1, 2013.

4. The Poamoho project is located within a hunting area with access by four-wheel drive vehicles via the Poamoho Hele Loa Road to the Poamoho trailhead parking lot, on foot via the Poamoho Trail, or by helicopter. Contract Specifications and Plans, Exhibit A to the DLNR’s Memorandum in Opposition to JBH’s motion at page S-2.

5. The fence corridor includes undulating sections along established public hiking trails (the Poamoho and Koolau Summit Trails) and two waterfalls. Contract Specifications and Plans, Exhibit A to the DLNR’s Memorandum in Opposition to JBH’s motion at page S-1. The fencing work includes the installation of pedestrian gates in each of the multiple locations where the fence crosses a public trail. Contract Specifications and Plans, Exhibit A to the DLNR’s Memorandum in Opposition to JBH’s motion at page S-6.

6. Section H, pages 1-2 and 1-3, of the Information and Instructions to Bidders for the Poamoho project required that the Contractor hold a specialty C-32 license. The Proposal template for the Poamoho Project, at page P-6, also references the specialty C-32 licensing requirement for the Poamoho project.

7. On May 8, 2013, prior to issuing IFB POA-1, the DLNR sought advice from the Contractors License Board (“CLB”) on when a C-32 specialty license is required for ungulate control fencing projects. At its May 17, 2013 regular meeting, the CLB determined that a C-32 license is required to install fencing in areas with pedestrian and/or vehicular access, but a C-32 specialty license is not required to install fencing in areas accessible only by helicopter. The DLNR was formally notified of this interpretation by a CLB letter dated May 22, 2013. See Exhibit 9 to JBH’s Motion for Summary Judgment.¹

8. The CLB letter of May 22, 2013 further informed DLNR that the CLB’s interpretation:

Is for informational and explanatory purposes only. It is not an official opinion or decision, and thus is not binding on the Board.

If a formal or binding opinion is requested, a petition for declaratory relief must be filed with the Board.

9. JBH was not informed of the DLNR request to the CLB and thus did not have an opportunity to be present at the CLB meeting on May 17, 2013, or to submit anything to the CLB with regard to the DLNR request considered at that meeting.

10. JBH does not hold a C-32 license.

11. By letter dated June 4, 2013, JBH protested to the DLNR regarding the IFB’s requirement of a C-32 license on two grounds:

a. A C-32 license is not required for the type of ungulate fencing work called for in the IFB; and

b. The DLNR cannot require such a license for the type of work called for in the IFB because such a requirement violates procurement policies of the State of Hawaii.

¹ The document is also Exhibit B to the DLNR Memorandum in Opposition to JBH’s summary judgment motion.

12. By letter dated June 26, 2013, DLNR informed JBH that its protest was denied.² In summary, the DLNR stated that the subject fence was clearly in an area with pedestrian and vehicular access and that is readily accessible to the public such that, per the CLB's interpretation in its letter of June 22, 2013, a C-32 license was required.

13. On July 3, 2013, JBH filed herein its RFAH challenging the June 26, 2013 DLNR decision.

14. One of the purposes of the fence being built pursuant to the Poamoho project is to accommodate public access to the area being fenced off to protect that area from feral pigs.

15. DLNR plans to have the Poamoho project contractor build five to ten stepovers or gates (the terms stepovers and gates being used interchangeably) in the fence to accommodate public access to the areas being enclosed by the fence. The exact number, and their location, will be determined by DLNR, which will then direct the contractor as to where installation should occur.

16. The Poamoho project fence would intersect the Poamoho trail, a hiking trail that is part of the official State of Hawaii trail inventory.

17. In 2003, Mr. John B. Hinton, principle of JBH, filed a petitioner for declaratory relief alleging that a C-32 license was not required for the Kuia and Kahikinui projects. Mr. Hinton was successful in obtaining a declaratory ruling from the CLB that a C-32 license was not required for those projects. In the Matter of the Petition for Declaratory Relief of John B. Hinton and Jeffrey Hanneken, dba Ranch Services, CLB-DR-2003-4 (May 21, 2004).

² JBH's Exhibit List states that this letter is JBH Exhibit 11. However, in the actual exhibit package submitted at the evidentiary hearing, this document was JBH Exhibit 9.

18. The fences in the Kuia and Kahikinui projects were not intersected by any trail that was part of the official State of Hawaii trail inventory and that was maintained by the State of Hawaii.

19. The Poamoho trail is actively maintained by the Division of Forestry and Wildlife of the LDNR. That Division sends regularly scheduled maintenance crews out to maintain the trail.

20. A DLNR permit is required to use the Poamoho trail. During the last year, DLNR has issued about 8,000 permits to hikers and hunters to use the trail. Each permit allows up to five people per vehicle. Vehicles drive to the trailhead, and visitors would then use the Poamoho trail from there. There is no charge for these permits.

21. At least one well-established hiking group, the Sierra Club, has held scheduled group hikes on the Poamoho trail in the past.

22. If a person or company wanted to conduct hikes on the Poamoho trail as part of its business, e.g., an eco-tourist company charging a fee to people who use the company for guided hikes, they would need to get a commercial use permit. Such permits are available although, currently, no such permits have been requested.

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. Motions for Summary Judgment

Summary judgment is appropriate when the record shows that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting

one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, were 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).

1. DLNR's Motion for Summary Judgment

The primary basis of the DLNR's motion for summary judgment is the CLB's "informational interpretation" in its letter of May 22, 2013. This is the only evidence cited by the DLNR in its motion for summary judgment.³ However, that letter specifically says that it is not a formal or binding opinion. Not being binding on the CLB, it is also not binding on JBH. This is especially the case where the DLNR has failed to demonstrate that JBH (or any other private contractor for that matter) had adequate notice and an opportunity to participate before the CLB at its May 17, 2013 meeting.

The DLNR's motion, at page 2, asserts that regardless of whether the Poamoho project is in a more or less remote location than other projects subject to prior administrative decisions, "the CLB has already addressed the **specific** circumstances of the Poamoho fencing project that is the subject of this proceeding." (Emphasis in original) There is no proof, however, in the motion or accompanying exhibits that this was actually the case, and the DLNR motion has failed to meet its burden to establish this alleged fact.

Moreover, this is actually an incorrect statement. There is nothing in the CLB's letter of May 22, 2013 that specifically discusses the Poamoho project. The letter is written as an overall informational interpretation without reference to any specific project. Indeed, at the CLB meeting on May 17, 2013, the DLNR, through Ms. Yuen, stated that a specific project

³ See page 2 of the DLNR's Memorandum in Support of Motion citing to the letter as Exhibit 9 to JBH's Motion for Summary Judgment.

was not at issue and that DLNR was “requesting more of a policy clarification.” Exhibit C to the DLNR Memorandum in Opposition to JBH’s summary judgment motion at page 3.⁴

It should be noted that neither party, connection with the summary judgment motions, submitted a copy of the DLNR’s actual request of May 8, 2013 to the CLB. However, that letter is DLNR’s Exhibit 1 that was admitted at the evidentiary hearing. The letter never mentions the Poamoho project and instead asks for general policy guidance.

Accordingly, there is no basis for the DLNR’s assertion that JBH is attempting to have the Hearings Officer improperly substitute his judgment on something already decided upon by the CLB.

In addition, the DLNR incorrectly asserts that JBH’s proper remedy is to institute a formal proceeding for a declaratory ruling by the CLB. Such a proceeding is one to consider when there is no specific IFB involved. Here, however, where there is a procurement protest of a specific IFB, the present RFAH is, by statute, the exclusive method for a potential bidder to challenge the terms of a pending IFB. HRS §§103D-701, 103D-704, and 103D-709.

Finally, the DLNR incorrectly asserts at page 3 of its motion that it would be subject to the possibility of “irreconcilable and conflicting determinations as to how it should proceed” with the Poamoho project. As set forth above, the CLB gave no ruling (binding or otherwise), informational interpretation, or statement whatsoever specifically about the Poamoho project.

The DLNR has failed to demonstrate that the limited basis upon which it brought its summary judgment motion is correct and/or sufficient to establish its entitlement to relief as a matter of law. Its motion for summary judgment should be denied.

⁴ This exhibit, the minutes of the CLB meeting, was apparently printed on both sides of each page but the DLNR appears to have erroneously copied only one side of each page so that the even-numbered pages of the minutes are missing from the exhibit. In light of the statement on page 3 of the minutes plus the general nature of the CLB’s May 22, 2013 letter, it is doubtful that the missing pages of the minutes contain an explicit request to the Board for an interpretation on Poamoho. In any event, it is DLNR’s obligation to present documents

2. JBH'S Motion for Summary Judgment

JBH's motion for summary judgment is based on an earlier declaratory ruling of the CLB in In the Matter of the Petition for Declaratory Relief of John B. Hinton and Jeffrey Hanneken, dba Ranch Services, CLB-DR-2003-4 (May 21, 2004). In that case, according to JBH, the CLB had, ironically, issued an informational decision that a C-32 license was not required for the work to be performed on the solicitations in question but that the DLNR had refused to recognize the CLB's position. JBH prevailed in its action, as the Board's Final Order stated: [the Board] concludes that a C-32 specialty license is not required for the work to be performed pursuant to the Kauai and Maui IFB's." Exhibit 1 to JBH's Motion for Summary Judgment.

The Board's Final Order adopted the Hearings Officer's proposed decision (which is included as part of JBH's Exhibit 1 to its Motion). On page 4 of the Hearings Officer Findings of Fact, Conclusions of Law, and Recommended Order, the Hearings Officer concluded that:

Based on the facts presented, the Hearings Officer concludes that a C-32 specialty contractor's license is not required for the work specified in the Maui and Kauai IFBs, given the location, purpose and remote nature of the projects." (Emphasis supplied)

Accordingly, whether or not a C-32 specialty license is required herein is a factual issue depending upon the "location, purpose and remote nature" of the particular project in question.

Recognizing this, JBH's motion attempts to equate the facts in the Kauai and Maui IFBs at issue in 2004 to the Poamoho project IFB in 2013. It asserts that the access situation for all three projects is the same, namely by foot, four-wheel drive vehicle, and helicopter. The Hearings Officer concludes that this perspective is much too limited. Considerations of

supporting its position, and it cannot require the Hearings Officer to speculate on what is contained in the pages missing from this exhibit.

the “location, purpose and remote nature” of a project can and should involve more than merely the methods of access to the site.

In the case of the Poamoho project, as the DNLR pointed out in its opposition to JBH’s motion, the project requires the installation of pedestrian gates for use by the general public to gain access to the area being fenced. IFB page S-6, Exhibit A to the DLNR’s Memorandum in Opposition to JBH’s Motion. The fence corridor goes along two established public trails. IFB pages S-1 and S-6, Exhibit A to the DLNR’s Memorandum in opposition to JBH’s Motion. The four-wheel drive access is to the trailhead parking lot for the public trail, and foot access is by means of the public trail. The project also is located within a “popular hunting unit C which allows hunting on weekends and holidays.” IFB page S-2, Exhibit A to the DLNR’s Memorandum in Opposition to JBH’s Motion. There was no showing in JBH’s motion that the previous Kauai and/or Maui projects were identical to the Poamoho project in these respects.

The submissions on summary judgment did not resolve the issues of fact regarding the “location, purpose and remote nature” of the Poamoho project.

In the 2004 proceeding the Hearing Officer had stated in footnote 1 on page 4 of the recommended order that “However, this does not preclude the DLNR from requiring that bidders hold a C-32 specialty contractor’s license.” JBH asserts, however, that the DLNR cannot take advantage of this dicta because of the later decision of In the Matter of John B. Hinton, dba J.B.H., v. Peter T. Young, in his capacity as Chief Procurement Officer, State of Hawaii, Department of Land and Natural Resources, PCH-2005-3 (June 22, 2005). That case precluded the DLNR from requiring a C-32 license for “extra protection” when such a license would not otherwise be required due to the “location, purpose and nature” of the project. The Hearings Officer concludes that even if JBH’s legal proposition here is correct

in the abstract, it does not entitle JBH to summary judgment because DLNR is not relying on any claimed ability to require a license in the specifications when one is not required by law.

Accordingly, the Hearings Officer concludes that JBH's Motion for Summary Judgment should be denied.

C. The Evidentiary Hearing

HRS §444-9 and HAR §16-77-4(a) contain the general requirements for contractors, including specialty contractors, to obtain a contractors' license.

Insofar as fencing is concerned, Exhibit A to HAR 16-77-28(c) states as follows:

C-32 **Ornamental, guardrail, and fencing contractor.** Installation of all types of structural and nonstructural units for residential, commercial, and industrial construction, both interior and exterior including, but not limited to, folding gates, guardrails, handrails, stairs, fencing and gates, window shutters and grills, roll up shades, non-electrical signs, room dividers and shields, accessories, railings, and traffic safety devices.

The purpose behind Hawaii contractor licensing laws is to protect the general public from dishonest, fraudulent, unskillful or unqualified contractors, District Council 50 of the International Union of Painters and Allied Trades. v. Lopez, 129 Haw. 281, 291, 298 P.3d 1045, 1055 (2013).

HAR §16-77-2 provides:

Objective. The board interprets the primary intent of the legislature in creating the contractors license board to be the protection of the public health, safety, and general welfare, in dealing with persons engaged in the construction industry, and affording to the public effective and practical protection against the incompetent, inexperienced, unlawful, and unfair practices of contractors with whom the public contracts. All rules adopted by the board shall be interpreted and construed in light of the policies set forth in this section.

In the present case, the interpretation of statutory terms is not directly involved, but the interpretation of terms in Exhibit A to HAR §16-77-28 (c), specifically "residential, commercial and industrial construction," is directly at issue. "Residential," "commercial," and "industrial" are not defined by the administrative rules adopted by the Contractors

License Board. Thus, in interpreting Exhibit A, the “plain and obvious meaning of the language must be given effect,” and “legal or other well accepted dictionaries” may be used to determine the ordinary meaning of words not defined in the rules. Cf. District Council 50 of the International Union of Painters and Allied Trades v. Lopez, 129 Haw. 281, 290, 298 P.23d 1045, 1054 (2013).

The Poamoho project clearly does not involve “residential” or “industrial” construction. The question boils down to whether it involves “commercial” construction.

The ordinary meaning of “commercial” is “related to or in connection with trade and traffic or commerce in general.” Black’s Law Dictionary (6th edition)(1990).

In turn, the ordinary meaning of the word “commerce” involves more than the purchase and sale of goods or services. It also can refer to travel or transportation of persons between locations that does not involve the purchase of goods or services as well as communication between places. Black’s Law Dictionary (6th edition)(1990).⁵

Consistent with this definition is the use by Exhibit A of examples of the type of construction fitting within the requirements for a C-32 license: “including, but not limited to, folding gates, guardrails, handrails, stairs, fencing and gates, window shutters and grills, roll up shades, non-electrical signs, room dividers and shields, accessories, railings, and traffic safety devices.” (Emphasis supplied) “Guardrails” and “traffic safety devices” are associated with road construction, i.e., traffic and travel.

The Poamoho fence project is designed to accommodate and facilitate travel by a substantial number of people between the area outside of the fence and the area enclosed by

⁵ Later editions of this dictionary truncate the definition of “commerce” and eliminate the definition of “commercial.” The Hearings Officer, however, cannot conclude that these more abridged editions mean the broader definition of “commerce,” based on cited case law, has somehow disappeared.

the fence. The fence is designed to let people continue to enter an area that people had frequented before the fence was constructed to keep out the feral pigs that were a threat to the environment.

The travel aspects of the Poamoho fence project are not insubstantial. In one year, permits were issued that allowed a minimum of 8,000 people and a maximum of 40,000 people to use an official State of Hawaii trail, maintained by the State of Hawaii, to potentially cross the fence. There was no evidence that the other projects that JBH attempts to assert are the equivalent of the Poamoho project involve anywhere near this substantial amount of people accessing the area and crossing the fence, a trail intersecting the fence that is part of an official State of Hawaii trail system, or a trail similarly maintained for public use by the State of Hawaii.

Furthermore, persons or companies could utilize the gates in the fence to conduct a for-profit touring business if they so desired.

The aforesaid interpretation of the C-32 licensing requirement is consistent with the overall purpose of the contractor licensing statute and the rules of the CLB to protect the public, while a contrary interpretation would result in less protection to a significant portion of the public that uses the area in question and must use the gates in the fence to access the area.

The Poamoho project is factually distinguishable in a significant way from the projects at issue in the 2004 declaratory relief proceeding.

Under these circumstances, the Hearings Officer concludes that the Poamoho fence project involves commercial construction of a fence within the meaning of Exhibit A to HAR §16-77-28(c).

On cross examination by JBH, the DLNR's only witness at the hearing agreed that the fence in question was not "residential, commercial or industrial construction." Counsel's question, however, called for a legal conclusion which this witness was not qualified to give. Further, it makes no difference that the DLNR's counsel did not object to this question, as the Hearings Officer is not obligated to accept as true all testimony which is unchallenged. In the Matter of Kiewit Infrastructure West, Inc. v. Department of Transportation, State of Hawaii, PCX 2011-2 (June 6, 2011), at page 63-64. In light of the discussion above, the answer from the DLNR witness was not accurate or persuasive.

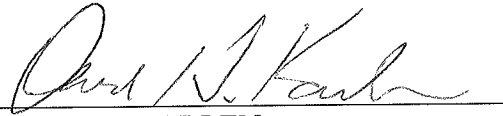
The Hearings Officer therefore concludes that the IFB for the Poamoho fence project correctly and appropriately called for the contractor to have a C-32 license.

IV. DECISION

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

- a. The DLNR's motion for summary judgment is denied.
- b. JBH's motion for summary judgment is denied.
- c. The determination of the Chairperson of the Board of Land and Natural Resources in the letter of June 26, 2013, is in accordance with the Constitution, statutes, rules, and terms and conditions of the solicitation in question. The DLNR's denial of JBH's procurement protest is affirmed, and JBH's Request for Administrating Hearing herein is dismissed.
- d. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, August 15, 2013.

A handwritten signature in cursive script, appearing to read "David H. Karlen", written over a horizontal line.

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