HAWAIʻI PUBLIC PROCUREMENT CODE

DESK REFERENCE

Denise P. Balanay, Esq.
Rodney K.F. Ching, Esq.
Desirée L. Hikida, Esq.
Natalia T. Chan, Esq.
Ryan H. Ota, Esq.

Office of Administrative Hearings
Department of Commerce and Consumer Affairs
State of Hawaiʻi

(Revised November 7, 2025)

TABLE OF CONTENTS

Page

PREFACE

In 1994, the Hawaii Legislature enacted the Hawaii Public Procurement Code, Hawaii Revised Statutes Chapter §103D. The new Procurement Code, which was patterned after the *American Bar Association's Model Procurement Code for State and Local Governments*, represented a sweeping reform of public procurement law in Hawaii.

Significant changes regarding procurement protests were made to the Code by the 2009 Hawaii Legislature, but those changes "sunsetted" as of June 30, 2011, and were no longer applicable after that date. However, those changes were revived and made permanent, effective July 1, 2012, by the 2012 Hawaii Legislature.

The Code requires that protests be submitted to the procuring agency. It also provides that an administrative review of a procuring agency's decision on a protest shall be made directly to the Office of Administrative Hearings ("OAH"), a division of the Department of Commerce and Consumer Affairs. An appeal of an OAH decision is made to the appropriate Circuit Court.

Since the enactment of the Code, a number of decisions on procurement protests have been issued by OAH. Those decisions have addressed a variety of issues involving the interpretation and application of the Code to the solicitation and procurement of government contracts. All of these decisions are made available on the OAH's website which can be found at the following address: cca.hawaii.gov/oah/oah_decisions/procurement.

This Desk Reference includes summaries of decisions rendered by OAH since the enactment of the Code and is provided here as an aid to both the public and the practitioner in fostering a better understanding of Hawaii's public procurement laws. It is not to be considered legal advice or statements binding on the State of Hawai'i, its departments, agencies, or employees.

The initial edition, which was issued on April 15, 2010, was prepared by Craig H. Uyehara, Esq. Subsequent updates of decisions were prepared by Mr. Uyehara, and the Administrative Hearings Officers of the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, including Sheryl Lee A. Nagata, Esq., David H. Karlen, Esq., Rodney K.F. Ching, Esq., Desirée L. Hikida, Esq., Denise P. Balanay, Esq., Natalia T. Chan, Esq., and Ryan H. Ota, Esq.

I. INTENT OF THE CODE

A. Legislative intent of Code and implementing rules: In enacting Hawaii Revised Statutes ("HRS") Chapter 103D, the Hawaii Public Procurement Code ("Code"), the Legislature sought to establish a comprehensive code that would: (1) provide for fair and equitable treatment of all persons dealing with the procurement system; (2) foster broad- based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and (3) increase confidence in the integrity of the system. Standing Committee Report No. S8-93, 1993, Senate Journal at 39; HAR §3-120-1.

Cases:

Purpose of Code; fair treatment; competition; integrity; In enacting HRS Chapter 103D, the Legislature sought to establish a comprehensive code that would: (1) provide for fair and equitable treatment of all persons dealing with the procurement system; (2) foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and (3) increase confidence in the integrity of the system. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99 -6 (August 9, 1999); Wheelabrator Clean Water Systems, Inc. v. City & County of Honolulu, PCH 94-1 (November 4, 1994); Fletcher Pacific Construction Co., Ltd. v. Dept. of Transportation, PCH 98-2 (May 19, 1998); Maui Kupono Builders, LLC v. Dept. of Transportation, PDH-2019-006 (December 23, 2019); SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-2021-001 (February 25, 2021); Securitas Security Services, USA, Inc. v. Dept. of Transportation, et al., PDH-2021-005 (May 14, 2021).*

Purpose of Code; flexibility; application of common sense; The intent of the Code, as expressed in the Senate Committee's Report S8 -93, Spec. Sess., Senate Journal at page 39 (1993), states that, "This bill lays the foundation and sets the standards for the way government purchases will be made, but allows for flexibility and the use of common sense by purchasing officials to implement the law in a manner that will be economical and efficient and will benefit the people of the State." *The Systemcenter, Inc. v. State Dept. of Transportation, PCH 98-9 (December 10, 1998); Certified Construction, Inc. v. DAGS, et al., PDH-2020-009 (January 29, 2021); SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-2021-001 (February 25, 2021).*

Purpose of Code; foster public confidence; technical violations; A savings of $21,000 of public funds would do more to foster public confidence in the integrity of the procurement system than would a strict adherence to a largely technical requirement. The requirement of Hawaii Administrative Rules ("HAR") §3-122-108(a) was not meant to cost public bodies thousands of dollars by requiring acceptance of higher bids for mere technical violations. *Standard Electric, Inc., vs. City & County of Honolulu, et al., PCH 97-7 (January 2, 1998).*

Purpose of Code; flexibility; common sense, foster public confidence; technical violation; At the end of the day, the Procurement Code was meant to ensure that government purchases will be made in an economical and efficient manner that will benefit the people of the State. Here, a more flexible and common-sense approach would have saved the public $23 Million thereby fostering public confidence in the integrity of the procurement system. The Hearings Officer concludes that Respondents' requirement that Petitioner produce a *legal document* showing that they are the *legal successor* to FCCC is a "technical" requirement, at best. Under the unique circumstances of this case (Hearings Officer found that Petitioner was a *de facto successor* of the Hawaii based operations of parent company), that requirement should not stand in the way of the public saving $23 Million in public funds. *FV Coluccio Construction Co., Inc. v. City & County of Honolulu, Department of Environmental Services and Department of Budget and Fiscal Services. PDH-2018-005 (May 8, 2018); SITA Information Networking Computing USA, Inc. v. Dept. of Transportation,*

PDH-2021-001 (February 25, 2021); Securitas Security Services, USA, Inc. v. Dept. of Transportation, et al., PDH-2021-005 (May 14, 2021).

Purpose of Code; promote competition; prevent favoritism, corruption; subsequent changes; Genuine competition can only result where parties are bidding against each other for precisely the same thing and on precisely the same footing. The object of bidding statutes is to prevent favoritism, corruption, extravagance and improvidence in the awarding of public contracts. To permit a substantial change in a proposal *after* bids have been opened and made public, would be contrary to public policy, and would tend to open the door to fraudulent and corrupt practices. *Wheelabrator Clean Water Systems, Inc. vs. City & County of Honolulu, PCH 94-1 (November 4, 1994)*.

Public bidding statutes construed to public good; requires rigid adherence; Public bidding statutes must be construed with sole reference to the public good and must be rigidly adhered to in order to guard against favoritism, improvidence, extravagance, and corruption. *Clinical Laboratories of Hawaii v. City & County of Honolulu, PCH 2000-8 (October 17, 2000)*.

Code construed in manner consistent with its purpose; legislative intent; In construing the various provisions of the Code, the foremost obligation is to ascertain and give effect to the intention of the Legislature which is to be construed primarily from the language of the statute itself. The language must be read in the context of the entire statute and construed in a manner that is consistent with its purpose. *Hawaii Newspaper Agency, et. al v. State Dept. of Accounting & General Services, PCH 99-2; Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, PCH 99-3 (April 16, 1999) (Consolidated)*.

Use of federal precedents to interpret Code; The Code was based in large part on the American Bar Association's Model Procurement Code and not on the federal procurement regulations. Federal precedent can aid the interpretation of Hawaii's Code only where the statutory language is the same or similar to the relevant Code provision. *Bombardier Transportation (Holdings) USA, Inc. v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, 128 Haw. 413, 239 P.3d 1049 (Haw. App. 2012).*

Purpose of Code; ensuring efficiency and accountability; While competition might have been furthered by allowing an unacceptable conditional offer to be modified to remove the unacceptable condition, doing so after the pricing information from other offerors had been revealed would be unfair and undermine the integrity of the procurement process. Ensuring efficiency and accountability in the procurement process are equally important as promoting competition. *Bombardier Transportation (Holdings) USA, Inc. v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, 128 Haw. 413, 239 P.3d 1049 (Haw. App. 2012).*

Interpretation of Code to be most consistent with purpose of Code; The foremost obligation in interpreting the statutory language is to give effect to the intention of the legislature from the language of the statute itself. Statutory language must be read in the context of the entire statute and construed in a manner consistent with the purpose of the statute. An interpretation of the Code that would make the procurement process uneconomical, inefficient, or inflexible is not appropriate. *Paul's Electrical Contracting, LLC v. City and County of Honolulu, Department of Budget and Fiscal Services (Ala Wai Community Park Project), PCY 2012-018 (July 27, 2012).*

Interpretation of Code to be most consistent with purpose of promptly resolving procurement protests; In the absence of specific guidance in the Code or any appellate decisions, and in the face of conflicting interpretations of the Code leading to impractical proposed solutions on the issue of whether or not a protest is premature, the Code is interpreted based upon one of its underlying goals—to promptly resolve procurement protests and not unnecessarily prolong that process. *Road Builders Corporation v. City and County of Honolulu, Department of Budget and Fiscal Services, PCY 2012-013 (April 27, 2012).*

Purpose of Code; common sense vs. technical approach; At the end of the day, the Procurement Code was meant to ensure that government purchases will be made in an economical and efficient manner that will benefit the people of the State. *SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-2021-001 (February 25, 2021); Securitas Security Services USA, Inc. v. Dept. of Transportation, PDH-2021-005 (May 14, 2021)*.

B. Legislative Intent of the 2009 and 2012 Amendments to the Code. The 2009 Legislature made several amendments to the Code insofar as requests for hearings filed with the OAH were concerned. The primary changes were: (a) establishing a minimum amount in controversy depending upon the amount of the procurement; (b) requiring a protestor to post a procurement protest bond in many cases; (c) establishing a strict 45-day time limit on proceedings before the OAH; and (d) eliminating the former requirement that the rules of evidence applied in hearings conducted by the OAH. The 2009 legislation made these changes applicable for only two years, and the law reverted to its previous provisions as of July 1, 2011. However, the 2012 Legislature reenacted these amendments and made them permanent, effective July 1, 2012.

Cases:

Purpose of the amendments; The Legislature intended to eliminate protests involving relatively minor issues so that the procurement is not delayed. Previously, the law allowed a bid protest over a minor, even trivial, matter to hold up the procurement. *Air Rescue Systems Corp. v. Finance Department, PDH 2012-006 (December 12, 2012); Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014); 57 Engineering, Inc. v. Dept. of Education, State of Hawaii, PDH-2018-009 (October 23, 2018).*

II. APPLICATION OF CODE

A. General Application: The Code applies to all procurement contracts made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance. "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any good, service, or construction. The term also includes all functions that pertain to the obtaining of any good, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. *HRS §§103D-102; 103D-104; HAR §3-120-3.*

Cases:

Code inapplicable to concession contract; A petition for an administrative hearing to contest the award of a concession contract which was solicited/awarded by an agency pursuant to the provisions of HRS Chapter 102 (Concessions on Public Property), does not fall within the jurisdictional authority of DCCA Hearings Officers as set out in HRS Chapter 103D. The term "concession" (as defined in HRS §102-1), focuses on an agency's granting of a privilege to conduct certain operations, while the term, "procurement" (as defined in HRS §103D-104), focuses on the agency's acquiring goods, services or construction. *Elite Transportation Co., Inc. v. State Dept. of Transportation, PCH 96-2 (May 21, 1997); See Robert's Tours and Transportation, Inc. v. DOT, PCH-2011-3 (September 2, 2011).*

Code inapplicable to Department of Human Services contracts; Procurements for the Department of Human Services are governed by HRS Chapter 103F. The Code, HRS Chapter 103D, does not apply to health and human services procurements under HRS Chapter 103F unless there is a specific provision of HRS Chapter 103F imposing a requirement of HRS Chapter 103D on the contract. *AlohaCare v. Department of Human Services, 126 Haw. 326, 271 P.3d 621 (2012).*

Code inapplicable to contracts of Regional Systems of Hawaii Health Systems Corporation; Pursuant to various statutes, the regional systems boards of the Hawaii Health Systems Corporation are exempt from the Code, HRS Chapter 103D. The OAH therefore has no jurisdiction to consider protests of procurements by those regional systems boards. *Maui Radiology Associates, LLP, v. Wesley P. Lo in his capacity as Regional Chief Procurement Officer/Regional Chief Executive Officer for Hawaii Health Systems Corporation, Maui Regional System, PCY 2012-020 (July 3, 2012).*

Code inapplicable to contracts for Energy Service Companies; The Code applies to the manner of advertising the solicitation of energy service companies to enter into energy performance contracts under HRS §§36-41(c) and 196-21 (c). However, except for this requirement regarding issuing the request for proposals, the procuring agency is not required to comply with HRS Chapter 103D in order to enter into an energy performance contract. References to the Code in correspondence from the procuring agency did not turn the solicitation into one covered in all aspects by the Code. The OAH therefore did not have jurisdiction to consider a procurement protest concerning the procuring agency's selection of a particular contractor. *Ameresco/Pacific Energy JV v. Department of Transportation, State of Hawaii, PCY 2012-007 (April 17, 2012).*

Code applicable to contracts involving expenditure of public funds; The Code was originally applicable to and continues to be applicable to procurement contracts made by governmental bodies that involved the expenditure of public funds as consideration irrespective of whether those funds consist of cash, revenues, realizations, receipts, or earnings. *Waikiki Windriders/Hawaiian Ocean's Waikiki, PCH 2002-9 (July 26, 2002).*

No expenditure of funds; Code inapplicable; A plain reading of the bid documents leads the Hearings Officer to conclude that the consideration for the contract involved in this solicitation is the payment to the City of a premium by the high bidder in exchange for the exclusive right to provide towing services. Indeed, the contract does not contemplate the expenditure of public funds by Respondent as consideration for the "buying, purchasing, renting, leasing, or . . . acquiring [of] any good, service, or construction." Accordingly, the solicitation is not subject to HRS Chapter 103D. S*toneridge Recoveries, LLC v. City and County of Honolulu; PCH-2003-5 (June 26, 2003).*

No jurisdiction to consider protest of a previous OAH decision: The procuring agency awarded a contract, and the losing bidder challenged that award in a request for administrative hearing. The contractor that had been awarded the contract did not intervene in the proceeding. The Hearings Officer held that the contract was required to be partially terminated and ordered that the contractor that had been awarded the contract be compensated for its actual expenses plus reasonable profit under the terms of HRS §103D-707(a)(B). In compliance with this decision, the procuring agency sent a letter to the originally chosen contractor partially terminating the contractor. The partially terminated contractor then filed a protest of this partial termination. This was a direct challenge to the Hearings Officer's prior decision. The protest was dismissed. The OAH has jurisdiction to consider challenges to the decisions of procurement officials, but it has no jurisdiction to consider challenges to previous OAH decisions. Any challenges to such previous decisions must be carried out by a timely application for review in the circuit court. *Wasatch Transportation, Inc. v. Amy S. Kunz in her capacity as Assistant Superintendent/Chief Financial Officer, State of Hawaii Department of Education, PCY 2012-012 (April 12, 2012).*

B. Exemptions; The Code shall not apply to contracts by governmental bodies of the types set forth in HRS §103D-102(b) and HAR §3-120-4.

Cases:

Review of exemption determination precluded; HRS §103D-102(b) precludes administrative review of chief procurement officer's determination that contract was exempt from requirements of Code. Therefore, Hearings Officer correctly concluded that he did not have jurisdiction to review chief procurement officer's determination that interim contract was exempt from requirements of the Code. *Carl. Corp. v. State, 93 Haw. 155, 997 P.2d 567 (2000).*

No exemption from HRS Chapter 103D for a purported grant; While a "grant" may not be subject to the requirements of the Code, a "grant" normally must be made to a specific recipient. Funding of paratransit services by means of selecting a recipient through a Request for Proposals is not a grant and is therefore subject to the requirements of the Code. *Robert's Tours and Transportation, Inc. v. Department of Finance, County of Maui,* PCX 2010-008 (December 8, 2010).

III. COMPETITIVE SEALED BIDDING

A. Generally: Award is based upon the criteria set forth in the invitation for bids. The invitation for bids must include a purchase description and all contractual terms and conditions applicable to the procurement. *HRS §103D-302.*

Cases:

> ***Ambiguity in the solicitation construed against drafter;*** An ambiguity in the language of a solicitation is properly interpreted against the party drafting that document. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998).*
>
> ***Duty of prospective bidder to make inquiry to procuring agency regarding ambiguous solicitation.*** As an exception to the above rule, if the terms of an RFB are patently ambiguous, a bidder has an "affirmative duty" to make an inquiry to the procuring agency. The procuring agency can then, if it so desires, clarify what it meant by the term in question and provide this clarification to all bidders. The successful bidder will then be bound by the meaning of the term in question that is attributed to it by the procuring agency. *Foundation International, Inc. v. E.T. Ige Construction, Inc.,102 Haw. 487, 78 P.3d 23 (2002); Soderholm Sales and Leasing, Inc. v. County of Kauai, Department of Finance, PCY 2012-017 (July 5, 2012).*
>
> ***After making a pre-bid inquiry to the procuring agency regarding ambiguous specifications, a protest of the agency's interpretation filed after bid opening was not timely*;** A prospective bidder satisfied its duty of inquiry under *Foundation International, Inc. v. E.T. Ige Construction, Inc., 102 Haw. 487, 78 P.3d 23 (2002,* by bringing a patent ambiguity to the procuring agency's attention during pre-bid discussions. The Petitioner, however, was not entitled to ignore the procuring agency's pre-bid interpretation and submit a bid based on its own interpretation. Under the *Foundation International* decision, any ambiguity is to be construed against the bidder as a matter of law because it was aware before bidding of the procuring agency's interpretation. Instead, the prospective bidder should have filed a timely procurement protest before bid opening in order to properly challenge the procuring agency's interpretation. *Interior Showplace, Ltd. v. Department of Human Services, State of Hawaii, PCY-2012-009 (April 2, 2012).*
>
> ***Bidder's reliance on document outside of the invitation is erroneous***; Any purported reliance on an outdated HDOT handout, which did not waive the pre-certification requirement that qualifying DBE subcontractors must have been certified as such prior to the bid opening date, which had been subsequently revised, and which was not even part of the invitation for bids, was misplaced and erroneous. *Fletcher Pacific Construction Company, Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998).*

B. Construction contracts; requirement to list subcontractors; If the invitation for bids is for construction, the invitation shall specify that all bids include the name of each person/firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. Construction bids that do not comply with this requirement may be accepted if the chief procurement officer concludes that:

(1) acceptance is in the *best interest of the State*; and

(2) the value of the work to be performed by the joint contractor or subcontractor is *equal to or less than one per cent of the total bid amount*.

HRS §103D-302(b); HAR §3-122-21(a)(8).

Cases:

Purpose of listing requirement; anti-bid shopping; One of the primary purposes of the listing requirement is to prevent bid shopping and bid peddling. The listing requirement was based in part on the recognition that a low bidder who is allowed to replace a subcontractor after bid opening would generally have greater leverage in its bargaining with other potential subcontractors. By forcing the contractor to commit, when it submits its bid, to utilize a specified subcontractor, the Code seeks to guard against bid shopping and bid peddling. *Hawaiian Dredging Construction Company v. City & County of Honolulu, PCH 99-6 (August 9, 1999); Okada Trucking Co., Ltd. v. Board of Water Supply, et. al, 97 Hawaii 544 (App. 2001); C C Engineering & Construction, Inc. v. Dept. of Budget and Fiscal Services, City and County of Honolulu, PCH-2005-6 (November 1, 2005); Parsons RCI, Inc. v. DOT, et al., PCH-2007-3 (July 13, 2007; Abhe & Svoboda, Inc. v. Dep't of Accounting and General Services, PCX-2009-5 (Dec. 3, 2009); Certified Construction, Inc. v. DAGS, et al., PDH-2020-009 (January 29, 2021).*

Purpose of the listing requirement; legislative intent*;* HRS §103D-302(b) was subsequently amended by Act 186, 1994 Haw. Sess. L. Act 186, §9 at 422, to, among other things, limit the discretion of the chief procurement officer to waive a bidder's failure to comply with the subcontractor listing requirement. Thus, the intent of the legislature was to add a one percent or less threshold to qualify for a waiver of a violation of the subcontractor's listing requirement. *Okada Trucking Co., v. Board of Water Supply, et. al., 97 Haw. 544, 40 P.3d 946 (App. 2001).*

Strict compliance required to effectuate intent; Strict compliance with subcontractor listing requirement required in order to effectuate legislative intent "to establish a process that would reduce the opportunity to bid shop or bid peddle" and "avoid the delays and expenses of an investigation into the existence of those practices in a given case*." Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH-2002-7 (August 2, 2002); CC Engineering & Construction, Inc. v. Dept. of Budget and Fiscal Services, City and County of Honolulu, PCH-2005-6 (November 1, 2005); Parsons RCI, Inc. v. DOT, et al., PCH-2007-3 (July 13, 2007); CR Dispatch Service, Inc. dba Security Armored Car & Courier Service v. DOE, et al., PCH-2007-7 (December 12, 2007).*

Listing requirement; scope*;* Construed literally, HRS §103D-302(b) does not mandate that a public works construction contractor use specialty subcontractors in performing portions of the construction work. The only requirement is that a contractor list those subcontractors who are "to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and nature and scope of the work to be performed by each." Therefore, if a contractor does not plan to use a subcontractor in the performance of the contract, and the contractor is not required by statute, rule, or the IFB to use a joint contractor or subcontractor to perform portions of the contract, the contract is not required to list any joint subcontractor. *Okada Trucking Co., v. Board of Water Supply, et. al., 97 Haw. 544, 40 P.3d 946 (App. 2001); CC Engineering & Construction, Inc. v. Dept. of Budget and Fiscal Services, City and County of Honolulu, PCH-2005-6 (November 1, 2005); Parsons RCI, Inc. v. DOT, et al., PCH-2007-3 (July 13, 2007).*

Substitution of listed subcontractor prohibited; HRS §103D-302(b) precludes the substitution of a listed subcontractor after bid opening, at least in cases where the anti-bid shopping purpose of the listing requirement may be undermined. Any other conclusion would nullify the underlying intent of the listing requirement. *Hawaiian Dredging Construction Company v. City & County of Honolulu, PCH 99-6 (August 9, 1999).*

Substitution of listed subcontractor may be justifiable; Where substitution of a listed subcontractor after bid opening is required for reasons beyond the bidder's control, replacement of the subcontractor may be justifiable. *Hawaiian Dredging Construction Company v. City & County of Honolulu, PCH 99-6 (August 9, 1999).*

Failure to list subcontractor renders bid nonresponsive; exception; The failure of a bidder to list its subcontractors results in the submission of a nonresponsive bid. Nevertheless, the provisions of HRS §103D-302(b) and HAR §3-122-21(a)(8) allow such a potentially fatal omission to be overcome provided that (1) acceptance of the bid is in the best interest of the State, and (2) the value of the unlisted work is equal to or less than one percent of the total bid amount. *Okada Trucking Co., Ltd.* v. Board of Water Supply, PCH 99-11 (November 10, 1999); Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998); Hawaiian Dredging Construction Company v. City & County of Honolulu, PCH 99-6 (August 9, 1999).

Listing of subcontractor required; Once a bidder names a subcontractor, that subcontractor cannot be substituted, unless substitution is permitted pursuant to HRS §103D-302(g). Conversely, if a bidder does not name a subcontractor for specialty work and the bidder subsequently wishes to use a subcontractor to perform such work, the bidder will similarly not be allowed to do so unless authorized to do so pursuant to HRS §103D-302(g). *Okada Trucking Co. v. Board of Water Supply, et al., 97 Haw. 544, 40 P.3d 946 (App. 2001); C C Engineering & Construction, Inc. v. Dept. of Budget and Fiscal Services, City and County of Honolulu, PCH-2005-6 (November 1, 2005); Parsons RCI, Inc. v. DOT, et al., PCH-2007-3 (July 13, 2007); Nan, Inc. v. DOT, PCH-2008-9 (October 3, 2008).*

Listing of subcontractor required; The provisions of HRS §103D-302(b) and HAR §3-122-21(a)(8) are clear and unequivocal. They state that the bidder shall provide the name of each subcontractor to be engaged to perform on the contract with the bidder. Consequently, the bidder had no option to elect to provide or not to provide the name of its subcontractor even where the value of the work to be performed by the subcontractor was one percent or less than the total bid amount. The consequences of a bidder's failure to provide the name of each subcontractor as required by the IFB, statutes and rules would result in a non-responsive bid that must be rejected. O*kada Trucking Co., Ltd. v. Board of Water Supply, et. al, PCH 99-11 (November 10, 1999) (reversed on other grounds).*

Low bid only one factor in best interest determination; In determining whether acceptance of Intervenor's bid is in the best interest of the City, the fact that Intervenor is the lowest bidder cannot be ignored. However, it should not be the only factor in determining whether it is in the City's best interest to accept Intervenor's bid, as even the lowest bid should not be accepted if it would be contrary to the expressed purposes and principles of the Code. *KD Construction, Inc. v. City & County of Honolulu, et al., PCH-2001-9 (December 26, 2001). But see, Okada Trucking Co. Ltd. v. Board of Water Supply, 101 Haw. 68, 62 P.3d 631 (Hawaii App. 2002).*

Post-award negotiations prohibited*;* If Intervenor is allowed to negotiate with subcontractors after bid award, it would not be in the City's best interest to accept Intervenor's bid. The subcontractor listing requirement is designed to guard against bid shopping by a contractor. *KD Construction, Inc. v. City & County of Honolulu, et al., PCH-2001-9 (December 26, 2001).*

Listing of subcontractors; requirement to list second-tier subcontractors; There is no requirement that bidders list subcontractors below the first tier. Rather, the listing requirement is aimed entirely at preventing the general contractor from bid shopping. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002); Ted's Wiring Service, Ltd. v. DOT, PCH-2007-5 (December 12, 2007); Nan, Inc. v. DOT, PCH-2008-9 (October 3, 2008).*

Listing of subcontractors; nature and scope of work; While bidders are not required to list second-tier subcontractors, HRS §103D-302(b) does require that bidders disclose the nature and scope of the work to be performed by its listed subcontractors. This disclosure is necessary to prevent a bidder from listing more than one subcontractor for the same work, then following the award of the contract, bid shop among those listed. This problem is avoided by requiring the bidder to disclose in its bid the work to be performed by each subcontractor and use the listed subcontractor to perform only the work previously disclosed in the bid. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002); Ted's Wiring Service, Ltd. v. DOT, PCH-2007-5 (December 12, 2007); Kiewit Pacific Co v. Dept. of Land and Natural Resources et al., PCH-2008-20 (February 20, 2009).*

Failure to disclose nature and scope of work; nonresponsive bid; The failure to adequately and unambiguously disclose the nature and scope of the work to be performed by each subcontractor may render the bid nonresponsive regardless of whether there is evidence of bid shopping. These principles also dictate that a subcontractor can only subcontract work that is included within the nature and scope of its work as disclosed in the bid. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002); Abhe & Svoboda, Inc. v. Dep't of Accounting and General Services, PCX-2009-5 (Dec. 3, 2009).*

Nature and scope of subcontractor's work; ambiguity construed against bidder; A problem may arise where it is unclear whether certain items of work are included in the nature and scope of a subcontractor's work as described in the bid. In that event, the Hearings Officer must look to the plain language of the disclosure and construe any ambiguity against the bidder. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Failure to list subcontractor; waiver; HRS §10 3D-302(b) does not preclude waiver of a bidder's failure to list a subcontractor who had not been "lined up and contractually bound" to perform the contract on bid opening date. *Okada Trucking Co., Ltd. v. Board of Water Supply, et al., 101 Haw. 68, 62 P.3d 631 (Hawaii App. 2002).*

Failure to describe nature and scope of subcontractor's work; A violation of HRS §103D- 302(b) occurs where a bidder fails to properly and adequately describe the nature and scope of the subcontractor's work which, in turn, creates an opportunity to bid shop*; Stoneridge Recoveries, LLC v. City and County of Honolulu; PCH-2003-5 (June 26, 2003).*

Disclosure of nature and scope of work of subcontractors; HRS §103D-302(b) requires that bidders, among other things, disclose the nature and scope of the work to be performed by its listed subcontractors. Consequently, a violation of HRS §103D-302(b) occurs where a bidder fails to properly and adequately describe the nature and scope of its subcontractors' work which, in turn, creates an opportunity to bid shop. *Oceanic Companies, Inc. v. DOT; PCH-2003-15 (July 3, 2004).*

Failure to list subcontractor; waiver; The agency maintains the discretion to waive a subcontractor listing violation even where the bidder intentionally fails to list a required subcontractor in its bid, opting instead to solicit bids from subcontractors after bid-opening. So long as the value of the work to be performed by the subcontractor is equal to or less than one percent of the total amount bid and the acceptance of the bid would be in the best interest of the State, the agency is authorized to waive violations of the subcontractor listing requirement. *Okada Trucking Co., Ltd. v. Board of Water Supply, City and County of Honolulu, 101 Haw. 68, 62 P.3d 631 (Hawaii App. 2002); Parsons RCI, Inc. v. DOT, et al., PCH-2007-3 (July 13, 2007); Maui Master Builders v. DOT; PCH-2007-8 (February 25, 2008).*

Failure to list subcontractor; waiver; best interest determination; In determining whether acceptance of the bid is in the State's best interest, the agency need not weigh the economic advantage to the State in accepting the low bid against the "evils of bid shopping*." Okada Trucking*

Co., Ltd. v. Board of Water Supply, 101 Haw. 68, 62 P.3d 631 (Hawaii App. 2002); Parsons RCI, Inc. v. DOT, et al., PCH-2007-3 (July 13, 2007).

Failure to list subcontractor; waiver; requirements; The only conditions for a waiver are (1) that acceptance of the bid would be in the best interest of the State; and (2) the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one percent of the total bid amount. The imposition of any additional requirements would be inappropriate. *Okada Trucking Co., Ltd. v. Board of Water Supply, City and County of Honolulu, 101 Haw. 68, 62 P.3d 631 (Hawaii App. 2002); Parsons RCI, Inc. v. DOT, et al., PCH-2007-3 (July 13, 2007).*

Failure to disclose nature and scope of work of subcontractors; opportunity to bid shop remote; Even though Gonzalez Construction's bid listed two subcontractors to perform "site work" on the Project, there is no dispute that only one was properly licensed to perform that work. As such, the opportunity to bid shop between the two subcontractors by the bidder would appear to be tenuous at best. *Oceanic Companies, Inc. v. DOT; PCH-2003-15 (July 3, 2004).*

Failure to properly and adequately disclose nature and scope of work of subcontractors; Bidder must adequately and unambiguously disclose nature and scope of subcontractor's work. Failure to do so may allow bidders to circumvent the subcontractor listing requirement. And where it is unclear whether certain items of work are included in the nature and scope of the subcontractor's work as described in the bid, the Hearings Officer must look to the plain language of the disclosure and construe any ambiguity against the bidder. *Robison Construction, Inc. v. Board of Water Supply; PCH-2003-11 (August 14, 2003).*

Failure to properly and adequately disclose nature and scope of work of subcontractors; The bidder's description of the subcontractor's nature and scope of work ("tank") was ambiguous at best and the roofing/waterproofing work was not within the nature and scope of the subcontractor's work as described by the bidder in its bid. *Robison Construction, Inc. v. Board of Water Supply; PCH- 2003-11 (August 14, 2003).*

Calculation of value of work; shipping costs; Where contractor was to pay the shipping costs directly to the shipping company of its choice, those costs are not properly includable in the calculation of the one percent. *Oceanic Companies, Inc. v. Dept. of Budget & Fiscal Services; PCH-2004-16 (December 23, 2004).*

Subcontractor listing requirement; calculation of value of work; labor only; The Hearings Officer found that the low bidder did not act unlawfully in having the subcontractors who were to do the plumbing and reinforcing steel work submit proposals for labor only. *Okada Trucking Co., Ltd. v. Board of Water Supply, et al., PCH-99-11 (1999) (reversed on other grounds). See generally, Ted's Wiring Service, Ltd. v. DOT, PCH-2007-5 (December 12, 2007); Maui Master Builders v. DOT; PCH- 2007-8 (February 25, 2008).*

Subcontractor listing requirement; listing two subcontractors for same work; Intervenor's listing of two subcontractors to perform "masonry" work, without more, is ambiguous and, as such, gives rise to an opportunity to bid shop. Intervenor's bid is therefore nonresponsive. Any other conclusion would render the subcontractor listing requirement meaningless. *Kiewit Pacific Co. v. Dept. of Land and Natural Resources, et al., PCH-2008-20 (February 20, 2009); Ludwig Contr., Inc. v. County of Hawaii, PCX-2009-6 (December 21, 2009); Abhe & Svoboda, Inc. v. Dep't of Accounting and General Services, PCX-2009-5 (Dec. 3, 2009).*

Subcontractor listing requirement; substitution precluded; Petitioner listed Horsley Company as the only subcontractor it intended to engage to perform the baggage handling work. Having done so, Petitioner was precluded from substituting Horsley Company with another subcontractor for the specified work. *Nan, Inc. v. DOT, PCH-2008-9 (October 3, 2008).*

Subcontractor listing requirement; application of waiver to multiple undisclosed subcontractors; HRS §103D-302(b) allows an undetermined number of undisclosed joint contractors or subcontractors, as long as the work to be performed by each individual undisclosed joint contractor or subcontractor, is separately valued at one percent or less, of the total bid amount. *LTM Corp. dba Civil Mechanical Contractor v. City & County of Honolulu, PCH-2009-17 (August 10, 2009).*

***Subcontractor listing requirement; applicability to nonconstruction project*;** A construction project is not involved in the invitation, concerns about bid shopping and bid peddling by the general contractor do not appear to be present, and the parties have not pointed to any statute requiring subcontractors to be listed. *Big Island Scrap Metal, LLC v. Dept. of Environmental Management, County of Hawaii, PDH-2014-003 (April 10, 2014).*

Subcontractor listing requirement; required in specifications; matter of responsibility; The specifications required a list of subcontractors approved by the County and prohibited the processing of propane tanks on County property and required that all processing shall be done off site at the Contractors/Sub-Contractors permitted facility. This combination of factors leads to the conclusion that the subcontractor listing requirement is one of responsibility. *Big Island Scrap Metal, LLC v. Dept. of Environmental Management, County of Hawaii, PDH-2014-003 (April 10, 2014).*

Subcontractor listing requirement; bidder's failure to list itself; agency under no obligation*;* If a bidder does not list any entity with an appropriate specialty license, it certainly does not list itself as doing the work under the specialty license. The County was under no obligation to do research on its own to discover what specialty licenses the bidder possessed that might possibly be relevant to the project*. Certified Construction, Inc. v. Dept. of Finance, County of Hawai'i, PDH-2014-006 (July 30, 2014).*

Subcontractor listing requirement; bidder failure to list itself not fatal; Under the particular circumstances of the case, the nonconformity of the bidder's bid in failing to list itself was not so material as to render the bid nonresponsive. *Certified Construction, Inc. v. Dept. of Finance, County of Hawai'i, PDH-2014-006 (July 30, 2014), citing Okada Trucking Co., Ltd v. Board of Water Supply, 97 Haw. 544, 40 P.3d 946 (Haw. App. 2001).*

Scope of work; "B" general contractor license required; Although an "A" general engineering contractor may be qualified and fully able to manage and coordinate all the work on a project, an "A" general engineering contractor cannot perform the work of a "B" general building contractor and manage and coordinate the construction of a project without also holding the "B" general building contractor's license. *P.B. Sullivan Construction, Inc. v. Department of Finance, County of Maui and Goodfellow Bros, Inc.* PCH 2008-21 (March 24, 2009).

Subcontractor listing requirement; naming of unlicensed vendor does not render bid nonresponsive; The protestor's bid was not rendered nonresponsive where it listed an unlicensed vendor in addition to a licensed contractor to ostensibly to conduct the solar panel work where there was no evidence of an opportunity to bid shop. C*ertified Construction, Inc. v. DAGS, et al., PDH-2020-009 (January 29, 2021).*

Subcontractor listing requirement; not limited to licensed subcontractors; HRS §103D-302(b) requires bidders to list all of the subcontractors they intend to engage in the project and there is no exclusion of that requirement for subcontractors without a specialty contractor license. C*ertified Construction, Inc. v. DAGS, et al., PDH-2020-009 (January 29, 2021).*

Subcontractor listing requirement; agency discretion. It is within the discretion of the procuring agency to specify what type of specialty subcontractor license is required for specific work on a project. It is also within the discretion of the procuring agency to approve or deny a request for waiver of a failure to list a less-than-1% subcontractor. *Alpha v Board of Water Supply,*

PDH-2022-003, (July 26, 2022). (Circuit Court affirmed September 6, 2022, Intermediate Court of Appeal affirmed, 153 Hawaii 564 (December 29, 2023), Hawaii Supreme Court reversed the Intermediate Court of Appeals and stated, "When it procures, a government entity participates in the private market. Like any private actor, if BWS wants a C-27 certified landscaper to do certain tasks, it may ask for one." 154 Hawaii 486, 495, 555 P.3d 173, 182 (September 4, 2024))

C. Public Notice of Invitation; Adequate public notice of the invitation for bids shall be given a reasonable time before the date set forth in the invitation for the opening of bids.

HRS §103D-302(c).

Cases:

Posting of notice on website required*;* According to HAR §3-122-16.03(d) the posting of statewide or countywide notices on the agency's website is the only required method of publication. All other methods referenced in HAR §3-122-16.03 are optional and in addition to publicizing the notice via the agency's internet website. *Global Medical & Dental v. State Procurement Office, PCH- 2006-4 (August 14, 2006).*

D. Notice of Intention; Prospective bidders/offerors shall be capable of performing the work for which offers are being called. Each prospective bidder or offeror shall file a written or facsimile notice of intention to submit an offer pursuant to the following:

(1) The notice shall be received not less than ten days prior to the date designated for opening.

(2) A notice shall be filed for the construction of any public building or public work when the offer submitted for the project by a contractor is or will be $25,000.00 or more.

(3) A notice need not be filed for the procurement of goods and services, unless specified in the solicitation.

(4) The requirement for a notice may be waived if there is only one offeror and the procurement officer concludes that acceptance of the bid will be in the best interest of the public.

HAR §3-122-108.

Cases:

Failure to file notice of intent; HAR §3-122-108(a)(4) provides the procurement officer with the authority to waive the notice requirement if the procurement officer concludes that acceptance of the bid will be in the best interest of the public. A plain and logical reading of HAR §3-122-108 leads to the conclusion that HAR §3-122-108(a)(4) was designed to ensure that the public interest would not be frustrated by a noncompliance with the requirement of HAR §3-122-108(a). *Standard Electric, Inc.* v. City & County of Honolulu, et al., PCH 97-7 (January 2, 1998).

Failure to file notice as basis for rejecting bid; A procuring agency's existing policy of automatically rejecting bids in all cases where a notice of intention to submit a bid was not filed

in a timely manner flies in the face of HAR § 3-122-108(a)(4) and does not provide a legitimate basis for the denial of a waiver. *Standard Electric, Inc. v. City & County of Honolulu, et al., PCH 97-7 (January 2, 1998)*.

Savings of public funds rather than adherence to technical requirement preferable; A savings of $21,000 of public funds would do more to foster public confidence in the integrity of the procurement system than would a strict adherence to a largely technical requirement. The requirement of HAR §3-122-108(a) was not meant to cost public bodies thousands of dollars by requiring acceptance of higher bids for mere technical violations. *Standard Electric, Inc., vs. City & County of Honolulu, et. al., PCH 97-7 (January 2, 1998)*.

Savings of public funds rather than adherence to technical requirement preferable; The Procurement Code was meant to ensure that government purchases are made in an economical and efficient manner that will benefit the people of the State. Here, a more flexible and common-sense approach would have saved the public over $15 Million thereby fostering public confidence in the integrity of the procurement system. The Hearings Officer concludes that Respondent's determination that Petitioner altered the Proposal Schedule is merely a "technical" violation, at best. *SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-2021-001 (February 25, 2021)*.

Notice of intention; responsibility determination; Neither HAR §3-122-108 nor HAR § 3- 122-110 requires the procuring agency to complete the responsibility determination prior to bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000)*.

E. Late Bids; Any notice of withdrawal, notice of modification of a bid with the actual modification, or any bid received after the time and date set for receipt and opening is late. *HAR §3-122-29.*

(1) A late bid, late modification, or late withdrawal shall *not* be considered late if received before contract award *and* would have been timely but for the action or inaction of personnel within the procurement activity.

(2) A late bid or late modification will not be considered for award and shall be returned to the bidder unopened as soon as practicable, accompanied by a letter from the procurement activity stating the reason for its return.

Cases:

Late proposal; exception; The disposition of late proposals is governed by the provisions of HAR §3-122-50 together with the provisions of HAR §§3-122-49 and 3-122-29 and expressly provide that any proposal received after the time set in the RFP is late and will not be considered. As an exception, a proposal filed after the designated deadline shall not be considered late but only if (1) it was received before the contract award, and (2) it would have been timely except for the action or inaction of the procuring agency. *Hawaii Newspaper Agency, et.al. v. State Dept. of Accounting & General Services, et al, and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et al. PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999).*

Timeliness of bid submission; "mailbox rule"; The "mailbox rule" which provides that acceptance is effective upon a timely and proper mailing is inapplicable where the solicitation required that bids be received by 2:00 p.m. Thus, a bid received 32 minutes after the 2:00 p.m. deadline is late. *Superior Protection, Inc. v. Department of Transportation, PCH-2004-12 (August 18, 2004).*

Timeliness of bid submission; when received*;* The Notice to Bidders states that bids will be rejected and returned if received after the time set for bid opening. In this context, "received" can only refer to the time when the purchasing agency has possession of the bid and therefore a bid is late if it is not in the possession of the purchasing agency by the due date. Thus, a bid "received" approximately 1 minute after the 2:00 p.m. due date was late. *Maui Master Builders, Inc. v. Dept. of Public Works, County of Maui, et al., PDH-2014-014 (December 9, 2014).*

F. Correction or withdrawal of bids; Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of invitations for bids, awards, or contracts based on such bid mistakes, shall be permitted in accordance with rules adopted by the policy board. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the public or to fair competition shall be permitted. Except as otherwise provided by rule, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the chief procurement officer or head of a purchasing agency. HRS §103D-302(g).

Cases:

Addenda for amendments and clarification, distribution requirement*;* HAR §3-122-16.06(d) requires addenda for amendments and clarification "shall be issued to all prospective offerors known to have received a solicitation." Subsection (e)(1) requires for amendments to "be distributed within a reasonable time to allow prospective offerors to consider them in preparing their offers." Respondent has an affirmative obligation to send or otherwise transmit a copy of the addendum. A message left on Petitioner's voicemail only 2 days prior to the bid submission deadline indicating that a copy of the addendum was available for pickup, undermines the Code's objectives of promoting competition and efficiency. Accordingly, Petitioner's alleged noncompliance with the terms of the addendum was not a proper basis for the rejection of Petitioner's bid. *Maui Kupono Builders, LLC v. Dept. of Transportation, PCH-2011-11 (Dec. 22, 2011).*

G. Mistakes in Bids; Correction or withdrawal of a bid because of an *obvious mistake* in the bid is permissible to the extent it is not contrary to the best interest of the government agency or the fair treatment of other bidders. *HAR §3-122-31.*

(1) A bidder may remedy a mistake in a bid discovered before the time and date set for opening by withdrawing or correcting the bid. Corrections to bids after opening but prior to award may be made if the mistake is attributable to an arithmetical error.

(2) If the mistake is a minor informality which does not affect price, quantity, quality, delivery, or contractual conditions, the procurement officer may waive the informalities or allow the bidder to request correction by submitting proof of evidentiary value which demonstrates that a mistake was made.

(3) Examples of mistakes include typographical errors, transposition errors, failure to sign the bid or provide an original signature, but only if the unsigned bid or photocopy is accompanied by other material indicating the bidder's intent to be bound. In addition, if the mistake is obvious that if allowed to be corrected or waived is in the best interest of the governmental agency or for the fair treatment of other bidders, and the chief

procurement officer concurs with this determination, the procurement officer shall correct or waive the mistake. *HAR §3-122-31.*

(4) If the mistake is not allowable under (1) and (2) but is an obvious mistake that if allowed to be corrected is in the best interest of the government or the fair treatment of the other bidders, and the chief procurement officer concurs in this determination, the procurement officer shall correct or waive the mistake.

(5) Correction or withdrawal of bids after award is not permissible except when the chief procurement officer makes a written determination that it would be unreasonable not to allow the mistake to be remedied or withdrawn.

Cases:

Typographical errors, waivable mistake; A typographical error is a waivable mistake under HAR 3-122-31(c)(1)(B)(i) if the mistake is a minor informality that does not affect price, quantity, quality, delivery, or contractual conditions. The rule allows documentation to be submitted to demonstrate that a mistake was made. *Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Order Granting in Part and Denying in Part Motions for Summary Judgment) (Oct. 27, 2011).*

Incomplete bid; waiver; The failure of a bidder to complete portions of its bid document may, under certain factual circumstances, constitute a "mistake" which should be allowed to be corrected or waived in order to make it responsive to the solicitation so long as such action is consistent with both HAR § 3-122-31 and the general purposes of the Code. *The Systemcenter, Inc. v. State Dept. of Transportation, PCH-98-9 (December 10, 1998)*.

Correction of obvious mistake must be in government's best interest; Correction of a mistake that is neither an arithmetical error nor a minor informality must be in the best interest of the DOE. However, questions of the responsiveness of a bid relate to conformity with the invitation and are generally not curable after bid opening. *Southern Food Groups, L.P. v. Dept. of Educ., et. al., 89 Haw. 443, 974 P.2d 1033 (1999).*

Correction not in agency's best interest if unfair to bidders; A correction would not have been in the best interest of the DOE, inasmuch as it would have been unfair to the other bidders. The specifications furnished Meadow Gold were clear and specific, and they were ignored. Meadow Gold cannot realistically be heard to say that it was relying on the minor irregularities clause of HAR §3-122-31. On the record, there is no abuse of discretion. *Southern Food Groups, L.P. v. Dept. of Educ., et al., 89 Haw. 443, 974 P.2d 1033 (1999).*

Discretion of chief procurement officer final and conclusive; The discretion of the head of the DOE in concurring with a determination that a mistake is correctable shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law. *Southern Food Groups, L.P. v. Dept. of Educ., et. al., 89 Haw. 443, 974 P.2d 1033 (1999).*

Correction of error in extension price according to solicitation provision permitted provided that application of provision leads to reasonable result. Where a discrepancy exists between the stated unit price and the stated extended price in a bid, correction pursuant to a provision in the IFB giving precedence to unit prices over extended prices is permitted provided that the application of the provision leads to a reasonable result that is not in conflict with the Code or its implementing rules, including HAR §3-122-31(c)(3). *Jas. W. Glover, Ltd. v. Board of Water Supply PCH-2001-2 (August 7, 2001); Site Engineering, Inc. v. DOT; PCH-2003-12 (September 15, 2003); Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004).*

Obvious mistake must be evident from face of bid documents; extrinsic evidence prohibited. Since the mistake and the intended bid must be evident on the face of the bid documents, extrinsic evidence may not be considered. However, the procurement officer may consider the other bids submitted and rely on his or her own experiences and common sense. By contrast, where the intended bid cannot be determined from the bid documents alone, a mistake is not correctable as an obvious mistake. HAR §3-122-31(c)(3). *Jas. W. Glover, Ltd. v. Board of Water Supply PCH-2001-02 (August 7, 2001); GP Roadway Solutions, Inc. v. Glenn Okimoto as Director of the Dep't of Transportation, PCH-2011-15/PCH-2011-16 (Jan. 27, 2012).*

In determining whether a mistake is an obvious one, reliance on worksheets improper. Respondent's use of RCI's worksheets was improper. However, the mere fact that a bidder provides bid worksheets or other materials in connection with its claim of mistake does not mean that resort to these materials was necessary to determine the intended bid. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

Correction of obvious mistake requires correction be in best interest of agency or for fair treatment of bidders. HAR §3-122-31(c)(3) also requires that the chief procurement officer concur in the determination that the contemplated correction would be in the best interest of the agency or for the fair treatment of other bidders. In that regard, a correction would not be in the agency's best interest where it would be unfair to the other bidders. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001); Southern Food Groups, LP v. Dept. of Educ. et. al., 89 Haw. 443, 974 P.2d 1033 (1999), GP Roadway Solutions, Inc. v. Glenn Okimoto as Director of the Dep't of Transportation, PCH-2011-15/PCH-2011-16 (Jan. 27, 2012).*

Correction of error in unit price pursuant to HAR §3-122-31(c)(3) was proper. Correction of a mistake in the unit price was proper where the stated unit price was substantially higher than the other bid prices for the item; extending the bid on the basis of the unit price resulted in an extended bid about six times greater than the highest bid for the item; the extended total when added to the other extended totals in the bid equaled the price RCI bid as its total bid price; the intended unit price was consistent with the other bidder's prices and could easily be determined by dividing the extended total price for the item by the number of units. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

HRS §103D-302(g) prohibits correction of mistake after bid opening that is prejudicial to the interest of the public or to fair competition. The public's interest includes an interest in ensuring the integrity of the procurement process and avoiding bid manipulation. Permitting the bidder to elect between two prices, only one of which will result in an award to the bidder, after competitors' prices are revealed allows the bidder an unfair advantage contrary to the Code. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

HAR §3-122-31 was intended to permit relief for certain mistakes; underlying policy. In promulgating the mistake in bid rules in HAR §3-122-31, the Procurement Policy Board presumably desired to permit relief for certain mistakes made in the calculation and submission of bids to allow the government to take advantage of what it knows or should know is an error by the bidder and to avoid depriving the government of an advantageous offer solely because the bidder made a mistake. Because the discovery of bid mistakes may occur in the period after bid opening, however, when bid prices have been exposed and market conditions may have changed, the rule also reflects a concern with protecting the integrity of the competitive bidding system by strictly limiting the ability to make bid corrections. If, as a matter of policy, the Board or the Legislature prefers a rule that sets the unit price as the intended price in all cases involving a discrepancy between unit price and extension price, they can so provide. They have not done so and the Hearings Officer has no authority, nor inclination to establish a policy contrary to that previously established by the Board and the Legislature. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

Requirement that contracting official concur with determination that mistake was obvious and in best interest of agency; The obvious intent of this requirement was to provide an additional layer of assurance that the requirements of HAR §3-122-31(c)(3) had been met before a bidder was allowed to correct its bid. It was not intended to prevent a bidder from protesting an agency's decision not to allow a correction under HAR §3-122-31(c)(3). *Site Engineering, Inc. v. DOT; PCH-2003-12 (September 15, 2003).*

Mistake in bid; minor informality may be waived; Petitioner's failure to specify the dollar amounts of the General Excise Tax and the Total Base Bid in its bid were minor informalities, rather than material nonconformities, which did not affect price or any other material terms of the IFB. Therefore, Respondent should have waived these informalities or allowed Petitioner to request correction pursuant to HAR §3-122-31(c)(1)(B). *Ted's Wiring Service, Ltd. v. Hawaii Public Housing Authority, PCH-2009-14 (July 6, 2009; SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-2021-001 (February 25, 2021)*.

Mistake in bid; minor informality may be waived; Petitioner's failure to specify the dollar amounts of the General Excise Tax and the Total Base Bid in its bid were mistakes that were obvious and evident from the face of the IFB; correction or waiver of those mistakes would allow Respondent to award the contract to the lowest bidder and would therefore be in Respondent's best interest; and because correction or waiver of those mistakes would not affect price or any other material term of Petitioner's bid, such measures would not provide Petitioner with an unfair advantage over the other bidders. For these reasons, Respondent should have waived these obvious mistakes or allowed those mistakes to be corrected pursuant to HAR §3-122-31(c)(1)(C). *Ted's Wiring Service, Ltd. v. Hawaii Public Housing Authority, PCH-2009-14 (July 6, 2009); SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-2021-001 (February 25, 2021)*.

Mistake in bid; failure to provide information in bid; immaterial deviation cannot justify finding of nonresponsiveness; The evidence clearly established that Respondent's concern over the substitution of one subcontractor for another, less qualified subcontractor, was already addressed by P-4. In other words, P-5 required information that was already required by P-4 and as such, served no useful purpose. Therefore, Petitioner's failure to complete P-5 can only be construed as an immaterial deviation of form over substance and, as such, cannot justify a finding that Petitioner's bid was nonresponsive to the IFB. *Nan, Inc. v. DOT, PCH-2008-9 (October 3, 2008)*.

Mistake in bid; use of incorrect bid form was an obvious mistake of minor informality; bidder allowed to correct; Petitioner's use of the incorrect bid form, which provided for 180-day as opposed to 270-day time of completion, was an obvious mistake of minor informality. Respondent's waiver of the mistake and allowance of Petitioner to submit the proper bid form was appropriate. The waiver of the obvious mistake was "perfected" by Respondent's invitation to Petitioner to resubmit its bid on the correct form, prior to award. *Hawaii Works, Inc. v. Dept. of Hawaiian Home Lands, PDH-2021-013 (December 27, 2021).*

Negotiations after bid opening and prior to award of contract prohibited; Competitive sealed bidding is based on the recognition that genuine competition can only result where parties are bidding against each other for precisely the same thing and on precisely the same footing. The object of bidding statutes is to prevent favoritism, corruption, extravagance and improvidence in the awarding of public contracts. HRS §103D-302 unequivocally prohibits negotiations once bids have been opened and prior to the award of the contract and requires that bids are evaluated strictly on the criteria set forth in the solicitation and unconditionally accepted without alteration or correction. The Hearings Officer cannot overlook the improper negotiation that occurred and its effect upon the integrity of the entire process which included asking and receiving Intervenor's agreement to lower prices at the risk of losing the contract and providing Intervenor alone with the opportunity to submit a revised proposal. *HI-Built, LLC v. Danilo F. Agsalog, Director of Finance, et al., PDH-2015-011*

(January 22, 2016).

Mistake in bid; addition of line for GET on required form not material nonconformity; The addition of separate lines for taxes and the total bid amount below the total, for comparison of bids line, did not affect price, quantity, delivery or any other material term of the IFB and, therefore, was not a material nonconformity. *SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-2021-001 (February 25, 2021)*.

Mistake in bid; common sense interpretation; Viewed through this common sense lens, the addition of GET to SITA's Bid price did not affect SITA's final, clearly intended, Bid price, quantity, quality, delivery, or contractual conditions. *Dept. of Transportation v. Dept. of Commerce and Consumer Affairs, et al., Civil No. 1CCV-21-0000270 (April 5, 2021).*

Minor informality; does not affect final bid price; HAR §3-122-31(c)(1)(B) must be read to mean that the mistake must not affect the bidder's *final* bid price, quantity, quality, delivery, or contractual conditions. It cannot be read to prohibit the affect upon the subtotal because that is the nature of a subtotal: to be affected by other values and yielding a different grand total. The restriction against corrections that "affect price" is intended to prevent changes to the bidder's total intended bid price-not to changes in the way that the bidder characterized its bid price or expressed its components. *Dept. of Transportation v. Dept. of Commerce and Consumer Affairs, et al., Civil No. 1CCV-21-0000270 (April 5, 2021).*

H. Bid Opening; Bids shall be opened publicly in the presence of one or more witnesses, at the time and place designated in the IFB. HRS §103D-302(d).

I. Evaluation of Bids; Bids shall be evaluated based upon the requirements set forth in the IFB. The invitation shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the IFB. *HRS §103D-302(f); HAR §3-122- 33*.

Cases:

Ambiguous bid; nonresponsive; Meadow Gold's double bid was ambiguous. The DOE is not required to engage in telepathy to discern what Meadow Gold intended by submitting two apparently different bids. Meadow Gold's multiple or double bid was nonresponsive to the Bid Solicitation and was properly rejected. *Southern Food Groups, L.P. v. Dept. of Educ., et. al., 89 Haw. 443, 974 P.2d 1033 (1999).*

Unit prices; artificially inflating unit prices; The DOT argues that it does not care what the bidder indicates for its unit price. However, this kind of cavalier attitude by DOT invites padding and manipulating a bid by artificially inflating or deflating the unit price to any amount, regardless of what the actual estimated unit price actually may be. This undermines the ability of one examining a bid to determine how legitimate the values the bidder is using when it submits its bid. Clever bidders may exploit this "flexibility" in the bid process to use the change order process to eventually increase the successful bidder's costs (and thereby increasing its profits and the cost of the project to the state). This could lead to a bidding process that lacks transparency and public confidence, thereby corrupting the bid process. *Dept. of Transportation v. Dept. of Commerce and Consumer Affairs, et al., Civil No. 1CCV-21-0000270 (April 5, 2021).*

J. Award of Contract; ***Responsiveness; Responsibility****;* The contract shall be awarded with reasonable promptness by *written notice* to the lowest *responsible* and *responsive* bidder whose bid meets the requirements and criteria set forth in the invitation for bids. In the event all bids exceed available funds as certified by the appropriate fiscal officer, the head of the purchasing agency responsible for the procurement in question is authorized in situations where time or

economic considerations preclude resolicitation of work of a reduced scope to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsible and responsive bidder, in order to bring the bid within the amount of available funds. *HRS §103D-302(h)*.

Cases:

Award requires written notice; HRS §103D-302(h) specifically requires that a contract be awarded by written notice. Accordingly, a verbal conversation between an agency representative and a bidder cannot constitute the award of a contract. *Makakilo Retrofit Pilot Project vs. City and County of Honolulu, PCH 95-1 (March 17, 1995)*.

Award of contract on same day as judgment permissible; Nothing in HRS Chapter 103D precludes an agency from executing a contract on the same day that the Hearings Officer enters judgment. *Southern Food Groups, L.P. v. Dept. of Educ., et. al., 89 Haw. 443, 974 P.2d 1033 (1999).*

Award shall be made with reasonable promptness; The Hearings Officer found the County failed to act with "reasonable promptness", causing the majority of the fund available for the project to lapse, in violation of HRS § 103D-302(h). As such, the Hearings Officer rejected the County's argument that a lack of sufficient funds due to this lapse justified the County's cancellation of the solicitation "in the best interests of the agency".

Mandatory duties after award; The fact that offerors have certain mandatory duties after award of contract pursuant to HRS § 103D-310(c), does not diminish the fact that there has been an "award," i.e. a written notice of acceptance of the offeror's proposal. The fact that certain documents are submitted after an award pursuant to HAR § 3-122-112 does not change the fact that an award has been made. There is nothing inherently contradictory in requiring a winning bidder or offeror to accomplish certain actions after an award has been made. The City's "conditional award" letter used by the City to encumber funds for the award of the contract is an "award" within the meaning of HAR § 3-126-1. The "conditional" phrasing referred to conditions that must be met subsequent to an award. *Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Dec. 28, 2011).*

Notice of intention and responsibility determination; Neither HAR §3-122-108 nor HAR §3-122-110 requires the procuring agency to complete the responsibility determination prior to bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000)*.

Tax clearance certificate matter of responsibility; The tax clearance certificate requirement relates to and remains a matter of responsibility rather than responsiveness. Petitioner was entitled to present the tax clearance statement after bid opening and up to the time of award, notwithstanding the requirement in the Notice to Bidders, and Respondent's rejection of Petitioner's bid on that basis was improper. *Standard Electric, Inc., vs. City & County of Honolulu, et al., PCH 97-7 (January 2, 1998)*; *Paradigm Constr. v. Dept. of Hawaiian Home Lands, State of Hawaii, PCH-2009-16 (October 7, 2009).*

Manufacturer certification a matter of responsibility; Requirement that contractor be a manufacturer certified applicator directly impacts capability, as well as integrity and reliability, of the contractor and is a matter of responsibility. *Ohana Flooring v. Dep't of Transportation, PCH-2011-12 (Nov. 18, 2011).*

Responsible bidder; determination at award; A responsible bidder is a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance. Capability refers to capability at the time of award of

contract. Accordingly, these definitions are consistent with the conclusion that responsibility may be determined at any time up to the awarding of the contract. *Browning-Ferris Industries of Hawaii, Inc. v. Dept. of Transportation, PCH 2000-4 (June 8, 2000); Okada Trucking Co., v. Board of Water Supply, et. al, 97 Haw. 544, 40 P.3d 946 (App. 2001); Hawaii Specialty Vehicles, LLC v. Wendy K. Imamura, PCH-2011-7 (Jan. 20, 2012); Ohana Flooring v. Dep't of Transportation, PCH-2011-12 (Nov. 18, 2011); Securitas Security Services, USA, Inc. v. Dept. of Transportation, et al., PDH-2021-005 (May 14, 2021).*

Licensing requirement; exemption; The contractor's licensing exemption set out in HRS §444-2(10) applies in situations involving work to be performed pursuant to an invitation for bids only when the scope of the relevant public works project requires, *inter alia*, additional qualifications beyond those established by the licensing law. In making a factual determination of whether such an exemption applies, the Hearings Officer looks first to the content of the Invitation for Bids itself. *Makakilo Retrofit Pilot Project v. City & County of Honolulu, PCH 95-1 (March 17, 1995).*

Responsibility; performance capability; determined at award; Responsibility involves an inquiry into the bidder's ability and will to perform the subject contract as promised. Responsibility concerns how a bidder will accomplish conformance with the material provisions of the contract. It addresses the performance capability of the bidder, and normally involves an inquiry into the potential contractor's financial resources, experience, management past performance, place of performance, and integrity. A bidder's responsibility is not determined at bid opening but rather is determined at any time up to the award based upon information available up to that time. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999); Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000); Enviroservices & Training Center, LLC v. Dept. of Environmental Management, County of Maui, PDH-2020-001 (April 6, 2020).*

Responsibility; nonresponsive bid; A bidder's non-responsibility can render an otherwise responsive bid to be non-responsive if it has the effect of causing the bid to vary materially from the requirements contained in the agency's Invitation for Bids. Generally, a requirement is material if granting a compliance variance would give that bidder a substantial advantage over its competitors. The conduct of a bidder in listing a subcontractor without the requisite experience may result in a substantial pricing advantage over other bidders and constitute a material deviation from the terms of the invitation which renders the bid non-responsive. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999).*

Responsibility; ability to perform; A bidder's ability to perform may warrant close scrutiny under circumstances where even though at the time of bid opening, the general contractor (or its designated subcontractors) had the required license(s) to perform, neither the general contractor nor the subcontractors had the actual workforce needed to accomplish the project. Nevertheless, such circumstances do not reflect noncompliance with the requirements for submitting a bid. The size and makeup of a construction firm can fluctuate considerably depending upon the volume of their work at any given time, and as long as they are properly licensed they may expand their infrastructure to meet the needs of a given project. *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998)*; *FV Coluccio Construction Co., Inc. v. City & County of Honolulu, Department of Environmental Services and Department of Budget and Fiscal Services. PDH-2018-005 (May 8, 2018).*

Responsible bidder; test; The true test of responsibility is whether a bidder will be able to perform the contract, not whether it will be able to start construction the day the bid is awarded. *Okada Trucking Co., v. Board of Water Supply, et. al., 101 Haw. 68, 62 P.3d 631 (Hawaii App. 2002) citing Federal Elec. Corp. v. Fasi, 56 Hawaii 57, 527 P. 2d 1284 (1974).*

Responsibility, submission after contract awarded; A bidder may supplement a bid after opening in order to satisfy responsibility requirements. Generally, pursuant to HAR §3-122-1, capability of performance is determined at the time of contract award. However, in several situations,

documentation of a bidder's responsibility can be submitted after a contract has been awarded. HRS §103D-310(c); HAR §3-122-112. *Hawaii Specialty Vehicles, LLC v. Wendy K. Imamura, PCH-2011-7 (Jan. 20, 2012).*

Bidder responsibility; determination at award; In the absence of special circumstances (such as the implementation of important social or economic policy), the regularly followed principle is that the characteristics of a bidder (such as its past payment of taxes – as demonstrated by the filing of a tax clearance certificate) is a matter of bidder responsibility rather than a matter of bid responsiveness. Accordingly, such a requirement may generally be met at any time before a contract is entered into, even in the presence of standard language in the Notice to Bidders that such a requirement be met at the time of bid opening. *Standard Electric, Inc. v. City & County of Honolulu, et. al., PCH 97-7 (January 2, 1998). See also Hawaii Specialty Vehicles, LLC v. Wendy K. Imamura, PCH-2011-7 (January 20, 2012).*

Bidder responsibility; ability to obtain resources; A bidder's responsibility may be established by a sufficient showing that it possesses the ability to obtain the resources necessary to perform its contractual obligations. The procuring agency will be given wide discretion and will not be interfered with unless the determination is unreasonable, arbitrary or capricious. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000)*; *FV Coluccio Construction Co., Inc. v. City & County of Honolulu, Department of Environmental Services and Department of Budget and Fiscal Services. PDH-2018-005 (May 8, 2018).*

Bidder responsibility; performance capability; determination at award; Responsibility addresses issue of performance capability of bidder, which can include inquiries into financial resources, experience, management, past performance, place of performance, and integrity. In contrast to responsiveness, a bidder may present evidence of responsibility after bid opening up until time of award. *Okada Trucking Co. v. Board of Water Supply, et. al., 97 Haw. 544, 40 P.3d 946 (Hawaii App. 2001) and 101 Haw. 68, 62 P.3d 631 (Hawaii App. 2002).*

Responsive bid; material nonconformity; Bid responsiveness refers to the question of whether a bidder has promised in the precise manner requested by the government with respect to price, quality, quantity, and delivery. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. Therefore, a bid that contains a material nonconformity must be rejected as nonresponsive. Material terms and conditions of a solicitation involve price, quality, quantity, and delivery. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH-99-6 (August 9, 1999); Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998).; Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000); SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-2021-001 (February 25, 2021).*

Conditional offers; nonresponsiveness; A proposal conditioned upon a change in the solicitation′s specifications is conditional and non-responsive and therefore appropriately rejected. *Bombardier Transportation (Holdings) USA, Inc. v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, 128 Haw. 413, 289 P.3d 1049 (2012).*

Responsive bid; material nonconformity; Although the 5-year coating experience requirement was intended to test bidder responsibility, it nevertheless had a direct impact on price. A contractor can obtain a considerable saving by utilizing subcontractors with less experience. As a result, a contractor may gain a substantial bid pricing advantage over other bidders whose bids were based upon prices from more experienced subcontractors. Accordingly, the Intervenor's listing of a subcontractor who lacked the required experience afforded Intervenor a substantial advantage with respect to bid pricing, constituted a material deviation from the terms of the IFB and as a result, rendered its bid nonresponsive. *Hawaiian Dredging Construction Co. vs. City & County of Honolulu, PCH-99-6 (August 9, 1999).*

Responsive bidder; definition; A responsive bidder under HRS §103D-104 and HAR §3-120-2 is defined as "a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids or requests for proposals." *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999); Okada Trucking Co. v. Board of Water Supply, et. al., 97 Haw. 544, 40 P.3d 946 (App. 2001).*

Material deviation from solicitation; multiple bids; price; It is elementary that submission of two bids in a sealed competitive bidding process that permits submission of only one bid is a material deviation from the Bid Solicitation special conditions and is nonresponsive. Moreover, Meadow Gold's deviation directly involved price, a term that is typically and traditionally material. *Southern Food Groups, L.P. v. Dept. of Educ., et. al., 89 Haw. 443 (1999)*.

Ambiguous bid; nonresponsive; Meadow Gold's double bid was ambiguous. The DOE is not required to engage in telepathy to discern what Meadow Gold intended by submitting two apparently different bids. Meadow Gold's multiple or double bid was nonresponsive to the Bid Solicitation and was properly rejected. *Southern Food Group, L.P. v. Dept. of Educ., et. al., 89 Haw. 443, 974 P.2d 1033 (1999). But see, SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-2021-001 (February 25, 2021)(where bid was not ambiguous)*.

Responsiveness; determination based solely upon requirements in solicitation; In a competitive sealed bidding procurement, bids must be evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 19 98). Kiewit Pacific Co. v. Dept. of Land and Natural Resources, et al., PCH-2008-20 (February 20, 2009); Nan, Inc. v. DOT, PCH-2008-9 (October 3, 2008); MAT Hawaii, Inc. v. Michael R. Hansen, Acting Director of Budget and Fiscal Services, and City and County of Honolulu, PCX-2010-7 (Nov. 9, 2010).*

Responsiveness; determination based upon requirements in solicitation; Matters of responsiveness must be discerned solely by reference to materials submitted with the bid and facts available to the government at the time of the bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000)*.

Responsiveness; failure to list subcontractor; Except in situations which involve the post award refusal or inability of a subcontractor to honor its agreement with the bidder, the failure of a bidder to list the subcontractor who will actually be performing the subcontracted work renders that bid non-responsive. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999)*.

Responsiveness; failure to list subcontractor; The failure of a bidder to list its subcontractors results in the submission of a non-responsive bid. Nevertheless, the provisions of HRS §103D-302(b) and HA R §3-122-21(a)(8) allow such a potentially fatal omission to be overcome provided that (1) acceptance of the bid is in the best interest of the State, and (2) the value of the unlisted work is equal to or less than one percent of the total bid amount. *Okada Trucking Co., Ltd., v. Board of Water Supply et al., PCH 99-11 (November 10, 1999) (reversed on other grounds); Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998).*

Failure to list subcontractor; no binding agreement; The failure of a bidder (general contractor) to have a subcontractor actually bound to perform any portion of the required work – which could not lawfully be performed by the bidder itself – results in a nonresponsive bid. Nevertheless, the provisions of HRS §103D-302(b) and HAR §3-122-21(a)(8) allow such a potentially fatal omission to be overcome provided that (1) acceptance of the bid is in the best interest of the State, and (2) the value of the unlisted work is equal to or less than one percent of the total bid amount. *Okada Trucking Co., Ltd., vs. Board of Water Supply et. al., PCH 99-11 (November 10, 1999) (reversed on other grounds).*

Bidder's reliance on document not a part of invitation is erroneous; Any purported reliance on an outdated HDOT handout, which did not waive the pre-certification requirement that qualifying DBE subcontractors must have been certified as such prior to the bid opening date, which had been subsequently revised, and which was not even part of the invitation for bids, was misplaced and erroneous. *Fletcher Pacific Construction Company, Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998)*.

Failure to comply with DBE pre-certification requirement for subcontractors renders bid nonresponsive; good faith exception; Because the listed subcontractor was not certified as a DBE subcontractor prior to bid opening as required by the terms of the invitation for bids, the subcontractor's bid price could not be used in calculating whether the general contractor met the 17.1% requirement, and without it, the general contractor did not meet that goal. Accordingly, unless the general contractor could show that it made good faith efforts to meet the DBE goal (as permitted by the terms of the solicitation), its bid would have to be rejected as non-responsive. *Fletcher Pacific Construction Company, Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998)*.

Failure to comply with requirement for pre-certification of DBE subcontractors and lack of good faith determination renders bid nonresponsive; The failure of the general contractor to actually meet the 17.1% DBE goal, combined with the failure of the State to articulate a determination that the general contractor had met the DBE good faith efforts goal, meant that the general contractor's bid was nonresponsive. The responsibility for making an initial determination on this issue rests with the contracting agency rather than with the reviewing authority. *Fletcher Pacific Construction Company, Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998)*.

Responsiveness; standard; The standard to be applied in determining the "responsiveness" of a bid is whether a bidder has promised in the precise manner requested by the government with respect to price, quantity, quality, and delivery. If this standard is satisfied, the bidder is effectively obligated to perform the exact thing called for in the solicitation. *Starcom Builders, Inc. v. Board of Water Supply; PCH-2003-18 (October 18, 2003); Greenleaf Distribution Services, Inc., et al. v. City & County of Honolulu, PCH-2004-7 (September 2, 2004).*

***Authorization to negotiate with lowest bidder*;** That section authorizes contracting officials to negotiate an adjustment of the bid price where (1) "all bids exceed available funds" and (2) "time or economic considerations preclude resolicitation of work of a reduced scope*." Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004).*

***Responsiveness determination; consideration of subsequent "clarification" from bidder improper*;** Respondent's consideration of Intervenor's subsequent "clarification" letter was improper. *Kiewit Pacific Co. v. Dept. of Land and Natural Resources, et al., PCH-2008-20 (February 20, 2009).*

Responsiveness of bid; altering of required bid form*; No statute of rule exists prohibiting bidders from altering their bid forms. Dept. of Transportation v. Dept. of Commerce and Consumer Affairs, et al., Civil No. 1CCV-21-0000270 (April 5, 2021).*

Responsiveness of bid; required bid form inadequate*; The DOT's form was inadequate, deficient, and confusing, to the extent that it fails to include a line or space for the bidder to indicate an amount of taxes to be included in the total bid amount for comparison. This invites a lack of transparency in the bid process and confusion on the part of bidders regarding how, and where the bidder is to include taxes in its bid amount. Additionally, the inadequacy of the DOT form also invited bidders such as SITA, who wished to be transparent about the effect of adding the general excise tax to its bid, to understandably alter DOT's form in order to show that exact amount of general excise taxes that were added to the bid. It is patently unfair to penalize SITA for DOT's failure to make available to the bidders, an adequate bid form, particularly when DOT required all bidders to*

exclusively use DOT's form on which to submit its bid. The absence of a line or space on the form to show the amount of taxes that are included in a bid is tantamount to setting a virtual trap for the unwary and then penalizing the victim of such a trap. Dept. of Transportation v. Dept. of Commerce and Consumer Affairs, et al., Civil No. 1CCV-21-0000270 (April 5, 2021).

K. Funding of Contract; Contracts awarded pursuant to sections 103D-302, 103D-303 or 103D-306 shall not be binding unless comptroller endorses a certificate that there are sufficient funds to cover the amount required by the contract. *HRS §103D-309(a)*.

L. Partially-Funded Contract; Certification of partial funding of a contract is permitted when an immediate solicitation will result in significantly more favorable contract terms and conditions to the State than a solicitation made at a later date. *HAR §3-122-102(c)*.

Cases:

Funding of contract; basis; The requirement in HRS §103D-309 that a procuring agency certify that sufficient funds are available to cover the contract prior to the awarding of the contract was presumably based upon the underlying objective of the Code. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Requirement of adequate funding; promotes fiscal integrity and competition; Requiring that adequate funding be available to cover the entire contract before an agency is permitted to enter into the contract promotes fiscal integrity and fosters open, broad-based competition. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Partially-funded contract; rationale*;* In promulgating the narrow exception in HAR §3-122-102(c), the Board desired to avoid depriving the agency of the ability to award a partially-funded contract where such a contract will result in significantly more favorable contract terms and conditions than subsequent solicitations. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Partially-funded contract; evidence; burden of proof*;* In order to award a partially-funded contract, the agency must show that the contract will be significantly more favorable than contracts obtained from subsequent solicitations. Thus, where the protestor presents evidence that the procuring agency intends to award a partially-funded contract, it is incumbent upon the agency to establish its authority to award such a contract under HAR §3-122-102(c). *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

Partially-funded contract; significantly more favorable*;* Mere speculation over the advantages of a partially-funded contract and disadvantages of subsequent solicitations is not enough. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002).*

IV. COMPETITIVE SEALED PROPOSALS

A. Generally; when used: When head of a purchasing agency determines *in writing* that use of competitive sealed bidding is either not practicable or not advantageous to the State, competitive sealed proposals may be utilized. Proposals shall be solicited through a request for proposals. *HRS §103D-303*.

Cases:

> ***Bidding not practicable; written determination required***; The provisions of HRS §103D-303(a) which require that, prior to proceeding with "competitive sealed proposals", the agency's appropriate official make a written determination that the use of "competitive sealed bidding" is not practicable or not advantageous, is not met by either 1) implication from the agency's act of issuing a request for proposals, nor 2) extraction from the content of the request for proposals itself. *PRC Public Sector, Inc. v. County of Hawaii, PCH 96-3 (May 3 1, 1996); Stoneridge Recoveries, LLC v. DOT, PCH-2006-3 (November 15, 2006).*

B. Notice of Intention; Prospective bidders/offerors shall be capable of performing the work for which offers are being called. Each prospective bidder or offeror shall file a written or facsimile notice of intention to submit an offer pursuant to the following:

(1) The notice shall be received not less than ten days prior to the date designated for opening.

(2) A notice shall be filed for the construction of any public building or public work when the offer submitted for the project by a contractor is or will be $25,000.00 or more.

(3) A notice need not be filed for the procurement of goods and services, unless specified in the solicitation.

(4) The requirement for a notice may be waived if there is only one offeror and the procurement officer concludes that acceptance of the bid will be in the best interest of the public.

HAR §3-122-108.

Cases:

> ***Failure to file notice of intent as basis for bid rejection;*** A procuring agency's existing policy of automatically rejecting bids in all cases where a notice of intention to submit a bid was not filed in a timely manner flies in the face of the provisions of HAR §3-122-108(a)(4) and does not provide a legitimate basis for the denial of a waiver. *Standard Electric, Inc. v. City & County of Honolulu, et. al., PCH 97-7 (January 2, 1998)*.
>
> ***Savings of public funds rather than adherence to technical requirement preferred;*** A savings of $21,000 of public funds would do more to foster public confidence in the integrity of the procurement system than would a strict adherence to a largely technical requirement. The requirement of HAR § 3-122-108(a) was not meant to cost public bodies thousands of dollars by requiring acceptance of higher bids for mere technical violations. *Standard Electric, Inc., vs. City*

& County of Honolulu, et. al., PCH 97-7 January 2, 1998).

Notice of intention; completion of responsibility determination prior to bid opening not required; HAR §§3-122-108 and 3-122-110 require the procurement officer to undertake to determine a bidder's responsibility once notified of the bidder's intention to bid. Neither section, however, requires the procuring agency to complete the responsibility determination prior to bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000)*.

C. Content of Request; The request for proposals shall state the relative importance of price and other evaluation factors. HRS §103D-303(e).

Cases:

Sufficiency of request for proposals; criteria; The language of HRS §103D-303(e) quite clearly sets out a requirement that the request for proposals state the relative importance of price and other evaluation factors. And when a procuring agency uses a numerical evaluation system, HAR §3- 122-53(b) requires, inter alia, that the relative priority to be applied to each evaluation factor shall also be set out in the request for proposals. *PRC Public Sector, Inc. v. City & County of Honolulu, PCH 96-3 (May 31, 1996).*

Changes to criteria after opening; It is fundamental to the fairness of the procurement process that changes in the criteria for selection not be made after proposals have been opened and their contents have become known to one or more of the evaluators. HAR § 3-122-53(g) states that an evaluation committee may meet to discuss the evaluation process and the weighing of evaluation factors "before evaluation", and having knowledge of the costs of proposals is sufficient for an evaluation of those costs to have begun. *PRC Public Sector, Inc. v. County of Hawaii, PCH 96-3 (May 31, 1996).*

D. Opening of Proposals; Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation.

E. Late Proposals; Any proposal received after the time and date set for receipt and opening is late. A late proposal shall not be considered late if received before contract award and would have been timely but for the action or inaction of personnel within the procurement activity. HAR §3-122-50.

Cases:

Late proposal; exception; The disposition of late proposals is governed by the provisions of HAR §3-122-50 together with the provisions of HAR §§3-122-49 and 3-122-29 and expressly provide that any proposal received after the time set in the RFP is late and will not be considered. As an exception, a proposal filed after the designated deadline shall not be considered late but only if 1) it was received before the contract award, and 2) it would have been timely except for the action or inaction of the procuring agency. *Hawaii Newspaper Agency, et.al. v. State Dept. of Accounting & General Services, et. al., and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al., PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999).*

F. Evaluation of Proposals; Evaluation factors shall be set out in the request for proposals and the evaluation shall be based only on the evaluation factors. Evaluation factors not specified in the request for proposals may not be considered. *HAR §3-122-52(a).*

Cases:

Sufficient language to put proposers on notice; The language in the RFP, which stated that proposers will be evaluated on past performance, including completing projects on time and on budget, was sufficient to put the proposers on notice that their past performance would be evaluated and therefore it was not necessary for the Proposers Past Performance Evaluation Form or the evaluation criteria be included in the RFPs. *Okada Trucking Co., Ltd. V. BWS and City & County of Honolulu, PCH-2011-4 and PCH-2011-5 (consolidated cases) (Nov. 1, 2011).*

Consensus scoring of proposals acceptable; When a committee evaluates proposals submitted in response to a solicitation, consensus scoring, rather than purely individual scoring, of the proposals is not prohibited. It is a reasonable method of evaluating design-build proposals, and may be a more desirable method when there is a wide range of technical matters to consider and the individual evaluators would not be expected to have extensive knowledge and experience on all of the technical matters. *Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii, PCX-2011-001 (June 6, 2011).*

Evaluation of proposals; technical merits; The determination of the relative technical merits of offers is a matter primarily left to the procuring agency and is entitled to great weight. The agency is in the best position to determine which technical proposal best meets its needs and must bear the burden for any difficulties incurred by a defective evaluation. The role of the Hearings Officer is therefore not to substitute his/her judgment for that of the agency. Rather, the Hearings Officer will determine whether a reasonable basis exists for the conclusions reached or whether the conclusions are instead shown to be unreasonable, arbitrary, capricious, or contrary to law. Mere disagreement with the decision of the evaluators is insufficient to show that the evaluation of proposals is unreasonable or the result of bias. *Roberts Hawaii School Bus, Inc. v. Kathryn S. Matayoshi, in her capacity as Superintendent/Chief Procurement Officer, Department of Education, State of Hawaii, PDH-2017-001 and 2017-002 [Consolidated] (April 13, 2017); Securitas Security Services, USA, Inc. v. Dept. of Transportation, et al., PDH-2021-005 (May 14, 2021).*

Evaluation of proposals; proposal not incomplete, indefinite, ambiguous or conditional; The proposal was not incomplete, indefinite, ambiguous or conditional, and that ambiguity, if any, was cured by Allied's BAFO of $17M and agreement to comply with the RFP including all Addenda. *Securitas Security Services, USA, Inc. v. Dept. of Transportation, et al., PDH-2021-005 (May 14, 2021).*

Evaluation of proposals; conflict of laws; If a conflict exists between state and federal requirements for a federally funded contract, the terms and provisions required by the United States or its instrumentalities shall govern. An RFP to furnish and deliver 40' buses for three (3) years does not require the listing of a state motor vehicle repair dealer or mechanic license. *Soderholm Sales & Leasing v. Dept. of Budget and Finance, City & County of Honolulu, PDH-2022-004 (November 14, 2022).*

G. Cost as an Evaluation Factor; When applicable, cost shall be an evaluation factor. The proposal with the lowest cost factor must receive the highest available rating allocated to cost. Each proposal that has a higher cost factor than the lowest must have a lower rating for cost. HAR §3-122-52(d).

Cases:

> ***Consideration of price by evaluation committee; purpose***; The consideration by the Evaluation Committee of price as one of the evaluation criteria was limited to the application of the formula provided by section 5.020 and HAR §3-122-52(d) and was solely for the purpose of allocating points and ranking the proposals. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH- 2008-3 (August 7, 2008).*
>
> ***Consideration of price by evaluation committee not aimed at determining reasonableness of offered price; cost or price analysis***; Application of the formula to the offered prices was not designed to and does not provide any analysis of the reasonableness of the price and underlying costs of the offeror receiving the most points by the committee. That analysis is provided by the preparation of a cost and/or price analysis. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

H. Discussions with Offerors; Revisions; Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors. HRS §103D-303(f).

Cases:

> ***Best and final offers; unfair treatment***; The conduct of a procurement officer in failing to establish a deadline for the submission of best and final offers from all priority-listed offerors, ignoring other finalists in favor of asking only one finalist to make such a submission, and doing so after the selection of a winning offeror had already been made, violated the provisions of HRS §103D-303 and HAR §3-122-54. *PRC Public Sector, Inc. v. County of Hawaii, PCH 96-3 (May 31, 1996).*
>
> ***Best and final offers; disclosure of proposal;*** HRS §103D-303 establishes a procedure by which proposals may be revised after opening and prior to award: once the proposals are opened and evaluated, and a priority list generated, the agency may accept best and final offers, provided that in conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors. Only after this process has been completed and the contract has been awarded is the agency allowed (and directed) to make the proposals open to public inspection. Thus, a plain reading of H RS § 103D-303 leads to the conclusion that the Legislature, as a matter of policy, intended that any discussions and revisions of proposals occur prior to the disclosure of the proposals- no doubt to maintain the integrity of the procurement system and to ensure that offerors are provided fair and equitable treatment. *Wheelabrator Clean Water Systems, Inc. v. City & County of Honolulu, PCH-94-1(November 4, 1994); Dick Pacific Constr. Co., Ltd. v. DOT, et al., PCH-2005-5 (September 23, 2005).*
>
> ***Best and final offers after disclosure of proposals; violation;*** The agency was no longer authorized to solicit and accept best and final offers after making offers available for public inspection as required by HRS §103D-303(d) and HAR §3-122-58. *Dick Pacific Constr. Co., Ltd. v. DOT, et al., PCH-2005-5 (September 23, 2005).*

Priority list required prior to discussions; HAR §3-122-53 requires that a priority list be generated before conducting discussions. The evidence presented showed that the committee classified the proposals but did not generate a priority list. As the committee did not follow the provisions of HAR §3-122-53, which required that a priority list be generated and dates, places, purpose of meetings and those attending be documented, it was improper for the committee to conduct discussions. *Access Service Corp. v. City and County of Honolulu, et al., PCX-2009-3 (November 16, 2009).*

Discussion after best and final offer, violation, Because bidder's proposal failed to meet a threshold requirement of the RFP by failing to provide a maximum management fee of $25, it was not reasonably susceptible of being selected for an award; therefore, HPHA's discussion with the bidder asking for a clarification of bidder's BAFO following the Committee's final evaluation of the BAFOs and prior to the awarding of the contract clearly violated HAR §3-122-54(b) and HRS §103D-303. *Realty Laua, LLC v. HPHA, PCH-2011-1 (Nov. 18, 2011).*

Best and final offer; no unfair advantage; Allied's BAFO did not provide them with an unfair advantage because both offerors were bound by the RFP and Addenda including only allowing wage increases under HGEA changes. *Securitas Security Services USA, Inc. v. Dept. of Transportation, et al., PDH-2021-005 (May 14, 2021).*

***Duty to conduct meaningful discussions satisfied*;** The Code and related regulations do not contain a provision to conduct "meaningful" discussions similar to the federal regulations. Even under the federal requirement of "meaningful" discussions, the procuring agency satisfied that provision when it issued four addenda addressing the prospective offeror's questions. The offeror should not have anticipated a further opportunity to discussion revision of the specifications, and the procuring agency was not required to take additional affirmative steps to alert the offeror as to the procuring agency's position. *Bombardier Transportation (Holdings) USA, Inc. v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, 128 Haw. 413, 2898 P.3d 1049 (Haw. App. 2012).*

I. Award; Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. *HRS §103D-303(g); HAR §3-122-57.*

Cases:

Alteration of criteria; violation; The unauthorized alteration of a proposal's evaluative methodology (in this case by the addition of another weighty evaluation factor) without proper written notification constitutes a violation of HRS §103D-303(g) which specifies that the award be made based upon price and the evaluation factors set forth in the request for proposals and that no other factors or criteria shall be used in the evaluation. *PRC Public Sector, Inc. v. County of Hawaii, PCH 96-3 (May 31, 1996).*

Responsive offeror; inapplicable to proposals; The Code has no definition for "responsive offeror", thus reinforcing the conclusion that the concept of "responsiveness" has no place in the statutes governing competitive sealed proposals. *Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii and Hawaiian Dredging Construction Company, Inc.* PCX 2011-2 and *Goodfellow Bros, Inc. v. Department of Transportation, State of Hawaii and Hawaiian Dredging Construction Company, Inc.,* PCX 2011-3 (Consolidated cases) (June 6, 2011), *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Nonresponsive offer; rejected*;* When, by the terms of the request for proposals, an offer must be responsive, the offer must be rejected if it materially varies from the specifications and is therefore nonresponsive. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Determination of award; most advantageous; price and evaluation factors*;* The determination of "most advantageous" must take into account both price and the evaluation factors in the request for proposals. If a proposal does not meet those evaluation factors, it never reaches the stage where it competes with other proposals for "most advantageous." Here, it has already been determined that responsiveness is an evaluation factor. That determination must be made first, before, and without, considering if the offer was most advantageous. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Determination of award; most advantageous*;* The standard is not which offeror is more responsible, but which proposal is more advantageous to the State taking into consideration price and other evaluation factors. *Securitas Security Services USA, Inc. v. Dept. of Transportation, et al., PDH-2021-005 (May 14, 2021).*

V. PRE-BID CONFERENCE

A. Generally; At least 15 days prior to the submission of bids pursuant to §103D-302 for a construction or design-build project with a total estimated contract value of $500,000 or more, and at least 15 days prior to the submission of proposals pursuant to §103D-303 for a construction or design-build project with a total estimated contract value of $100,000 or more, the head of the purchasing agency shall hold a pre-bid conference and shall invite all potential interested bidders, offerors, subcontractors, and union representatives to attend. HRS §103D-303.5.

Cases:

> ***Failure to attend pre-bid conference***; The failure to attend a pre-bid conference was not a proper basis for a finding of nonresponsiveness. *Greenleaf Distribution Services, Inc. v. City and County of Honolulu; PCH-2004-7 (September 2, 2004).*
>
> ***Failure to hold pre-proposal conference;*** The initial decision of whether to hold a pre-proposal conference pursuant to HAR § 3-122-16.05 is a discretionary one and a determination not to hold such a meeting should not be interfered with unless there has been an abuse of discretion or the decision is unreasonable, arbitrary or capricious. *Maui Community Television, Inc. dba Akaku Maui Community Television v. Department of Accounting and General Services, State of Hawaii,* PCX 2010-6 (September 22, 2010).

VI. EMERGENCY PROCUREMENTS

A. Generally; requisites: Pursuant to HRS §103D-307, the head of a purchasing agency may obtain a good, service, or construction essential to meet an emergency by means other than specified in this chapter when the following conditions exist:

(1) A situation of an unusual or compelling urgency creates a threat to life, public health, welfare, or safety by reason of major natural disaster, epidemic, riot, fire, or such other reason as may be determined by the head of that purchasing agency;

(2) The emergency condition generates an immediate and serious need for goods, services, or construction that cannot be met through normal procurement methods and the government would be seriously injured if the purchasing agency is not permitted to employ the means it proposes to use to obtain the goods, services, or construction; and

(3) Without the needed good, service, or construction, the continued functioning of government, the preservation or protection of irreplaceable property, or the health and safety of any person will be seriously threatened.

B. Approval from contracting official; written determination; The emergency procurement shall be made with such competition as is practicable under the circumstances and, where practicable, approval from the chief procurement officer shall be obtained prior to the procurement. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

VII. CANCELLATION OF SOLICITATIONS

A. Generally; requisites:Pursuant to HRS §103D-308, an invitation for bids, a request for proposals, or other solicitation may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the governmental body which issued the invitation, request, or other solicitation. The reasons therefore shall be made a part of the contract file.

Cases:

Underlying policy; HRS §103D-308 reflects a policy of giving precedence to the government's ability to cancel a solicitation over a bidder's interest in having the solicitation go forward where the government's best interests would be served. Justification for this policy can be found in the fact that in general, the cancellation or rejection of all bids treats all bidders equally. This is in contrast to instances where an agency treats certain bidders differently, such as the rejection of a bidder as nonresponsive. *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004); Prometheus Construction v. University of Hawaii, PCH-2008-5 (May 28, 2008).*

Underlying policy considerations; State's best interest; In promulgating HAR §3-122-96(a)(2), the Procurement Policy Board presumably was cognizant of the potentially serious adverse impact a cancellation might have on the integrity of the competitive bidding system once the bids are revealed. Among other things, the cancellation of a solicitation after bid opening tends to discourage competition because it results in making all bidders' prices and competitive positions public without an award. With that in mind, the Board identified certain specific circumstances in HAR §3-122-96(a)(2) where the cancellation of a solicitation may be in the best interests of the agency and therefore justified, even after bid opening. *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004).*

Best interest determination must consider policy underlying Code; A best interest determination must be consistent with the underlying purposes of the Code, including, but not limited to the providing for fair and equitable treatment of all persons dealing with the procurement process and maintaining the public's confidence in the integrity of the system. The Code also requires that all parties involved in the negotiation, performance, or administration of state contracts shall act in good faith. *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (March 18, 2004).*

Cancellation; all factors of significance to agency; Cancellation under HAR §3-122-96(a)(2)(C) would only be appropriate where the solicitation failed to provide for consideration of all factors of significance to the agency. Included among those factors, of course, is the government's interest in avoiding favoritism and corruption in the bidding process. *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (March 18, 2004).*

Respondent not precluded from raising additional reasons for cancellation; Respondent was not precluded from alleging that the cancellation was justified because the specifications were inadequate and that the solicitation did not provide for the consideration of all factors of significance to the agency, in addition to the claim that there were insufficient funds to cover the contract. Moreover, the Hearings Officer noted that the Comptroller General has held that a contracting agency's initial reliance on an improper reason for canceling a solicitation is not significant if the record establishes that another proper basis for the cancellation exists. *Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (2004) citing Peterson-Nunez Joint Venture, B-258788, Feb. 13, 1995.*

Cancellation within agency's discretion; HRS §103D-308 and HAR §3-122-95 and 96 provide the agency with the discretion to cancel a solicitation, notwithstanding the receipt of bids that meet the requirements of and are otherwise responsive to the solicitation. The solicitation may still be cancelled where the agency determines that cancellation would be in its or the public's best

interest. *Stoneridge Recoveries, L LC v. Dept. of Budget and Fiscal Services, City and County of Honolulu, PCH-2003-5 (March 6, 2007).*

***Agency may cancel solicitation where all bids unresponsive*;** Where all of the bids received in response to a solicitation are rejected as nonresponsive, the agency may cancel the solicitation and rebid the contract unless the agency determines that it is neither practicable, nor advantageous to the State to issue a new solicitation. *HAR §3-122-35(a)(3); Stoneridge Recoveries, LLC v. Dept. of Budget and Fiscal Services, City and County of Honolulu, PCH-2003-5 (March 6, 2007).*

All bids rejected as nonresponsive; agency not obligated to undertake best interest determination; Where the agency rejected all of the bids it received in response to a solicitation, it was not compelled to undertake a best interest determination. *Stoneridge Recoveries, LLC v. Dept. of Budget and Fiscal Services, City and County of Honolulu, PCH-2003-5 (March 6, 2007).*

Cancellation of solicitation; reasonable basis for best interest determination; Although the procuring agency has broad discretion to cancel a solicitation, its determination that cancellation is in the best interest of the government must have a reasonable basis because of the potential adverse impact of cancellation on the competitive bidding system after the bids are opened and the prices have been exposed. Cancellation also means that bidders have expended labor and incurred costs in the preparation of their bids without the possibility of acceptance. *Prometheus Construction v. University of Hawaii, PCH-2008-5 (May 28, 2008).*

Cancellation of solicitation; inadequate specifications; agency's minimum needs; Where the specifications do not adequately describe the government's actual minimum needs, the best interests of the government require cancellation of the solicitation. On the other hand, the fact that a solicitation is defective in some way does not justify cancellation after bid opening if award of the contract would meet the agency's actual minimum needs, and there is no showing of prejudice to the other bidders. *Prometheus Construction v. University of Hawaii, PCH-2008-5 (May 28, 2008).*

Cancellation of solicitation; best interests of agency; burden of proof; As the party challenging the cancellation, Petitioner bears the burden of showing that the cancellation of the solicitation was not in the government's best interests. *Prometheus Construction v. University of Hawaii, PCH-2008-5 (May 28, 2008).*

Cancellation of solicitation; timing; Where the government's best interests are served by the cancellation of a solicitation, the solicitation may be cancelled notwithstanding a pending protest and the resulting stay imposed by HRS §103D-701(f). A protest must give way to the procuring agency's ability to cancel a solicitation as long as the cancellation is in the government's best interests. *International Display Systems, Inc. v. Morioka, Department of Transportation, State of Hawaii and Ford-Audio-Video Systems, Inc.* PCH-2008-17 (September 17, 2009).

Cancellation of solicitation; bid preparation costs; Where a solicitation is properly cancelled pursuant to HRS §103D-308, prior to a decision by a Hearings Officer on the underlying protest, a protestor is not entitled to recover its bid preparation costs. *International Display Systems, Inc. v. Morioka, Department of Transportation, State of Hawaii and Ford-Audio-Video Systems, Inc.* PCH-2008-17 (September 17, 2009).

Cancellation of solicitation; bid amounts greater than appropriation; public interest; It is against the public's interest to void a cancellation thereby upholding a bid that is more than the amount appropriated. *Certified Construction, Inc. v. Sarah Allen, as Administrator of the State Procurement Office, et. al., PDH-2018-002 (February 15, 2018).*

Cancellation of solicitation; discrepancy in the estimated quantity; best interest determination; A solicitation is not rendered inadequate by a discrepancy in the estimated quantity where the procuring agency has the authority to negotiate a lower unit price with the low bidder for the difference in quantity. A best interest determination must be consistent with the underlying purposes of the Code, including, but not limited to, providing for fair and equitable treatment of all persons dealing with the procurement process and maintaining the public's confidence in the integrity of the system. The Hearings Officer concluded that the procuring agency lacked a reasonable basis to justify the cancellation of the solicitation, and the cancelation was therefore contrary to HRS Chapter 103D and its implementing rules. *HI-Built, LLC v. Department of Finance, Department of Public Works, County of Maui, PDH-2018-003 (February 26, 2018).*

Cancellation of solicitation; cancellation not in the best interest of the agency; The County of Maui's cancellation of a solicitation was not in the best interest of the agency where the alleged lack of funding for the entire project would not affect the performance of Alternate 1, which called for construction of a smaller portion of the project. The Hearings Officer also found unpersuasive the County's argument that the solicitation should be cancelled because the County failed to consider the need for a usable restroom at the project when the solicitation specifically allowed for Alternative 1, which called for the possible construction of a portion of the project without the restroom.

VIII. BID SECURITY

A. Generally; Pursuant to 103D-323(a), 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 or, if the contract is for goods or services, the purchasing agency secures the approval of the chief procurement officer. 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.

Cases:

> ***Ambiguous bonds, nonresponsive;*** Petitioner's bids were ambiguous and nonresponsive where the IFB required a bid security in the fixed sum of $6,250.00 per area and Petitioner's bond was in the amount of "Five Percent (5%) of Bid Amount." *GP Roadway Solutions, Inc. v. Glenn Okimoto as Director of the Dep't of Transportation, PCH-2011-15/PCH-2011-16 (Jan. 27, 2012).*
>
> ***Bid security; failure to provide; nonresponsive****;* Except for a limited number of exceptions, the failure to provide proper bid security with a bid makes the bid nonresponsive. *Certified Construction, Inc. v. Dept. of Accounting & General Services, State of Hawaii, PDH-2014-013 (November 21, 2014).*
>
> ***Bid form; State of Hawaii specified as owner****;* 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. *Certified Construction, Inc. v. Dept. of Accounting & General Services, State of Hawaii, PDH-2014-013 (November 21, 2014).*
>
> ***Bid form; identification of owner****;* If the designation of the owner of the bid bond as "State of Hawaii, Department of Accounting and General Services" is taken 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. 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 statutory bid bond from making that bid bond fatally defective. *Certified Construction, Inc. v. Dept. of Accounting & General Services, State of Hawaii, PDH-2014-013 (November 21, 2014).*

IX. COST OR PRICING DATA

A. Generally; Pursuant to HRS §103D-312, a contractor shall submit cost or pricing data and shall certify that the cost or pricing data submitted is accurate, complete, and current.

Cases:

Consideration of price by evaluation committee not aimed at determining reasonableness of offered price; purpose for cost or price analysis; Application of the formula to the offered prices was not designed to and does not provide any analysis of the reasonableness of the price and underlying costs of the offeror receiving the most points by the committee. That analysis is provided by the preparation of a cost and/or price analysis. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Cost or price analysis; reasonableness of offered price; The aim of a cost and/or price analysis is not to interfere with evaluation committee's evaluation and ranking of the offers. Rather, it is to confirm the reasonableness of the offered price and underlying costs of the vendor once the vendor is selected by the evaluation committee and to ensure that tax dollars are spent prudently. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Cost or price analysis and committee's evaluation of offered prices; The evaluation committee's evaluation of the proposals and the price and/or cost analysis together serve to, not only enable the government to obtain the best products, but to do so at fair prices. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Cost or price analysis required; HAR §3-122-57(a) requires that the award of the contract be made to the responsible offeror "whose proposal is determined . . . to provide the *best value to the State taking into consideration price and the evaluation criteria* in the request for proposals . . ." HAR §3-122-57(b) directs the procurement officer to refer to "section 103D-312, HRS, and subchapter 15 for cost or pricing data requirements." Thus, in order to determine whether an offered price represents the "best value", the procurement officer must obtain and analyze the offeror's cost or pricing data. Among other things, the purpose of requiring the procurement officer to obtain the cost and pricing data is "to evaluate . . . the reasonableness of the total cost or price". HAR §3-122-128(7). *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Cost or price analysis; accountant not required; however, analysis must be fair and reasonable and done in good faith; While the Code does not require that the cost and/or price analysis be performed by a certified public accountant, the analysis must nevertheless be fair and reasonable, done in good faith, and consistent with the requirements of the Code and its implementing rules. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Offered price unreasonable; failure to reject unreasonable offer violates HAR §3-122-97(b)(2)(C); The offered price was unreasonable where, among other factors, the offered price to the State was significantly higher than the costs of the services and goods involved for no apparent reason. Having arrived at this determination, the Hearings Officer also concluded that Respondent Office of Elections' failure to reject Intervenor's proposal constitutes a violation of HAR §3-122-97(b)(2)(C). Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).

Cost or price analysis; bad faith; Where Respondent attempted to manipulate both the data and the facts in order to justify its award of the contract to Intervenor rather than prepare an objective analysis of the reasonableness of the offered price, Respondent's conduct amounted to a

reckless disregard of clearly applicable laws, including HRS §103D-312 and its implementing rules, and HRS §103D-101, which requires all parties to act in good faith. After careful consideration of the totality of the circumstances, including the unfounded conclusions and misleading and false representations in the COPA, the Hearings Officer is compelled to conclude that Respondents demonstrated bad faith in the preparation of the COPA and the awarding of the contract to the Intervenor. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

X. SPECIFICATIONS

A. Purpose; generally; A specification is the basis for procuring goods, service, or construction items adequate and suitable for the State's needs in a cost effective manner. All specifications shall seek to promote overall competition, shall not be unduly restrictive, and provide a fair and equal opportunity for every supplier that is able to meet the State's needs. In developing specifications, unique requirements should be avoided. *HAR §3-122-10.*

B. Authority to Prepare; The chief procurement officer, with the assistance of the using agency, shall prepare and approve specifications, and may delegate, in writing, to purchasing or using agencies the authority to prepare and use its own specifications, provided the delegation may be revoked by the chief procurement officer. HAR §3-122-11.

C. Development; A specification should identify minimum requirements, allow for a competitive bid, list reproducible test methods to be used in testing for compliance with specifications and provide for an equitable award at the lowest possible cost. *HAR §3-122-13.*

Cases:

Specifications; standard; The Code requires that specifications be written in such a manner as to balance the minimum needs of the State against the goal of obtaining maximum practicable competition. As such, a specification may be restrictive as long as it is not unduly so and the preclusion of one or more potential bidders from a particular competition does not render a specification unduly restrictive if the specification is reasonably related to the minimum needs of the agency. *John B. Hinton, dba J.B.H. v. DLNR; PCH 2005-3 (June 21, 2005); Maui Kupono Builders, LLC v. Dept. of Transportation, PDH-2019-006 (December 23, 2019)*.

Drafting of specifications left to procurement officials; The drafting of specifications to reflect the minimum needs of the agency is a matter primarily left to the discretion of the procurement officials. Generally, these officials are most familiar with the conditions under which similar services have been procured in the past and are in the best position to know the government's needs. Consequently, a protestor who challenges a specification as unduly restrictive of competition has a heavy burden to establish that the restriction is unreasonable. *John B. Hinton, dba J.B.H. v. DLNR; PCH 2005-3 (June 21, 2005)*.

Contractor license requirement unduly restrictive; A requirement for a C-32 contractor's license was unduly restrictive where there was little evidence of a reasonable relationship between the license requirement and the agency's goal to promote public safety. *John B. Hinton, dba J.B.H. v. DLNR; PCH 2005-3 (June 21, 2005)*.

Evaluation criteria not unduly restrictive; The evaluation criteria does not place an unreasonable emphasis on a preference for FSP Program experience, given the fact that the FSP Program concept is new to Hawaii and the agency's stated objective that this demonstration project be successful. *Stoneridge Recoveries, LLC v. DOT; PCH-2006-3 (November 15, 2006).*

Cancellation of solicitation; inadequate specifications; agency's minimum needs; Where the specifications do not adequately describe the government's actual minimum needs, the best interests of the government require cancellation of the solicitation. On the other hand, the fact that a solicitation is defective in some way does not justify cancellation after bid opening if award of the contract would meet the agency's actual minimum needs, and there is no showing of prejudice to the other bidders. *Prometheus Construction v. University of Hawaii, PCH-2008-5* (May 28, 2008).

XI. REJECTION OF BIDS AND PROPOSALS

A. Bid rejection; basis; Bids shall be rejected for reasons including, but not limited to

(1) The bidder that submitted the bid is nonresponsible. *HRS §103D-302(h); HAR §3-122-97*.

Cases:

Responsibility distinguished from responsiveness; The bid specifications required the contractor to submit a statement of qualifications and relevant experience. This was a matter of responsibility, not responsiveness, because it pertained to the bidder's ability and will to perform the subject contract as promised. Responsibility concerns how a bidder will accomplish performance and its performance capabilities. It is not determined at bid opening but at any time prior to award, and such a determination can be based on information submitted up until the time of the award. The contractor was ultimately allowed to submit a statement of qualifications and experience for consideration by the procuring agency even though the specifications ostensibly prohibited submitting such statements after bid opening. *Walter Y. Arakaki General Contractor, Inc. v. State of Hawaii, Department of Accounting and General Services, PCH 96-8 (June 23, 1997). See also Safety Systems and Signs Hawaii, Inc. v. Department of Transportation, State of Hawaii, PDH 2013-012 (Despite phrasing a protest in terms of responsiveness, a challenge to the low bidder's statement of key employees and whether they met the standards set forth in the specifications was a matter of responsibility)*

Nonresponsibility can render bid nonresponsive in limited circumstances; material deviation; A bidder's non-responsibility can render an otherwise responsive bid to be non-responsive if it has the effect of causing the bid to vary materially from the requirements contained in the agency's Invitation for Bids. Generally, a requirement is material if granting a compliance variance would give that bidder a substantial advantage over its competitors. The conduct of a bidder in listing a subcontractor without the requisite experience may result in a substantial pricing advantage over other bidders and constitute a material deviation from the terms of the invitation which renders the bid non-responsive. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999)*. Information intended to determine bidder responsibility can also render a bid nonresponsive if the information indicates the bidder does not intend to comply with the material requirements of the solicitation. This is the case however, only when the terms of the solicitation or provisions of Hawai'i law specifically prohibit post-bid submissions or actions that would cure any nonresponsibility initially evident at the time of bid opening. Such a prohibition on post-bid opening submissions must be more substantial than a direction to submit the information "with bid." *Safety Systems and Signs Hawaii, Inc. v. Department of Transportation, State of Hawaii, PDH 2013-012 (March 10, 2014).*

Tax clearance certificate matter of responsibility; The tax clearance certificate requirement relates to and remains a matter of responsibility rather than responsiveness. Petitioner was entitled to present the tax clearance statement after bid opening and up to the time of award, notwithstanding the requirement in the Notice to Bidders, and that Respondent's rejection of Petitioner's bid on that basis was improper. *Standard Electric, Inc., vs. City & County of Honolulu, et. al., PCH 97-7 January 2, 1998)*.

Responsible bidder; determination at award; A responsible bidder is a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance. Capability refers to capability at the time of award of contract. Accordingly, these definitions are consistent with the conclusion that responsibility may be determined at any time up to the awarding of the contract. *Browning-Ferris Industries of Hawaii, Inc. v. Dept. of Transportation, PCH 2000-4 (June 8, 2000).*

Responsibility; performance capability at award; Responsibility involves an inquiry into the bidder's ability and will to perform the subject contract as promised. Responsibility concerns how a bidder will accomplish conformance with the material provisions of the contract. It addresses the performance capability of the bidder, and normally involves an inquiry into the potential contractor's financial resources, experience, management past performance, place of performance, and integrity. A bidder's responsibility is not determined at bid opening but rather is determined at any time up to the award based upon information available up to that time. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999); Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000); Enviroservices & Training Center, LLC v. Dept. of Environmental Management, County of Maui, PDH-2020-001 (April 6, 2020).*

Responsibility determination; when made; Neither HAR §3-122-108 nor HAR §3-122-110 requires the procuring agency to complete the responsibility determination prior to bid opening. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000)*.

Responsibility; supplement to bid after bid opening; When it comes to matters of responsibility, a bidder can supplement its bid after bid opening with new materials relevant to the determination of responsibility. Such supplementation is allowed even when the invitation for bids requires, on its face, submission of the responsibility materials with the bid. *Hawaii Specialty Vehicles, LLC v. Wendy K. Imamura, PCH 2011-7 (January 20, 2012); Refrigerant Recycling, Inc. v. Department of Budget & Fiscal Services, City and County of Honolulu, PCY 2012-005 (September 17, 2012).*

Responsibility; ability to perform; A bidder's ability to perform may warrant close scrutiny under circumstances where even though at the time of bid opening, the general contractor (or its designated subcontractors) had the required license(s) to perform, neither the general contractor nor the subcontractors had the actual workforce needed to accomplish the project. Nevertheless, such circumstances do not reflect noncompliance with the requirements for submitting a bid. The size and makeup of a construction firm can fluctuate considerably depending upon the volume of their work at any given time, and as long as they are properly licensed they may expand their infrastructure to meet the needs of a given project. *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998)*.

Bidder responsibility determined at award; In the absence of special circumstances (such as the implementation of important social or economic policy), the regularly followed principle is that the characteristics of a bidder (such as its past payment of taxes – as demonstrated by the filing of a tax clearance certificate) is a matter of bidder responsibility rather than a matter of bid responsiveness. Accordingly, such a requirement may generally be met at any time before a contract is entered into, even in the presence of standard language in the Notice to Bidders that such a requirement be met at the time of bid opening. *Standard Electric, Inc. v. City & County of Honolulu, et. al., PCH 97-7 (January 2, 1998)*.

Bidder responsibility; ability to obtain resources; agency given wide discretion; A bidder's responsibility may be established by a sufficient showing that it possesses the ability to obtain the resources necessary to perform its contractual obligations. The procuring agency will be given wide discretion and will not be interfered with unless the determination is unreasonable, arbitrary or capricious. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000)*; *Refrigerant Recycling, Inc. v. Department of Budget & Fiscal Services, City and County of Honolulu, PCY 2012-005 (September 17, 2012).*

Bidder responsibility; additional information necessary for determination; Pursuant to HRS §103D-310(b) and HAR §3-122-108, responsibility shall be made by the procurement officer

on the basis of available information. If the procurement officer requires additional information, the bidder may be required to answer questions contained in the sample questionnaire provided by the policy board. Where the Board of Water Supply had sufficient available information to determine whether a bidder was responsible, the Board's contractor questionnaire asking for prior experience of similar contracts was not necessary and the questionnaire did not constitute additional information necessary for the determination of responsibility under HAR §3-122-109(6).

Prequalification of suppliers; A clear reading of HAR§3-122-116 reflects that prequalification of suppliers is permitted, but is not required. *United Courier Services, Inc. v. DOE, et al., PCH -2002-10 (October 15, 2002)*.

(2) The bid is nonresponsive, that is, it does not conform in all material respects to the invitation for bids. *HRS §103D-302(h); HAR §3-122-97*.

Cases:

Plain meaning interpretation, material nonconformity; Contract or solicitation terms are normally interpreted according to their plain, ordinary, and accepted sense in common speech. Where the RFB specifications stated: 'There are two ambulatory entrances on each vehicle: a driver's entrance and a passenger entrance," it is a clear statement that the RFB required only two entrances and the phrase cannot be read as saying there could mean an additional entrance of an unspecified type. Bidder's addition of a third door is a material nonconformity rendering bidder nonresponsive. *Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Oct. 27, 2011).*

Material nonconformity renders bid nonresponsive; Bid responsiveness refers to the question of whether a bidder has promised in the precise manner requested by the government with respect to price, quality, quantity, and delivery. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. Therefore, a bid that contains a material nonconformity must be rejected as nonresponsive. Material terms and conditions of a solicitation involve price, quality, quantity, and delivery. *Hawaiian Dredging Construction Co. vs. City & County of Honolulu, PCH-99-6 (August 9, 1999); Environmental Recycling vs. County of Hawaii, PCH 98-1 (July 2, 1998).; Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8,* 2000); *Nan, Inc. v. DOT, PCH-2008-9 (October 3, 2008).*

Responsiveness; dating of Declaration; A Declaration dated June 9, 2016 submitted to verify prices on a form that was not created and issued until June 14, 2016 does not render a bid unresponsive. The Declaration, regardless of when it was dated, merely added another layer of assurance of the bidder's commitment. The Hearings Officer concludes that the dating of the Declaration for June 9, 2016 did not affect any material term of the Solicitation and, therefore, did not render Intervenor's bid unresponsive. *Hensel Phelps Construction Co., v. Department of Transportation, State of Hawaii, PDH-2016-004 (October 14, 2016).*

Material nonconformity renders bid nonresponsive; Although the 5-year coating experience requirement was intended to test bidder responsibility, it nevertheless had a direct impact on price. A contractor can obtain a considerable savings by utilizing subcontractors with less experience. As a result, a contractor may gain a substantial bid pricing advantage over other bidders whose bids were based upon prices from more experienced subcontractors. Accordingly, the Intervenor's listing of a subcontractor who lacked the required experience afforded Intervenor a substantial advantage with respect to bid pricing, constituted a material deviation from the terms of the IFB and as a result, rendered its bid nonresponsive. *Hawaiian Dredging Construction Co. vs. City & County of Honolulu, PCH-99-6 (August 9, 1999); Nan, Inc. v. DOT, PCH-2008-9 (October 3, 2008).*

Material nonconformity renders bid nonresponsive; Where the RFP contained a requirement of two 10-foot shoulders on both sides of the road during construction work and Petitioner's drawings omitted one, the omission was deemed material and not minor or trivial as its omission affecting price and project duration are material and not minor or trivial. *Hawaiian Dredging Construction Company vs. DOT, PCH 2009-9 (July 2, 2009)*.

Material nonconformity renders bid nonresponsive; Where the bid stated that a wheelchair lift would be supplied "as specified" and its bid materials stated that a different product would be supplied that was not specified and was not approved as equal, it is a material nonconformity and is ambiguous and does not conform to the requirements of the specification and is rendered nonresponsive, as defined by Southern Foods Group, L.P. v. State, 89 Haw. 443, 457, 974 P.2d 1033, 1047 (1999). *Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Dec. 28, 2011).*

Material Nonconformity; A rear wheelchair entry, which is too time consuming, critically interferes with scheduling paratransit vehicle services, and is much less safe, is a material nonconformity where a RFB specifies a forward wheelchair door. *Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Order Granting in Part and Denying in Part Motions for Summary Judgment) (Oct. 27, 2011).*

Nonresponsive bid rejected; Because Respondent did not possess a C-37 specialty contractor's license and did not list a C-37 subcontractor in its bid, when a C-37 specialty license was required in the IFB, Respondent's bid is nonresponsive and must be rejected. *Global Specialty Contractors, Inc. v. Dep't of Land and Natural Resources, PCX-2010-5 (Oct. 15, 2010)*.

Lack of proper license justifies rejection of bid; The contractor asserted that it did not need a C-32 fencing license to perform the contract work. The purpose behind Hawaii contractor licensing laws is to protect the general public from dishonest, fraudulent, unskillful, or unqualified contractors. Interpretation of administrative rules regarding licensing should give effect to the plain and obvious meaning of the rule's language consistent with the overall purpose of the contractor licensing statute to protect the public. Accordingly, the Hearings Officer held that a C-32 license was required and that Petitioner's bid was properly rejected due to Petitioner's lack of such a license. *JBH, Ltd. v. William Aila, Jr., in his capacity as Chairman and Contracting Officer of Div. of Forestry and Wildlife, Dept. of Land and Natural Resources, PDH 2013-007 (August 15, 2013).*

Responsive bidder defined; A responsive bidder under HRS §103D-104 and HAR §3-120-2 is defined as "a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids or requests for proposals." *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999); Abhe & Svoboda, Inc. v. Dep't of Accounting and General Services, PCX-2009-5 (Dec. 3, 2009)*.

Material deviation from solicitation affecting price; multiple bids; It is elementary that submission of two bids in a sealed competitive bidding process that permits submission of only one bid is a material deviation from the Bid Solicitation special conditions and is nonresponsive. Moreover, Meadow Gold's deviation directly involved price, a term that is typically and traditionally material. *Southern Food Group, L.P. v. Dept. of Educ., et. al., 89 Haw. 443, 974 P.2d 1033 (1999); Maui Kupono Builders, LLC, v. Kathryn S. Matayoshi. Superintendent, Department of Education, State of Hawaii, PDH-2016-005 (December 9, 2016).*

Responsiveness determination; evidence of government's best interest and savings of public funds irrelevant; The best interest of the DOE as well as the savings the DOE would have received are irrelevant, insofar as applicable statutory provisions and rules mandated the rejection of Meadow Gold's multiple bids. *Southern Food Group, L.P. v. Dept. of Educ., et. al., 89 Haw. 443, 974 P.2d 1033 (1999).*

Rejection of nonresponsive bid; cogent and compelling reasons unnecessary; Pursuant to HAR §3-122-97, if Meadow Gold's bid was nonresponsive, the DOE should have rejected the bid and was not compelled to provide cogent or compelling reasons why it was in the DOE's best interest to reject the bid. *Southern Food Group, L.P. v. Dept. of Educ., et. al., 89 Haw. 443, 974 P.2d 1033 (1999).*

Rejection of nonresponsive bid after opportunity for clarification; After the bidder was provided with an opportunity to clarify its proposal and still failed to comply with a material term of the RFP, the proposal should have been rejected pursuant to HAR§3-122-97(b)(2)(B). *Realty Laua, LLC v. HPHA, PCH-2011-1 (Nov. 18, 2011).*

Responsiveness based solely upon requirements in solicitation; In a competitive sealed bidding procurement, bids must be evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998)*.

Responsiveness; determination based upon requirements in solicitation; Matters of responsiveness must be discerned solely by reference to materials submitted with the bid and facts available to the government at the time of the bid opening. *Browning-Ferris Industries of Hawaii, Inc.*
v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000); Abhe & Svoboda, Inc. v. Dep't of Accounting and General Services, PCX-2009-5 (Dec. 3, 2009).

Failure to list subcontractor renders bid nonresponsive; Except in situations which involve the post award refusal or inability of a subcontractor to honor its agreement with the bidder, the failure of a bidder to list the subcontractor who will actually be performing the subcontracted work renders that bid non-responsive. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999)*.

Responsiveness; subcontractor; verbal quote; A bid is not nonresponsive merely because a subcontractor's quote is verbal rather than written. *Nan, Inc. v. State Dept. of Transportation, State of Hawaii, PDH-2015-006 (September 4, 2015).*

Exception to subcontractor listing requirement; The failure of a bidder to list its subcontractors results in the submission of a non-responsive bid. Nevertheless, the provisions of HRS §103D-302(b) and HAR § 3-122-21(a)(8) allow such a potentially fatal omission to be overcome provided that (1) acceptance of the bid is in the best interest of the State, and (2) the value of the unlisted work is equal to or less than one percent of the total bid amount. *Okada Trucking Co., Ltd., v. Board of Water Supply et. al., PCH 99-11 (November 10, 1999) (reversed on other grounds); Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998).*

Exception to subcontractor listing requirement; The failure of a bidder (general contractor) to have a subcontractor actually bound to perform any portion of the required work – which could not lawfully be performed by the bidder itself – results in a nonresponsive bid since the bidder is consequently unable to meet the requirement that all subcontractors be listed in its bid. Nevertheless, the provisions of HRS §103D-302(b) and HAR §3-122-21(a)(8) allow such a potentially fatal omission to be overcome provided that (1) acceptance of the bid is in the best interest of the State, and (2) the value of the unlisted work is equal to or less than one percent of the total bid amount. *Okada Trucking Co., Ltd., vs. Board of Water Supply et. al., PCH 99-11 (November 10, 1999) (reversed on other grounds).*

Responsiveness; licensed subcontractor; insurance; A bid submitted in response to a solicitation requiring that all subcontractors be licensed is still responsive, notwithstanding DCCA records show that the subcontractor's license was "automatically forfeited due to insurance loss (60 days to restore)", where the subcontractor was properly insured, but nevertheless did not immediately update its insurance records with DCCA. The Hearings Officer concluded that the subcontractor was properly insured and therefore, properly licensed on the date of bid opening, notwithstanding the information provided on the DCCA website. *Hensel Phelps Construction Co. v. Department of Transportation, State of Hawaii, PDH-2016-004 (October 14, 2016).*

Responsiveness; standard; The standard to be applied in determining the "responsiveness" of a bid is whether a bidder has promised in the precise manner requested by the government with respect to price, quantity, quality, and delivery. If this standard is satisfied, the bidder is effectively obligated to perform the exact thing called for in the solicitation. *Starcom Builders, Inc. v. Board of Water Supply; PCH-2003-18 (October 18, 2003); MAT Hawaii, Inc. v. Michael R. Hansen, Acting Director of Budget and Fiscal Services, and City and County of Honolulu, PCX-2010-7 (Nov. 9, 2010).*

Responsiveness; failure to attend prebid site visit; The standard to be applied in determining the "responsiveness" of a bid is whether a bidder has promised in the precise manner requested by the government with respect to price, quantity, quality, and delivery. If this standard is satisfied, the bidder is effectively obligated to perform the exact thing called for in the solicitation. As such, the Hearings Officer fails to see how the failure to attend a prebid meeting, let alone a scheduled prebid meeting, would limit or otherwise affect that obligation. Regardless of its nonattendance at a site visit, a bidder who submits a bid after having been offered the opportunity to visit the job site knowingly commits itself to perform the work at its bid price and assumes the risk of any unanticipated increased costs due to observable site conditions. Based on these considerations, the Hearings Officer concludes that the prebid site visit requirement provides no basis for disqualifying Petitioner from the solicitation. *Starcom Builders, Inc. v. Board of Water Supply; PCH-2003-18 (October 18, 2003).*

Immaterial nonconformity; Although National's bid did not conform to the specifications when it utilized the incorrect weight for passengers in its Theoretical Weight Analysis (150 pounds/person where specifications called for 200 pounds/person), the nonconformity was not material and did not render National's bid nonresponsive. The rise of the correct weight did not result in an increase exceeding the maximum GVWR set by the specifications. *Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Dec. 28, 2011).*

Federal law may excuse defects in an otherwise nonresponsive bid; When a state procurement is based in whole or in part, upon federal funds, HRS §29-15 requires that federal requirements prevail over contrary state law provisions. The primary purpose of the statute is to avoid hindering or impeding the State's ability to contract for any project involving federal financial aid. For example, federal requirements pertaining to procurement of Handi-vans excused a potential contractor from the State's requirement of possessing a motor vehicle dealer's license. *Soderholm Sales and Leasing, Inc. v. County of Kauai, Department of Finance*, *PCY 2012-017 (July 5, 2012).*

Procurement protestor's claim of "misrepresentation" is not a claim of nonresponsiveness; A claim of misrepresentation was based on an alleged difference between representations in the bid and actions after award of the contractor. Such claims are not ones of nonresponsiveness, as they depend upon events occurring after bids are opened. It is not clear that Hawai'i law recognizes a claim of misrepresentation as a valid basis for a procurement protest. The Hearings Officer assumed, for purposes of argument only, that a claim of material misrepresentations subverting the integrity of the procurement process could result in a successful protest along the lines considered in *Carl Corporation v. State Department of Education, 85 Haw. 431, 946 P.2d 1 (1997)*. No definitive decision on that point was necessary because the protester failed to prove that there

were any valid claims of misrepresentation that could properly be considered by the Hearings Officer. *Safety Systems and Signs Hawaii, Inc. v. Department of Transportation, State of Hawaii, PDH 2013-012 (March 10, 2014).*

Responsiveness of bid; blank line item not fatal*;* When a lump sum bid contains the contractor's total proposed price, leaving a line item blank cannot be interpreted as the bidder reserving the right to change the contract price by adding in an amount for that line item at a later date. Similarly, a blank line item does not indicate any possible intent to not do the work for that line item or a refusal to commit to doing that work. The only result of an omission of a figure for a line item is that progress payments to the contractor cannot be based on how much work the contractor has done on that line item. The contractor still has to do the work but cannot use that work as a basis for progress payments. *Nan, Inc. v. Dept. of Public Works, et al., PDH-2014-017 (December 29, 2014).*

Responsiveness; Mathematical imbalance; Material imbalance; *Mathematical* imbalance, alone, does not make a bid unacceptable. A bid must be *materially* imbalanced before it must be rejected. Because there was no showing of *mathematical* imbalance, the decision did not go into whether there was a *material* imbalance. *Nan, Inc. v. HART, PDH-2015-004 (May 28, 2015).*

Material nonresponsiveness; In order to prove that a bid is unbalanced, the protestor must show that the bid is both "mathematically" unbalanced and "materially" unbalanced. A bid is "mathematically" unbalanced "when each line item in the bid does not reflect that actual costs to the bidder." The concept of material nonresponsiveness corresponds closely to the concept of "materially unbalanced." The Hearings Officer concludes that Hawaii law requires that a bid be materially unbalanced (e.g. front loaded or back loaded) before it can be rejected pursuant to General Provision 2.8(5). *Nan, Inc. v. Department of Transportation, State of Hawaii, PDH-2015-006 (September 4, 2015).*

Responsiveness of bid; an ambiguous bid is a nonresponsive bid; Protestor who had formally changed its LLC name, submitted a bid under its former LLC name, and at the time of bid opening existed under its new LLC name. The Hearings Officer concluded that a bid is nonresponsive if the identity of the bidder is ambiguous. *Maui Kupono Builders, LLC v. Wendy K. Imamura, Purchasing Administrator, Department of Budget and Fiscal Services, City and County of Honolulu, PDH-2016-001 (February 26, 2016).*

Responsiveness of bid; multiple bids; The submission of the 2 bids rendered the bidder′s identity and the bids ambiguous. The submission of the 2 bids in the face of the express prohibition in the IFB and HAR §3-122-4 against the submission of multiple bids was a material deviation and rendered those bids nonresponsive. *Maui Kupono Builders, LLC v. Kathryn S. Matayoshi. Superintendent, Department of Education, State of Hawaii, PDH-2016-005 (December 9, 2016).*

Responsiveness of bid; handwritten additions and/or changes; An employee of a bidder can make handwritten additions and/or changes to a bid after the declaration was signed, but before the bid is submitted without rendering the bid nonresponsive. *Nan, Inc. v. State of Hawaii, Department of Transportation, PDH-2017-004 (September 12, 2017).*

Responsiveness of bid; signing Form 1; An employee of a bidder, other than the person who signed the declaration, can sign the Certification Form 1s (Approved Apprenticeship Program Certification) without rendering the bid nonresponsive. *Nan, Inc. v. State of Hawaii, Department of Transportation, PDH-2017-004 (September 12, 2017).*

Responsiveness of bid; failure to include mandatory subsection; When an RFP sets forth mandatory requirements and requires proposals to include certain subsections, omission of a required subsection, even inadvertently, renders the proposal incomplete and consequently non-responsive. *Access Media Services Inc. v. Hawaii State Legislature and 'Olelo Community Television, PDH-2019-001 (February 4, 2019).*

Nonresponsive bid not entitled to further consideration*;* Protestor's proposal was deemed non-responsive and rejected for failure to follow the RFP. Protestor, the long-time successful incumbent bidder, was not entitled to further evaluation and scoring. *Access Media Services Inc. v. Hawaii State Legislature and 'Olelo Community Television, PDH-2019-001 (February 4, 2019).*

(3) The good, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the invitation for bids.

B. Rejection of proposals; basis; Reasons for rejection of proposals include, but are not limited to:

(1) The offeror that submitted the proposal is nonresponsible.

(2) The proposal ultimately, after any opportunity has passed for altering or clarifying the proposal, fails to meet the announced requirements of the agency in some material respect; or

(3) The proposed price is clearly unreasonable.

Cases:

Offered price unreasonable; failure to reject unreasonable offer violates HAR §3-122-97(b)(2)(C); The offered price was unreasonable where, among other factors, the offered price to the State was significantly higher than the costs of the services and goods involved for no apparent reason. Having arrived at this determination, the Hearings Officer also concludes that Respondent Office of Elections' failure to reject Intervenor's proposal constitutes a violation of HAR §3-122-97(b)(2)(C). *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Incomplete and vague presentation of approach to project, work plan, and budget prevented evaluation of proposal; In response to a solicitation for professional services, the petitioner submitted an incomplete and vague statement of qualifications that could not be evaluated. The Hearings Officer upheld the agency's rejection of this proposal. The petitioner claimed that the solicitation lacked sufficient information to allow a more detailed response. Three other firms, however, were able to comply with the solicitation's requirements. Furthermore, the petitioner chose to submit its proposal without contacting the procuring agency to request any additional information it deemed necessary to provide a more complete submission. *Amel Technologies, Inc. v. Department of Business, Economic Development & Tourism, PDH 2013-005 (June 13, 2013).*

Responsive offeror; term normally inapplicable to proposals*;* Under HRS §103D-303(g), an award in the case of competitive sealed proposal shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The Code has no definition for "responsive offeror", thus reinforcing the conclusion that the concept of "responsiveness" has no place in the statutes governing competitive sealed proposals. *Aon Risk Services, Inc. v. Honolulu Authority for Rapid Transportation, PDH 2013-011 (November 27, 2013); Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

A procuring agency can choose, but is not required, to incorporate terms in the solicitation for a proposal that establish a responsiveness requirement; nonresponsive offer; rejected*;* While the Code does not require offers in response to a request for competitive sealed proposals to be responsive, the procuring agency can choose on its own to incorporate responsiveness requirement in such requests. When, by the terms of the request for proposals, an offer must be responsive, the offer must be rejected if it materially varies from the specifications and is therefore nonresponsive. *Aon Risk Services, Inc. v. Honolulu Authority for Rapid Transportation, PDH 2013-011 (November 27, 2013); Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Identity of offeror ambiguous; nonresponsive*;* If the identity of the offeror in the proposal is ambiguous, or if there are two different offerors identified in the proposal, the proposal is nonresponsive. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

When the terms of a request for proposals grant the procuring agency the discretion to consider an award to a contractor whose proposal was not in conformity with some of the proposal's requirements, such discretionary authority must be properly exercised. While the terms of a request for proposals were not as clear as they could have been, ultimately the allowance of a selection of a proposal that did not conform to all requirements set forth in the proposal was allowed because such a selection was to be made in the "sole discretion" of the procuring agency. In that situation, however, the procuring agency must give due consideration to the particular factors involved in making such a choice. Merely selecting a proposal that does not conform to all requirements is actually a failure to exercise discretion, and the choice is thus an abuse of discretion. *Aon Risk Services, Inc. v. Honolulu Authority for Rapid Transportation, PDH 2013-011 (November 27, 2013).*

Offeror not required to have contractor's license when submitting offer as long as license is obtained by time of award; The Request for Proposals required only that an offeror have a contractor's license when the contract was awarded even though Hawaii's licensing laws required a contractor's license at the time the offer was submitted. The licensing laws authorized sanctions for an unlicensed contractor submitting an offer, but disqualification of that offeror from obtaining the contract was not one of the sanctions as long as the offeror obtained a license by the time of the contract award. *Sumitomo Corporation of America v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, Exhibit "A", PCX-2011-005 (August 13, 2011)*

XII. PROTESTS

A. ***Standing to Protest***; Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award or a contract may protest to the chief procurement officer or designee. *HRS §103D-701(a).*

Cases:

Standing limited to actual or prospective bidders, offerors and contractors; In order to qualify as a party with standing to file a request for an administrative hearing, the Petitioner must be an "actual or prospective bidder, offeror, or contractor" as set forth in HRS §103D-701(a). HAR §3-120-2 defines a "bidder" as a business submitting a bid in response to an invitation for bids, while an offeror is a business submitting a bid or proposal in response to an invitation for bids or a request for proposals, or an unpriced technical offer in response to an expression of interest. A contractor is defined in HRS §103D-104 as any person having a contract with a governmental body. *Browning Ferris Industries et.al. v. County of Kauai, PCH 96-11 (January 29, 1997)*.

Standing limited to actual or prospective bidders, offerors and contractors; Where funding for the subject project lapsed during the course of appeal of procurement matter to the Circuit Court, and agency withdrew the solicitation for lack of funding, Petitioner was no longer a prospective bidder and therefore could not file a protest pursuant to HRS §103D-709. As a result, Petitioner did not have standing. *Alpha Inc. v. Dept of Finance, County of Maui, PDH-2021-016 (January 21, 2022).*

Standing limited to actual or prospective bidders; legal entity; In order to have standing to file a request for an administrative hearing, the petitioner must be an "actual or prospective bidder, offeror, or contractor" as set forth in HRS §103D-701(a). HAR §3-120-2 defines a "bidder" as, among other things, a "legal entity" submitting a bid for the construction contemplated. A bidder who had formally changed its LLC name, but submits a bid under its former LLC name, and at the time of bid opening existed under its new LLC name lacks standing to pursue this protest. *Maui Kupono Builders, LLC v. Wendy K. Imamura, Purchasing Administrator, Department of Budget and Fiscal Services, City and County of Honolulu, PDH-2016-001 (February 26, 2016).*

Standing; submission of bid prior to deadline; A person or entity which has not submitted a bid in response to an invitation for bids (or request for proposals) prior to the deadline for such submissions is neither an actual nor a prospective bidder, offeror, nor contractor, and thus has no standing to file a request for administrative hearing under HRS Chapter 103D. *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000); Hawaiian Natural Water Co. v. City & County of Honolulu, PCH 99-14 (April 25, 2000).*

Standing to protest; taxpayers; Under the Code and its implementing rules, standing to protest is limited to actual or prospective bidders, offerors and contractors. The qualifying language in HRS §103D-701(a) and HAR §3-126-1 precludes persons or entities from having standing simply as taxpayers of the State to initiate or pursue protests in such a capacity. *Hawaii Newspaper Agency, et al. v. State Dept. of Accounting & General Services et. al., and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al., PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999).*

Standing issue may be raised sua sponte; The question of standing to bring an action may be raised *sua sponte* by Hearings Officer having jurisdiction over the case. *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et.al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et.al., PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999).*

Standing; intent to submit proposal insufficient to create standing; The protestor's

stated intention to submit a proposal in response to any resolicitation, and its efforts to secure resolicitation by filing a protest, can do nothing to create the necessary interested party status. *MCI Telecommunications Corp. v. United States, 878 F.2d 362 (Fed. Cir. 1989), cited in Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et al., PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999).*

Standing; aggrieved party; no realistic expectation; Because Milici no longer had any realistic expectation of submitting a proposal and being awarded the contract, it was not an "aggrieved" party when the contract was subsequently awarded to RFD. *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et al., PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999); Construction Material Agents and Supply LLC, et al. v. State Dept. of Accounting & General Services, et al., PCH-2000-11 (September 17, 2001); See* also *Ohana Flooring v. Dep't of Transportation, PCH-2011-12 (Nov. 18, 2011).*

Person aggrieved*;* A "person aggrieved" has been defined as one who has been specially, personally and adversely affected by a special injury or damage to his personal property rights. *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et.al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et al, PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999) citing Jordan v. Hamada, 54 Haw. 451 (1982); Dick Pacific Constr. Co., Ltd. v. DOT, et al., PCH-2005-5 (September 23, 2005).*

Standing; aggrieved party; realistic expectation; The rights and remedies created under HRS Chapter 103D were intended for and are available only to those who participated in or still have a realistic expectation of submitting a bid in response to the IFB. Standing to bring a protest is conferred upon any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract. *Hawaii School Bus Assn v. DOE; PCH-2003-3 (May 16, 2003).*

Aggrieved persons; defined; According to HRS §103D-701(a), only aggrieved persons have standing to protest. In order to have standing, an actual or prospective bidder, offeror or contractor must show that it has suffered, or will suffer, a direct economic injury as a result of the alleged adverse agency action. Consequently, a party is not aggrieved until official action, adverse to it, has been taken. *Eckard Brandes, Inc. v. Dept. of Finance, County of Hawaii; PCH-2003-14, PCH-2003-20 (Consolidated on remand from Third Circuit Court) (June 24, 2004); Dick Pacific Constr. Co., Ltd. v. DOT, et al., PCH-2005-5 (September 23, 2005); Schnitzer Steel Hawaii Corp. v. Dept. of Budget and Fiscal Services, City and County of Honolulu; PDH-2021-010.*

Aggrieved persons; official action; Respondent's determination that there was no conflict of interest constituted an "official" action that adversely affected Petitioner and, according to the record, was the first time Petitioner had been so affected by any action or decision of Respondent. Thus, Petitioner attained "aggrieved" party status when Respondent issued its May 6, 2003 denial letter to Petitioner. *Eckard Brandes, Inc. v. Dept. of Finance, County of Hawaii; PCH-2003-14, PCH-2003-20 (Consolidated on remand from Third Circuit Court) (June 24, 2004).*

Standing; aggrieved party status; premature; Because Respondent's denial was based on the fact that Jamile had not undertaken any of the acts complained of, the denial was not adverse to Petitioner and Petitioner was not "aggrieved" in connection with the solicitation or award of the contract and therefore lacks standing to bring this action. At the very least, this action is premature. *Associates, Inc. v. Board of Water Supply, PCH-2004-11 (September 17, 2004); Schnitzer Steel Hawaii Corp. v. Dept. of Budget and Fiscal Services, City and County of Honolulu; PDH-2021-010.*

Standing; determination of aggrieved party; A "person aggrieved" is someone who has

suffered an "injury in fact." Whether someone has suffered an injury in fact is determined by a three-part test: (1) whether person has suffered an actual or threatened injury as a result of the agency decision; (2) whether the injury is fairly traceable to the agency's decision; and (3) whether a favorable decision would likely provide relief for the injury. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014), citing Alohacare v. Ito, 126 Hawaii 326, 271 P.3d 621(2012); Soderholm Sales and Leasing, Inc. v. Department of Finance, County of Kauai, PDH-2016-002 (June 29, 2016).*

Standing; determination of injury; increased competition; Petitioner in this case faces increased competition because of Respondent's determination that it will accept metal frame buses [as opposed to composite only], as described in Addendum No. 4. Petitioner's injury of increased competition is fairly traceable to Addendum No. 4. and a favorable decision would provide Petitioner relief from its injury because if Petitioner prevails and the protest is sustained, Petitioner would be relieved from competition. Accordingly, the Hearings Officer concludes that Petitioner has standing to pursue this appeal. *Soderholm Sales and Leasing, Inc. v. Department of Finance, County of Kauai, PDH-2016-002 (June 29, 2016).*

Dismissal of appeals terminates protestor's standing in current protest; As a result of the dismissal of two appeals before the Circuit Court, Respondent's earlier rejection of Petitioner's bid remained intact and Petitioner's involvement in the solicitation was effectively terminated. Consequently, Petitioner could no longer be considered an actual bidder. *Stoneridge Recoveries, LLC v. Dept. of Budget & Fiscal Services; PCH-2003-2 (January 19, 2005).*

No standing; failure to obtain product approval in advance; The IFB required all products be approved in advance and that all prospective bidders submit a request for product approval by a specified date. Thus, having failed to submit a timely request, the bidder could no longer be considered a prospective bidder and no longer had any realistic expectation of submitting a bid. *Global Medical & Dental v. State Procurement Office, PCH-2006-4 (August 14, 2007).*

Standing; economic injury; No economic injury to protestor where agency's rescission of award of contract to first-ranked offeror may benefit protestor if contract ultimately awarded to protestor. *Dick Pacific Constr. Co., Ltd. v. DOT, et al., PCH-2005-5 (September 23, 2005).*

B. Time to Protest; A protest shall be filed in writing and in duplicate, five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract; provided further, that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers. HRS §103D-701(a); HAR §3-126-4(a).

Cases:

"Submit"; plain meaning; The plain meaning of "submit," as defined in Webster's Ninth New Collegiate Dictionary, includes "to present or propose to another for review, consideration, or decision," and "to deliver formally." HAR §§3-126-3 and -4 both use the term, "filing" interchangeably with the term, "submit." Therefore, a protest whether by personal service, or by other permissible means, must be received by the agency within the requisite 5-day period. For this very reason, HAR §3-126-3(c) suggests that where the protestor elects to mail its protest, it do so via certified mail, return receipt requested, so as to have proof of the date the protest was received by the agency. *Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010).*

Protest minimum requirements; the minimum requirements for a written procurement protest

include a statement of reasons for that protest, which should put the procuring agency on sufficient notice of the reasons for the protest. *Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Order Granting in Part and Denying in Part Motions for Summary Judgment) (Dec. 1, 2011).*

Protest minimum requirements; the minimum requirements for a written procurement protest filed prior to receipt of offers include, first, an attempt at an informal resolution and then a formal protest specifically identified as such. *Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Order Granting in Part and Denying in Part Motions for Summary Judgment) (Oct. 27, 2011).*

Time to file protest over nonresponsive bid begins when protestor knows of government's intent to award contract; The protest shall be submitted in writing within 5 working days after the aggrieved person knows or should have known of the facts giving rise thereto. In that regard, the basis for a protest grounded upon nonresponsiveness of another bid, in addition to the alleged nonresponsiveness itself, is the protestor's knowledge that the government has awarded or *intends to award* the contract to the nonresponsive bidder. Prior to that time, a protest would be premature since the government could well reject the offending bid. In other words, the adverse action being protested is the government's acceptance of the alleged nonresponsive bid, not merely the offeror's submission of such a bid. *GTE Hawaiian Telephone Co., v. County of Maui, PCH 98-6 (December 9, 1998).*

Timeliness requirement not affected by HAR §3-126-3(a); While HAR §3-126-3(a) uses the term, "should" to express a *preference* that the parties attempt to resolve a complaint informally, both HRS §103D-701 and HAR §3-126-4, by use of the term, "shall," clearly *require* the filing of protests within 5 days. Thus, although HAR §3-126-3(a) encourages the parties to resolve their differences prior to the filing of a protest, that section does not toll or otherwise affect the timeliness requirements set forth in HRS §103D-701. *Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010).*

Timeliness requirement, bidder's responsibility to submit protest within requisite 5 working days; The commencement of the 5-day period within which to submit a protest does not depend on a party's ability to "digest" the RFP or to "become aware of the problems giving rise to the protest." The period commences once the aggrieved party knows or should have known of the facts giving rise to its protest. Thus, once provided with access to the information upon which its protest is eventually based, it is the bidder's responsibility to diligently access the solicitation and to "digest," prepare and submit its protest within the requisite working days. This conclusion is in keeping with the underlying intent of the 5-day filing period to expedite the resolution of protests and provides agencies with some degree of certainty as to when protests may be filed. *Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010), Maui Kupono Builders, LLC v. Dept. of Transportation, PDH-2019-006 (December 23, 2019); Hooklifts Hawaii, LLC v. County of Kauai, PDH-2019-008 (January 17, 2020).*

Timeliness requirement, should have known requirement depends on when bidder was given opportunity to review bids; When Petitioner should have known of the facts giving rise to his protest depends on when he was given the opportunity to review the bid contents containing the relevant information. Petitioner, who was present during March 27, 2009 bid opening and had the opportunity to review the comments containing all factual information giving rise to his protest, should have known of the facts giving rise to his protest on March 27, 2009 and was required to submit his protest no later than April 3, 2009. Because Petitioner did not submit his protest until April 6, 2009, the protest was untimely. *Diversified Plumbing & Air Conditioning v. Hawai'i Housing Finance and Development Corp., PCH-2009-11 (June 30, 2009).*

Time to file protest is when Petitioner believed requirements in IFB violated the Procurement Code; HRS §103D-701(a) makes clear that if Petitioner believed that the bid security requirement in the IFBs was in violation of the Code, it was "aggrieved" and obligated to submit a protest expeditiously and, in any event, prior to the bid submission deadline, rather than wait until the

bids were opened and its bids rejected. *GP Roadway Solutions, Inc. v. Glenn Okimoto as Director of the Dep't of Transportation, PCH-2011-15/PCH-2011-16 (Jan 27, 2012).*

Time to file protest; one person's knowledge not imputed to protestor; The knowledge of one person may not be imputed to the protestor as the requirement stated in HRS §103D-701(a) and HAR § 3-126-3(a) refers to knowledge that the *aggrieved person* had or should have had. *Okada Trucking Company, Ltd. v. Board of Water Supply, PCH 99-11 (November 10, 1999) (reversed on other grounds).*

Failure to provide information not an excuse for untimely filing; The State's alleged failure to provide information did not constitute a legitimate basis for the protestor's failure to comply with the time requirements for requesting an agency reconsideration or an administrative hearing. *Brewer Environmental Industries, Inc. v. County of Kauai, PCH 96-9 (November 20, 1996)*.

Time constraints must be strictly adhered to; The accomplishment of the underlying objectives of the Code requires strict adherence to the time constraints for the initiation and prosecution of protests. *GTE Hawaiian Telephone Co., Inc., v. County of Maui, PCH 98-6 (December 9, 1998); Diversified Plumbing & Air Conditioning v. Hawai'i Housing Finance and Development Corp., PCH-2009-11 (June 30, 2009); Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010), Maui Kupono Builders, LLC v. Dept. Of Transportation, PDH-2019-006 (December 23, 2019); Hensel Phelps Construction Co. v. Dept. of Transportation, PDH-2021-002 (February 26, 2021).*

Facsimile "filings" of protests must be completed during normal business hours; In order to be timely, documents filed in HRS Chapter 103D proceedings must be filed in the designated governmental office during the normal weekday operating hours of 7:45 a.m. to 4:30 p.m. open for the transaction of public business. The fact that a government office's machinery is operational and receives transmissions at other times is irrelevant in meeting this requirement where the filing could not have been personally served during the above hours. *GTE Hawaiian Telephone Co., Inc., vs. County of Maui, PCH 98-6 (December 9, 1998); Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010).*

Time requirement mandatory and not subject to waiver; The timeliness requirements set forth in HRS §103D-701(a) are mandatory and cannot be waived by Respondent. *GP Roadway Solutions, Inc. v. Glenn Okimoto as Director of the Dep't of Transportation, PCH-2011-15/PCH-2011-16 (Jan 27, 2012)*

Time requirement mandatory and not subject to waiver; The time requirement set forth in HAR § 3-126-3(a) is mandatory and therefore not subject to waiver by Respondent. *GTE Hawaiian Telephone Co., Inc., vs. County of Maui, PCH 98-6 (December 9, 1998)*; *CR Dispatch Service, Inc. dba Security Armored Car & Courier Service v. DOE, et al., PCH-2007-7 (December 12, 2007).*

Person aggrieved*;* A "person aggrieved" has been defined as one who has been specially, personally and adversely affected by a special injury or damage to his personal property rights. *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et.al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al., PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999) citing Jordan v. Hamada, 64 Haw. 451,643 P.2d 73 (1982).*

Time to file generally; The language of HAR §3-126-3 does not require that the time within which a protest must be filed is necessarily calculated from the date of an award, or the signing of a contract. In fact, subsection (b) makes it clear that timely protests may be filed well in advance of – or well subsequent to – either date, depending upon when the protestor knew or should have known about facts that provided him or her a reasonable basis for filing a protest. *Environmental Recycling of Haw. Ltd. v. County of Hawaii, PCH 95-4 (March 20, 1996).*

Incomplete protest does not toll time to file; In order to expedite the resolution of protests,

HAR §3-126-3(c) requires that protests include a statement of reasons for the protest and supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time. Petitioner's initial protest letter does not contain *any* of that information. Nor is the requirement satisfied by an indirect reference to an earlier letter. The government is not required to assume or speculate as to the basis for a protest. Rather, HAR §3-126-3(c) mandates that protests shall include that information. Such a requirement is not unreasonable, particularly in light of the Code's objective of expediting the resolution of protests. The time limitation for the filing of a protest is not tolled by the filing of an incomplete protest letter. Simply put, HAR § 3-126-3 contemplates and requires the timely filing of a complete protest. *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998); Maui Kupono Builders, LLC v. State Dept. of Transportation, PDH-2019-006 (December 23, 2019)*.

Supplemental letter of protest must meet time requirement; While Petitioner's supplemental letter detailed the basis for the protest, it was filed well beyond the 5-day period of HAR §3-126-3(a). To be considered, the supplemental letter must independently meet the timeliness requirement for the filing of protests. The time limitation for filing a valid protest is not tolled by an initial incomplete filing. *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998). See also, Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH-2002-12 (October 18, 2002).*

Untimely protest; constructive notice of award; Bidder is deemed to have constructive notice of an award when it is posted on the State Procurement Office's website. *Alii Security Systems, Inc. v. Department of Transportation, State of Hawaii,* PCY 2012-2 (February 24, 2012).

Content of protest; Failure to comply with requirements of HAR § 3-126-4 by failing to file supporting documentation, exhibits or evidence with the protest is a ground for dismissal of the protest. *Alii Security Systems, Inc. v. Department of Transportation, State of Hawaii,* PCY 2012-2 (February 24, 2012).

Conditional protest purportedly reserving the right to make an additional, subsequent protest, was not timely; A protestor attempted to make a conditional protest by reserving the right to supplement its original protest based on documents it had requested but had not yet received at the time of the original protest. A conditional protest of this type is not adequate notice that the condition was satisfied and that there was, in fact, a separate significant protest issue. The protestor failed to file a second protest that adequately brought the newly obtained documents, and the new claim based thereon, to the procuring agency's attention within five business days of the receipt of the additional documents. It was therefore untimely. *Sumitomo Corporation of America v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, Exhibit "C", PCX-2011-005 (August 13, 2011).*

Supporting materials submitted for the first time in connection with an OAH hearing are untimely; Submission for the first time of information, arguments, and/or documentation in a request for an administrative hearing fails to comply with HAR §3-12-4 and amounts to a failure to exhaust administrative remedies. Submission of new evidence during the OAH hearing process, when that evidence was readily available before the request for hearing was filed, was also untimely. The question of whether a second bid protest would be required in order to present new evidence discovered in the course of the original bid protest there did not need to be decided. *Paul's Electrical Contracting, LLC v. City and County of Honolulu, Department of Budget and Fiscal Services (Ala Wai Community Park Project), PCY 2012-018 (July 27, 2012).*

Exhaustion of administrative remedies excused on ground of futility: The Hawaii Supreme Court considered the possibility that exhaustion of administrative remedies for a "contract controversy" governed by the Procurement Code could be excused on the ground of futility. *Koga Engineering Construction, Inc. v. State, 122 Haw. 60, 222 P.3d 979 (2010)*. Accordingly, it would be appropriate to consider the excusal of the requirement of exhausting administrative remedies in the case of procurement protests based upon the futility doctrine. When the protest claim has already been

reviewed by the procuring agency, and when there is no realistic possibility that the procuring agency will look upon the merits of a protest any differently than it had already concluded, further exhaustion of administrative remedies would be futile. *Road Builders Corporation v. City and County of Honolulu, Department of Budget and Fiscal Services, PCY 2-12-013 (April 27, 2012).*

Exhaustion of administrative remedies not excused on ground of futility; A contractor protesting the disqualification of its bid could not allege that the procuring agency had agreed in post-disqualification conversations to submit the issue to the Contractors License Board. That claim should have been first presented in a protest to the procuring agency. The protestor failed to demonstrate that the County would have automatically rejected the argument if it had been presented with the claim. Based upon the authority of *Koga Engineering Construction, Inc. v. State, 122 Haw. 60, 222 P.3d 979 (2010)*, the fact that the procuring agency disputed the protestor's claim in later litigation did not mean it would have rejected it during an administrative review had the protestor given the procuring agency an opportunity to make such a review. *Certified Construction, Inc. v. Department of Finance, County of Hawaii, on Remand, PDH 2014-006 (July 30, 2014).*

When there are two protests over the same solicitation, each protestor must raise its own claims and exhaust its administrative remedies pertinent to its own claims; In the case of two protestors for the same solicitation, one protestor cannot incorporate by reference the claims raised by the other protestor unless it has itself exhausted its own administrative remedies with respect to those claims. *Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii, PCX-2011-002 (June 6, 2011).*

Legislative intent to expedite procurement process; The Recommended Regulations for the ABA's Model Procurement Code for State and Local Governments suggests a 14-day period within which to file protests rather than the shorter 5-day period provided in HAR §3-126-3(a). Also, although the Recommended Regulations in an Editorial Note suggest that "jurisdictions may wish to allow consideration of protests filed after 14 days for good cause shown, no such exception was included in HAR §3-126-3. These considerations underscore the importance the Legislature placed on the expeditious processing of protests through an efficient and effective procurement system so as to minimize the disruption to procurements and contract performance. *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998); Maui Kupono Builders, LLC v. Dept. of Transportation, PDH-2019-006 (December 23, 2019).*

Protest of award of contract cannot resurrect prior untimely protest; A protestor is not allowed to file a post award protest (contesting the award itself) on essentially the same factual basis – which was known to the protestor and was used by the protestor in filing an earlier (pre-award) protest. Rather, the requirement that protests be filed within 5 working days after the protestor knows or should have known of the facts leading to the filing of the protest is still controlling. Thus, the subsequent awarding of the contract, in and of itself, does not provide an independent basis for the filing of a second protest and cannot resurrect an untimely protest. *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998).*

Filing of duplicate copies of protest is directory in nature; The requirement in HAR §3-126-3(a) which states that protests shall be filed in duplicate is directory rather than mandatory. While the word "shall" is generally regarded as mandatory, in certain situations, it may be given a directory meaning. In analogous situations, courts have looked to the essence of the particular requirement and, where no substantial rights depend on strict compliance, have considered the requirement to be directory in nature. *Big Island Recycling & Rubbish v. County of Hawaii, PCH 99-12 (December 17, 1999); Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

Protests based on content of solicitation; generally; The amendment was obviously designed to provide governmental agencies with the opportunity to correct deficiencies in the bid documents early in the solicitation process in order to "minimize the disruption to procurements and contract performance". The possibility of having to reject all bids, cancel the solicitation and resolicit may be

avoided by requiring the correction of such deficiencies prior to the bid submission date. *Clinical Laboratories of Hawaii v. City & County of Honolulu, Dept. of Budget & Fiscal Services; PCH 2000-8 (October 17, 2000); American Marine Corp. v. DOT, et al., PCH-2005-12 and PCH 2006-1 (March 30, 2006);); Delta Construction v. Dept. of Hawaiian Home Lands, et al., PCH-2008-22/PCH-2009-7 (April 9, 2009); Ludwig Contr., Inc. v. County of Hawaii, PCX-2009-6 (December 21, 2009); Paradigm Constr. v. Dept. of Hawaiian Home Lands, State of Hawaii, PCH-2009-16 (October 7, 2009); Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010); GP Roadway Solutions, Inc. v. Glenn Okimoto as Director of the Dep't of Transportation, PCH-2011-15/PCH-2011-16 (Jan 27, 2012)); Kuni's Enterprises, Inc. v. Michael R. Hansen, Director of the Department of Budget and Fiscal Services, City and County of Honolulu, PCY 2012-021 (August 3, 2012); Hensel Phelps Construction Co. v. Dept. of Transportation, PDH-2021-002 (February 26, 2021).*

Strict compliance with time constraints required; Strict, rather than substantial compliance with the time constraints set forth in HRS §103D-701(a) is required in order to effectuate the statute's underlying purpose. *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget & Fiscal Services, PCH-2000-8 (October 17, 2000)*; *CR Dispatch Service, Inc. dba Security Armored Car & Courier Service v. DOE, et al., PCH-2007-7 (December 12, 2007); Ludwig Contr., Inc. v. County of Hawaii, PCX-2009-6 (December 21, 2009); Paradigm Constr. v. Dept. of Hawaiian Home Lands, State of Hawaii, PCH-2009-16 (October 7, 2009).*

Protest filed 14 days after bid submission is untimely; The filing of a protest 14 days after the bids were submitted defeats the very purpose for which the statute was intended. *Clinical Laboratories of Hawaii, Inc. v. City & County of Honolulu, Dept. of Budget & Fiscal Services, PCH-2000-8 (October 17, 2000)*.

Absence of certification of partial funding; Absent a certification of partial funding, the evidence was insufficient to conclude that the protestor knew or should have known that the City nevertheless intended to award a partially-funded contract for the entire project. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002)*.

Protest based upon content of solicitation; HRS §103D-701 requires that a protest based on the content of the solicitation be submitted prior to the date set for the receipt of offers. This presumes that the protestor will have sufficient knowledge of the contents of the bid documents soon after its issuance and provides governmental agencies with the opportunity to correct deficiencies in those documents early in the process in order to minimize disruption to procurements and contract performance. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH-2002-7 (August 2, 2002); Delta Construction v. Dept. of Hawaiian Home Lands, et al., PCH-2008-22/PCH-2009-7 (April 9, 2009); Ludwig Contr., Inc. v. County of Hawaii, PCX-2009-6 (December 21, 2009); Paradigm Constr. v. Dept. of Hawaiian Home Lands, State of Hawaii, PCH-2009-16 (October 7, 2009); Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010); GP Roadway Solutions, Inc. v. Glenn Okimoto as Director of the Dep't of Transportation, PCH-2011-15/PCH-2011-16 (Jan 27, 2012); Kuni's Enterprises, Inc. v. Michael R. Hansen, Director of the Department of Budget and Fiscal Services, City and County of Honolulu, PCY 2012-021 (August 3, 2012); Securitas Security Services USA, Inc. v. Dept. of Transportation, et al., PDH-2021-005 (May 14, 2021).*

Protest based upon content of solicitation, untimely protest; HRS §103D-701(a) provides that no protest based on the content of the solicitation shall be considered unless it is submitted in writing prior the date set for receipt of offers. A protest received on the date set for receipt of offers is untimely. *Pinky Tows Hawaii, Inc. v. Dept. of Budget and Fiscal Services, City and County of Honolulu, PDH-2018-007 (July 17, 2018).*

Protest based upon content of solicitation; information outside documents*;* Because the protest was based in part on information that was not included in the bid documents, the protest was not a protest based upon the content of the solicitation. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002); MGD Technologies, Inc. v. City & County of Honolulu; PCH-2003-8 (June 20, 2003); Delta Construction v. Dept. of Hawaiian Home Lands, et al., PCH-2008-22/PCH-2009-7 (April 9, 2009).*

Time for filing protest; posting of award*;* HRS §103D-701(a), as amended, requires that protests of an award or proposed award shall in any event be submitted within five working days after the posting of the award. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-18 (February 13, 2003).* ***Untimely protest; equitable estoppel****;* Equitable estoppel may be applied against governmental agencies to prevent manifest injustice. However, the doctrine should be applied only when the failure to do so would operate to defeat a right legally and rightfully obtained-it cannot create a right; nor can it operate to relieve one from the mandatory operation of a statute. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-18 (February 13, 2003).*

Untimely protest; equitable estoppel inapplicable*;* The application of equitable estoppel would frustrate the policy underlying HRS §103D-701(a) by relieving the protestor from the clear and unambiguous time limitation set forth in that section. Accordingly, equitable estoppel is inapplicable under the circumstances presented in this case. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-18 (February 13, 2003).*

Untimely protest; fraudulent concealment*;* The application of HRS §657-20 (fraudulent concealment) is limited to HRS Chapter 663 actions. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-18 (February 13, 2003).*

Untimely protest; HAR §3-126-4(a) invalid; As rules and regulations may not enlarge, alter, or restrict the provisions of the act being administered, the conflict between HRS §103D-701(a) (requiring protests to be filed within 5 working days after protestor knew or should have known of basis for protest) and HAR §3-126-4(a) (permitting protests to be filed prior to the expiration of five working days after the posting of the notice of award) must be resolved in favor of HRS §103D-701(a). *Eckard Brandes, Inc. v. Dept. of Finance, County of Hawaii; PCH-2003-14 (July 15, 2003).*

Untimely protest; content of solicitation; Petitioner's "latent ambiguity" claim is a protest based upon the content of the IFB and as such, Petitioner was required to have filed a protest with Respondent prior to the date set for receipt of offers. *Akal Security, Inc. v. Dept. of Transportation; PCH-2004-10 (August 23, 2004).*

Untimely protest; issuance of addendum; The issuance of an addendum to the IFB does not constitute a separate solicitation that allows the petitioner to raise the claim within 5 working days from the issuance of the addendum, at least where the addendum did not change or otherwise affect the provision which was the subject of the protest. *Stoneridge Recoveries, LLC v. City and County of Honolulu, PCH-2005-7 (December 6, 2005); CR Dispatch Service, Inc. dba Security Armored Car & Courier Service v. DOE, et al., PCH-2007-7 (December 12, 2007).*

Untimely protest; tolling of limitation period by issuance of addendum; Where none of the addenda issued in connection with the IFBs affected the provision upon which the protest was based, the addenda cannot serve as a basis to toll the limitation period. *CR Dispatch Service, Inc., dba Security Armored Car & Courier Service v. Dept. of Education, et al., PCH-2007-7 (December 12, 2007).*

Untimely protest; protest submitted 1 month after issuance of solicitation untimely; HRS §103D-701(a) requires that a protest must be made within 5 days after the protestor knew or should have known of the facts giving rise to the protest. Protestor's protest of the pre-bid solicitation one

month after the issuance of the solicitation was untimely. *Pinky Tows Hawaii, Inc. v. Dept. of Budget and Fiscal Services, City and County of Honolulu, PDH-2018-007 (July 17, 2018).*

5-day period not triggered by speculation; The 5-day period within which a protest must be submitted is not triggered by mere speculation or hindsight. *Delta Construction v. Dept. of Hawaiian Home Lands, et al., PCH-2008-22/PCH-2009-7 (April 9, 2009).*

Untimely protest; license required by solicitation; The IFB unequivocally required a C-37 specialty contractor's license. Thus, if Petitioner believed that that requirement was improper, it was obligated to protest within 5 working days and, in any event, prior to the submission of bids. *Ludwig Contr., Inc. v. County of Hawaii, PCX-2009-6 (December 21, 2009).*

Protest based upon content of solicitation; Paradigm's claim that the Preference is unduly restrictive because it required contractors to provide proof that all applicable returns had been filed and all corresponding payments had been made for the four successive years prior to the submission of their bids, and should be modified "to give recognition to Paradigm for the more than 17 years of experience of its President, Alex Kwon, in Hawaii", constitutes a claim based upon the content of the solicitation. Thus, if Paradigm believed that the Preference was contrary to HRS §103D-405(a) and should be modified "to make it rational", it was obligated to submit such a protest prior to the submission of bids. *Paradigm Constr. v. Dept. of Hawaiian Home Lands, State of Hawaii, PCH-2009-16 (October 7, 2009).*

Untimely protest; failure to timely request debriefing; Petitioner's protest is untimely as Petitioner's request for debriefing was not made within three working days after the posting of the award of the contract. Respondent's granting of Petitioner's late request for debriefing does not give Petitioner the basis to file a protest because Petitioner cannot rely on HRS §103D-304(k) and HAR §3-122-70 as the basis for filing a protest if it did not comply with the initial requirement of filing a request for debriefing within three working days after the posting of the award of the contract. This conclusion is consistent with the Procurement Code's purpose of "expeditious processing of protests through an efficient procurement system so as to minimize the disruption to procurements and contract performance." *Amel Technologies, Inc. v. Dept. of Transportation, State of Hawaii, et al., PDH-2014-007 (June 9, 2014), citing GTE Hawaiian Telephone Company, Inc. v. Dept. of Finance, County of Maui, PCH-98-6 (December 9, 1998).*

Untimely protest; bidder's responsibility to determine if award posted; It is Petitioner's responsibility to determine if an award has been posted for projects it has submitted proposals for, and Respondent is not required to send nonselected providers notices. *Amel Technologies, Inc. v. Dept. of Transportation, State of Hawaii, et al., PDH-2014-007 (June 9, 2014), citing Alii Security Systems, Inc. v. Dept. of Transportation, State of Hawaii, PCY-2012-2 (February 24, 2012).*

Untimely protest; Hearings Officer has no authority to resolve the protested award; A protest filed more than 5 working days after the posting of the award is untimely and the Hearings Officer lacks the authority to resolve the protested award. *Aloha Waste Systems, Inc. v. Department of Education, State of Hawaii, PDH-2017-003 (April 17, 2017).*

C. Subject of Protest; Protestors may file a protest on any phase of the solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer. HAR §3-126-3(b).

Cases:

Filing of second protest based upon the "award" of contract cannot resurrect untimely protest; A protestor is not allowed to file a post award protest (contesting the award itself) on essentially the same factual basis – which was known to the protestor and was used by the

protestor in filing an earlier (pre-award) protest. Rather, the requirement that protests be filed within 5 working days after the protestor knows or should have known of the facts leading to the filing of the protest is still controlling. Thus, the subsequent awarding of the contract, in and of itself, does not provide an independent basis for the filing of a second protest and cannot resurrect an untimely protest. *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998). See also, Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001) (filing of second protest unnecessary).*

Breach of contract claim not properly before Hearings Officer; Construing the foregoing provisions with reference to each other leads to the obvious conclusion that the legislature intended to limit the authority of the Hearings Officer to review claims arising directly from the solicitation process while reserving exclusively to the courts the power to preside over contract disputes. *Roberts Hawaii School Bus, Inc. v. DOE; PCH-2003-25 (November 7, 2003).*

Solicitation process; Solicitation process includes but is not limited to specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer. *Roberts Hawaii School Bus, Inc. v. DOE; PCH-2003-25 (November 7, 2003).*

Letter of clarification not a protest, Hearings Officer lacks jurisdiction; Because Petitioner's letter to Respondent was a request for clarification and not a protest, HRS §103D-701 does not apply. Therefore, the Hearings Officer lacks jurisdiction under HRS §103D-709. *Cushnie Construction v. Dept. of Finance, County of Kauai, PCH-2008-18 (December 11, 2008).*

D. Content of Protest; The written protest shall include as a minimum the following:

(1) The name and address of the protestor;

(2) Appropriate identification of the procurement, and, if a contract has been awarded, the contract number;

(3) A statement of reasons for the protest; and

(4) Supporting exhibits, evidence, or documents available within the filing time in which case the expected availability date shall be indicated.

HAR §3-126-3(c).

Cases:

Content of protest; directory in nature; The requirement in HAR §3-126-3(c) which states that protests shall include supporting exhibits, evidence, or documents appears to be one which was promulgated with a view to the proper and orderly conduct of business concerning convenience rather than substance and therefore can be regarded as directory. This is particularly true where the protest has included a sufficient statement of the reason underlying it, and there has been a refusal by the affected agency to release such materials for inclusion in the protest. *Big Island Recycling & Rubbish v. County of Hawaii, PCH 99-12 (December 17, 1999)*.

Protest must place agency on notice of filing of protest; At minimum, a protest must place the procuring agency on notice of the filing of a protest. Such notice is obviously necessary before the agency can take steps to resolve the protest or issue a decision upholding or denying the protest. Additionally, adequate notice of a protest is a prerequisite to the application of the stay. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH-2002-12*

(October 18, 2002); Maui Kupono Builders, LLC v. State Dept. of Transportation, PDH-2019-006 (December 23, 2019).

Protest; inadequate notice of issues; Protest that did not give Respondent notice of challenge to mineral filler and length of contract was not properly before Hearings Officer. *Maui Kupono Builders, LLC v. Dept. of Transportation, PDH-2019-006 (December 23, 2019).*

Protest properly raised issue; knowledge of issue by agency; Protest properly raised issue of availability of binder and Respondent was clearly aware of issue as it provided response on issue in its denial of protest. *Maui Kupono Builders, LLC v. Dept. of Transportation, PDH-2019-006 (December 23, 2019).*

E. Authority to Resolve Protest; The chief procurement officer or designee, prior to the commencement of an administrative proceeding or an action in court may settle and resolve a protest concerning the solicitation or award of a contract. *HRS §103D-701(b)*.

Cases:

Governmental agencies; limited jurisdiction; Administrative agencies are tribunals of limited jurisdiction. Generally, they only have adjudicatory jurisdiction conferred on them by statute. Their jurisdiction is dependent entirely upon the validity and the terms of the statute reposing power in them. *Roberts Hawaii School Bus, Inc. v. DOE; PCH-2003-25 (November 7, 2003); Stoneridge Recoveries, LLC v. City and County of Honolulu; PCH-2003-5 (June 26, 2003); 2 Am Jur 2d Administrative Law, §275 (2nd Edition).*

F. Agency Decision; If the protest is not resolved by mutual agreement, the chief procurement officer or designee shall promptly issue a decision in writing to uphold or deny the protest. The decision shall:

(1) State the reasons for the action taken; and

(2) Inform the protestor of the protestor's rights to review.

HRS §103D-701(c)

Cases:

Failure to properly inform protestor of its rights to review; estoppel; Respondent's violation of HRS §103D-701(c) may have been a basis for estopping Respondent from claiming that Petitioner's request for administrative review was untimely. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

Failure to properly inform protestor of its right to an administrative hearing renders denial decision defective; A denial decision that *omits* statutorily (HRS §103D-701(c)) mandated information is akin to a denial decision that provides *erroneous* information, if not worse. The Hearings Officer finds and concludes that Respondent's Denial Decision failed to inform Petitioner of its right to an administrative proceeding and hence was defective. The 7-day deadline begins to run from issuance of a *proper* denial decision. *Access Media Services, Inc. v. Hawaii State Legislature, PDH-2018-001 (February 13, 2018).*

Failure to properly inform protestor of the time for appeal; The decision by Chief Procurement Officer must notify the protestor of the correct time limitations under HRS §103D-

712(a). Where the decision erroneously states that the time for appeal is seven days from the date of receipt of the written decision when the statute provides that the time for appeal is for seven days from the date of the issuance of the decision, the decision failed to comply with HRS § 103D-701(c)(2). *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated) (First Circuit Court, 5/28/02).*

Failure to properly inform protestor of the time for appeal*;* Where the decision erroneously states that the time for appeal is seven days from the date of *receipt* of the written decision rather than seven days from the issuance of the decision, a protest filed within the time provided in the decision is nevertheless timely. *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated) (First Circuit Court, 5/28/02).*

Failure to properly inform protestor of the time for appeal; denial of due process; Where the decision erroneously states that the time for appeal is seven days from the date of *receipt* of the written decision rather than seven days from the issuance of the decision, a protest filed more than seven days after the issuance of the decision but within the time provided in the decision would constitute a denial of the appellant's right to due process. *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated) (First Circuit Court, 5/28/02).*

Agency decision; failure to address all issues raised in protest; If the agency's determination that a protest was untimely is incorrect, the agency's failure to address all of the issues raised in the protest would only result in unnecessary delays and piecemeal litigation. *Marsh USA Inc. v. City & County of Honolulu, et al., PCX-2010-1 (February 11, 2010).*

Agency decision must address all issues raised in protest; waiver; Just as protestors are required to raise all of its claims in a timely and "efficient" manner, so is the procuring agency required to respond to all of those claims in its decision. The practice of responding to a protest in piecemeal fashion which may result in the need for multiple proceedings is directly contrary to HRS §103D-701 and the Legislature's desire to minimize the disruption to procurements and contract performance. Accordingly, a procuring agency's failure to promptly address all of the protestor's claims in its decision may constitute a waiver of the agency's right to challenge those claims. *Marsh USA Inc. v. City & County of Honolulu, et al., PCX-2010-1 (February 11, 2010).*

Agency decision must address all issues raised in protest; waiver determined from totality of circumstances; A waiver occurs when there is "an intentional relinquishment of a known right, a voluntary relinquishment of rights, and the relinquishment or refusal to use a right" *Coon v. City & County of Honolulu, 98 Hawaii 233, 47 P. 3d 348 (2002)*, and is determined by a consideration of the totality of the circumstances. *State v. Mariano, 114 Hawaii 271, 160 P.3d 1258 (2007)*. An effective waiver presupposes full knowledge of the right or privilege being waived and some act done designedly or knowingly to relinquish it. The waiver must be accomplished with sufficient awareness of the relevant circumstances and likely consequences. *State of Connecticut v. Nelson 986 A .2d 311(2010) Marsh USA Inc. v. City & County of Honolulu, et al., PCX-2010-1 (February 11, 2010).*

Agency decision must address all issues raised in protest; waiver; governmental agencies placed on notice; Governmental agencies are henceforth placed on notice that their failure to promptly address in their decision all of the claims raised in a protest may result in the waiver of their ability to later challenge those unaddressed claims. *Marsh USA Inc. v. City & County of Honolulu, et al. PCX-2010-1 (February 11, 2010).*

G. ***Decision Mailed to Protestor***; A copy of the decision shall be mailed or otherwise furnished immediately to the protestor and any other party intervening. HRS §103D-701(d).

Cases:

> ***Issuance of denial by facsimile transmission; timely appeal****;* A procuring agency may issue its decision under HRS §103D-701(c) by facsimile transmission and, in that event, the term "issuance" as used in HRS §103D-712(a) means the date of the transmission, as evidenced by the confirmation sheet. *Diversified Plumbing & Air Conditioning v. Hawaii Public Housing Authority, et al., PCH- 2009-4 (March 9, 2009); Friends of He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii, PCX-2009-4 (November 19, 2009).*

H. ***Stay***; In the event of a *timely* protest, no further action shall be taken on the solicitation or the award of the contract until the chief procurement officer makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State. HRS §103D-701(f); HAR §3-126-5 (states "no award").

Cases:

> ***Violation of stay;*** The award of a contract notwithstanding the fact that a timely protest had been received and no written determination had been made by the agency that the award of the contract without delay was necessary to protect the substantial interests of the State, violates the provisions of HRS §103D-701(f). Because the award of a contract so severely limits the relief available, HRS §103D-701(f) requires that a timely protest halt solicitation and contracting activities until the protest is resolved. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997).*
>
> ***Violation of stay;*** The contract was awarded to KTW notwithstanding the fact that a timely protest had been received and no written determination had been made by Respondent that the award of the contract without delay was necessary to protect the substantial interests of the State. The record is completely devoid of any such "substantial interest" determination that would arguably meet the requirements of HRS §103D-701(f). Thus, the award of the contract to KTW violated the stay. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998).*
>
> ***Head of purchasing agency chargeable with knowledge of applicable regulations; reliance solely on HRS §103D-701 insufficient to make execution of contract reasonable in face of stay provision****;* By virtue as head of a purchasing agency with authority to enter contracts, Kane is certainly chargeable with knowledge of the regulations applicable to public procurement. Thus, Kane's reliance on HRS §103D-701 was insufficient to make his execution of the contract, notwithstanding the stay provision, reasonable. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997).*
>
> ***Merits of protest irrelevant to substantial interest determination****;* Consideration of the merits of the protest has no place in the "substantial interest" determination required by HRS §103D-701(f). *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997).*
>
> ***Substantial interest determination must specify State's interest****;* A "substantial interest" determination must specifically identify the State interests involved and articulate why it is necessary for the protection of those interests that the contract be awarded without delay. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997).*

Stay provision applies to all activities relating to procurement. *In re Carl* makes clear that all activities relating to the procurement, including activities relating to the solicitation, contract and performance of the contract must immediately cease once a timely protest has been received, notwithstanding the delivery of the contract and a notice of award letter. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

Processing of contract violated stay. City violated *HRS §103D-701(f)* when it continued to process the contract for final execution notwithstanding the timely filing of a protest. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

Action taken prior to automatic stay not a violation; Where Petitioner, the successful incumbent bidder of the contract, did not vacate the Senate Radio Room after its contract expired, actions taken to request return of parking gate cards prior to the automatic stay were merely housekeeping matters and not a violation of the stay. *Access Media Services Inc. v. Hawaii State Legislature and 'Olelo Community Television, PDH-2019-001 (February 4, 2019).*

Substantial interest determination; requirements; A determination that substantial State interests were "involved" is not sufficient under the plain language of HRS §103D-701(f), to allow the agency to proceed with the contract despite the protest. Not only must substantial State interests be "involved", but the delay required to resolve the solicitation protest must threaten to impair those interests such that award of the contract without delay is necessary to protect them. *Carl Corp. v. DOE, 85 Haw. 431, 946 P.2d 1 (1997).*

Stay; general rule; The general rule established by HRS §103D-701(f) is that a timely protest halts solicitation and contract activities until the protest is resolved. By maintaining the status quo during the pendency of a protest, violations of the procurement Code can be rectified before the work on the contract has proceeded so far that effective remedies, for the protestor and the public, are precluded by expense and impracticality. *Carl Corp. v. DOE, 85 Haw. 431, 946 P.2d 1 (1997).*

Substantial interest determination; delay normally minimal; Because the Code shortens deadlines for filing protests and applications for review and expedites the administrative hearings process, the delay contemplated is minimal, generally a few months. *Carl Corp. v. DOE, 85 Haw. 431, 946 P.2d 1 (1997).*

Substantial interest determination; essential state functions; There are situations where a delay of several months before a contract may be awarded would have serious repercussions on the continuation of essential State functions. It is in these situations that the solicitation or award is allowed to proceed, upon a written determination that "the award of the contract without delay is necessary to protect the substantial interests of the State." As the commentary to the ABA Model Code §9-101, which is substantially identical to HRS §103D-701(f), explains: "In general, the filing of a protest should halt the procurement until the controversy is resolved. In order to allow essential governmental functions to continue, Subsection (6) provides that the [State] may proceed with the solicitation or award of the contract, despite the protest, upon a determination in writing by the Chief Procurement Officer or the head of the Purchasing Agency that such action is necessary. It is expected that such a determination will occur only in those few circumstances where it is necessary to protect a substantial interest of the [State]." *Carl Corp. v. DOE, 85 Haw. 431, 946 P.2d 1 (1997).*

Substantial interest determination; burden of proof; The bidder met its burden of proving by a preponderance of the evidence that continued performance on the contract pending resolution of the protest was not necessary to protect substantial State interests. *Carl Corp. v. DOE, 85 Haw. 431, 946 P.2d 1 (1997).*

Substantial interest not established; The record shows by a preponderance of the evidence that performance of the contract without delay was not necessary to maintain library automation services. A library official testified that DRA would continue to support the agency on a month-to- month extension agreement and that the maintenance support contract with DRA renews automatically from year to year if both parties agree to all the terms and that DRA was willing to continue providing services under its contract until the protest was resolved and a new vendor commenced providing services. Therefore, although the State may have a substantial interest in continuing library automation services, award of the contract to Ameritech without delay was not necessary to protect that interest and Carl proved as much by a preponderance of the evidence. *Carl Corp. v. DOE, 85 Haw. 431, 946 P.2d 1 (1997).*

Substantial interest not established; The savings that would be realized by motorists in having a vehicle storage lot within the zone; the disruption that would result from having to transfer the towing duties back to Petitioner; and a preference for distributing the towing services contract to other vendors are not "substantial government interests." Moreover, the fact that the substantial interest determination was not made until some eleven days after the protest had been filed also belies the City's characterization of those interests as substantial. *Stoneridge Recoveries, LLC v. City and County of Honolulu, PCH-2004-3 (March 19, 2004).*

Substantial interest established; The City's need for towing services in the zone is a substantial interest where the evidence established that such services were required to remove vehicles that are involved in accidents, obstruct driveways, block fire hydrants, and otherwise pose public safety hazards. *Stoneridge Recoveries, LLC v. City and County of Honolulu, PCH-2004-3 (March 19, 2004).*

Stay applies to contract performance; In discussing the stay and the remedies available under the Procurement Code, the *Carl* Court held that a timely protest halts solicitation and *contract activities* until the protest is resolved, and "*the further performance on the contract has proceeded*, the more likely it is, given the applicable factors, that ratification of the contract is 'in the best interests of the State,' effectively eliminating any remedy, either to the public or the protestor, from an illegally entered contract." The Court's comments make clear that the stay applies to, and requires the halting of, any further performance on the contract. *Stoneridge Recoveries, LLC v. City and County of Honolulu, PCH-2004-3 (March 19, 2004).*

Stay not applicable to contract unrelated to solicitation; The imposition of the stay does not entitle Petitioner to the contract since the stay only affects the emergency procurement, award and contract to Oahu Auto. It does not affect the towing services agreement between Petitioner and Respondent which expired after March 5, 2004. *Stoneridge Recoveries, LLC v. City and County of Honolulu, PCH-2004-3 (March 19, 2004).*

***Violation of Stay; Basis for sanctions*;** Under the Code as presently written, a violation of the stay does not present an independent basis for the imposition of sanctions. Where the agency violates the stay, but the protestor is unable to prove that (1) the solicitation itself was in violation of the code and that (2) the agency's actions in awarding the contract amounted to bad faith, the Hearings Officer is powerless to impose sanctions for the violation and award attorney's fees. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001); Access Media Services Inc. v. Hawaii State Legislature and 'Olelo Community Television, PDH-2019-001 (February 4, 2019).*

Substantial interest determination; uncertainty arising from litigation; The uncertainty arising from litigation cannot serve as the sole basis for establishing that a waiver of the stay without delay is necessary. That is because the very purpose of a substantial interest determination is to allow the solicitation and contract award to proceed in the face of a pending protest or administrative review – but only when the pending action threatens to impair the substantial interest involved. Notwithstanding this, there is nothing in the CPO's "comments" that identifies or otherwise

indicates that the time required to complete the election preparations was identified or considered. Thus, the CPO's decision did not sufficiently "articulate why it is necessary" for the contract to be awarded without delay. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

I. Costs; In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid or proposal preparation costs but no attorney's fees. *HRS §103D-701(g); HAR §3-126-7(b).*

J. Request for Reconsideration; *HAR §3-126-8*. [REPEALED eff 12/15/1995]

Cases:

Untimely request for reconsideration does not restart time to appeal; A Petitioner's untimely filing of a motion for reconsideration – regardless of how it may have been handled by the agency – did not restart the clock for calculating the time to file a request for an administrative review under HRS §103D-712(a). *Brewer Environmental Industries, Inc. v. County of Kauai, PCH 96-9 (November 20, 1996)*.

Validity of rule providing for reconsideration; HAR §3-126-8 may be either an appropriate rule for clarifying and enhancing the implementation of HRS Chapter 103D, or an invalid rule which "violates constitutional or statutory provisions, or exceeds the statutory authority of the agency as expressed by the legislature in enacting that chapter. *RCI Environmental, Inc. v. State Dept. of Land and Natural Resources, PCH 2000-10 (January 2, 2001).*

Reconsideration rule counterproductive to purpose of Code; It would seem that the reconsideration process may actually be counterproductive to the expressed purpose(s) of the Hawaii Public Procurement Code. *RCI Environmental, Inc. v. State Dept. of Land and Natural Resources, PCH 2000-10 (January 2, 2001).*

Reconsideration rule appears to be invalid; The promulgation of HAR §3-126-8 might have been appropriate if the ten working days allowed for requesting a reconsideration under subsection (b) had been less, instead of more, than the seven calendar days allowed for requesting an administrative hearing under subsection (e). Nevertheless, such is not the situation here, where the effect of the rule is to extend – more or less indefinitely – the statutory time limitations on actions prescribed in HRS §103D-712. Thus, it appears that HAR §3-126-8 is invalid because it exceeds the statutory authority of the procurement policy board and the Petitioner's request for an administrative hearing should actually have been made in accordance with the requirements of HRS §103D-712 (i.e., within seven calendar days of Respondent's decision denying the Petitioner's protest). *RCI Environmental, Inc. v. State Dept. of Land and Natural Resources, PCH 2000-10 (January 2, 2001).*

XIII. ADMINISTRATIVE REVIEW

A. Jurisdiction of Hearings Officers; Hearings Officers 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.

HRS §103D-709(a).

Cases:

De novo determination; The provisions of HRS §103D-709(a) extend jurisdiction to the Hearings Officer to review de novo the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer, made pursuant to HRS §§103D-310, 103D-701 or 103D-702. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997)*; *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000); Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001); Phillip G. Kuchler, Inc. v. DOT; PCH-2003-21 (March 18, 2004); Abhe & Svoboda, Inc. v. Dep't of Accounting and General Services, PCX-2009-5 (Dec. 3, 2009); Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010); Realty Laua, LLC v. HPHA, PCH-2011-1 (Nov. 18, 2011); Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Dec. 28, 2011); GP Roadway Solutions, Inc. v. Glenn Okimoto as Director of the Dep't of Transportation, PCH-2011-15/PCH-2011-16 (Jan 27, 2012); Maui Kupono Builders, LLC v. Dept. of Transportation, PDH-2019-006 (December 23, 2019); Certified Construction, Inc. v. DAGS, et al., PDH-2020-009 (January 29, 2021); SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-1021-001 (February 25, 2021); Securitas Security Services, USA, Inc. v. Dept. of Transportation, et al., PDH-2021-005 (May 14, 2021).*

De novo determination*;* Under the State Procurement Code, the Hearings Officer engages in a de novo review of the claims in the request for administrative review. *Safety Systems and Signs Hawaii, Inc. v. DOT, et al., PDH-2014-005 (April 30, 2014); Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Jurisdiction of administrative agency. An administrative agency may always determine questions about its own jurisdiction. *Carl. Corp. v. State, 93 Haw. 155, 997 P.2d 567 (2000).*

No jurisdiction over concession contract; A petition for an administrative hearing to contest the award of a concession contract which was solicited/awarded by an agency pursuant to the provisions of HRS Chapter 102 (Concessions on Public Property) does not fall within the jurisdictional authority of DCCA hearings officers as set out in HRS Chapter 103D. The term "concession" (as defined in HRS §102-1) focuses on an agency's granting a privilege to conduct certain operations, while the term, "procurement" (as defined in HRS §103D-104) focuses on the agency acquiring goods, services or construction. *Elite Transportation Co., Inc. v. State Dept. of Transportation, PCH 96-2 (May 21, 1997). See also Robert's Tours and Transportation, Inc. v. DOT, PCH-2011-3 (Sep. 2, 2011).*

No jurisdiction over concession contract even if solicited/awarded pursuant to HRS Chapter 103D; A petition for an administrative hearing to contest the award of a concession contract which was solicited/awarded by an agency pursuant to the provisions of HRS Chapter 103D (Hawaii Public Procurement Code) does not fall within the jurisdictional authority of DCCA hearings officers. *Hawaiian Ocean's Waikiki, Inc. v Department of Budget and Financial Services, City and County of Honolulu, PDH-2017-005 (October 3, 2017).*

No jurisdiction to review exemption determination; HRS §103D-102(b) precluded administrative review of chief procurement officer's determination that contract was exempt from requirements of Code. Therefore, Hearings Officer correctly concluded that he did not have jurisdiction to review chief procurement officer's determination that interim contract was exempt from requirements of code. *Carl. Corp. v. State, 93 Haw. 155, 997 P.2d 567 (2000).*

No jurisdiction to hear contractual disputes; Under HRS Chapter 103D, the Hearings Officer has no jurisdiction to consider or decide contractual disputes over existing contracts. *Roberts Hawaii School Bus, Inc. v. DOE, PCH 2003-025 (November 7, 2003); Kuni's Enterprises, Inc. v. Michael R. Hansen, Director of the Department of Budget and Fiscal Services, City and County of Honolulu, PCY 2012-021 (August 3, 2012).*

No jurisdiction to consider "new" claims, failure to exhaust administrative remedies; Absent some factor that excuses the inclusion of any claim in the original procurement protests of Petitioners, claims protesting the award of contract to Intervenor cannot be brought if they were not included in the original protests. There would be no jurisdiction to consider these "new" claims because of the failure to exhaust administrative remedies. *Kiewit Infrastructure West Co. v. Dep't of Transportation and Goodfellow Bros., Inc. v. Dep't of Transportation and Hawaiian Dredging Construction, Co., PCX-2011-2/PCX-2011-3 (June 6, 2011).*

No jurisdiction to consider matters raised for the first time at administrative proceeding; Petitioner's request to amend its protest letter to include a claim that the stay was violated was denied. Petitioner did not protest the denial. It is axiomatic that a CPO cannot make a determination on a claim, allegation or issue that is not raised in the protest letter and, therefore, a hearings officer cannot review that determination. The Hearings Officer does not have jurisdiction to hear a motion to reinstate an automatic stay when the alleged violation of the stay was not timely protested. *Access Media Services Inc. v. Hawaii State Legislature and 'Olelo Community Television, PDH-2019-001 (February 4, 2019; Maui Kupono Builders, LLC v. Dept. of Transportation, PDH-2019-006 (December 23, 2019).*

No jurisdiction; failure to exhaust administrative remedies; Hearings Officer does not have jurisdiction where the agency level protest has not yet been addressed by the agency. It is axiomatic that the Hearings Officer cannot decide if the determinations of the chief procurement officer were in accordance with the Constitution, statutes, rules and terms and conditions of the solicitation or contract pursuant to HRS 103D-709(h) if those determinations were not properly made (pre-dated the protest) and/or not made at all. *FV Coluccio Construction Co., Inc. v. City & County of Honolulu, Department of Environmental Services and Department of Budget and Fiscal Services. PDH-2018-004 (March 14, 2018).*

Termination of contract renders moot question of whether contract should be ratified; Hearings Officer was not required to consider best interest of State in accepting parties' termination of contract, and Hearings Officer properly found that contracting agency's termination of contract rendered moot the determination of whether contract should be terminated or ratified. *Carl. Corp. v. State, 93 Haw. 155, 997 P.2d 567 (2000).*

Termination of contract renders moot question of protestor's entitlement to attorney's fees unless procuring agency acted in bad faith or arbitrarily and capriciously. As a general rule, the cancellation of the underlying project and termination of the protested contract renders moot an unsuccessful bidder's protest of the contract award, even if a successful protestor could otherwise be entitled to an award of attorney's fees. There is an exception to this general rule if the protestor shows the procuring agency acted in bad faith or arbitrarily and capriciously in cancelling the underlying project and terminating the protested contract. *International Display Systems, Inc. v. Okimoto, 129 Haw. 355, 300 P.3d 601 (Haw. App. 2013).*

Termination of Hearings Officer's jurisdiction upon issuance of decision; The Code requires Hearings Officers to expeditiously issue a decision on a request for review made pursuant to HRS §103D-709 that disposes of the underlying protest. When issued, that decision is final

and conclusive and constitutes a final adjudication of the merits of the protest. The issuance of that decision also terminates the Hearings Officer's jurisdiction over the request for review. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH-2002-12 (October 18, 2002).*

Question of lack of jurisdiction can be raised at any time; 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, as jurisdiction is a statutory matter and cannot be conferred by the stipulation or agreement of the parties. *Ohana Flooring v. Dep't of Transportation, PCH-2011-12 (Nov. 18, 2011); Kiewit Infrastructure West Co. v. Dep't of Transportation and Goodfellow Bros., Inc. v. Dep't of Transportation and Hawaiian Dredging Construction, Co., PCX-2011-2/PCX-2011-3 (June 6, 2011); Nan, Inc. v. HART, PDH-2015-004 (May 28, 2015).*

No jurisdiction over protest once decision issued; reliance on earlier protest inappropriate; Petitioner cannot rely on its protest in PCH-2002-7 to establish the Hearings Officer's jurisdiction over its September 27, 2002 request for review since that protest was fully adjudicated in the earlier action. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH-2002-12 (October 18, 2002).*

Governmental agencies; limited jurisdiction; Administrative agencies are tribunals of limited jurisdiction. Generally, they only have adjudicatory jurisdiction conferred on them by statute. Their jurisdiction is dependent entirely upon the validity and the terms of the statute reposing power in them. *Roberts Hawaii School Bus, Inc. v. DOE; PCH-2003-25 (November 7, 2003); Stoneridge Recoveries, LLC v. City and County of Honolulu; PCH-2003-5 (June 26, 2003); 2 Am Jur 2d Administrative Law, §275 (2nd Edition).*

Suspension of Code by Governor terminates Hearings Officer jurisdiction*;* As a result of the 2006 earthquake, the Governor, pursuant to HR S § 128-10, suspended application of the Code for projects aimed at repairing damage. Suspension of the Code removed the solicitation and request for administrative review from the jurisdiction and authority of the Hearings Officer. *HI-Tech Rockfall Construction, Inc. v. County of Maui, PCH-2008-1 (May 5, 2008).*

Doctrine of primary jurisdiction did not apply; A claim that the Hearing Officer presiding over a procurement protest should suspend the proceeding so that critical issues could first be resolved by a federal administrative agency with responsibility for, and special competence in, those issues was rejected because there was no evidence the protestor could meaningfully participate in the federal administrative process. *Soderholm Sales and Leasing, Inc. v. County of Kauai, Department of Finance, PCY 2012-017 (July 5, 2012).*

Failure to perfect appeal; HAR §3-126-7(c) states that a "protestor ***shall*** inform the head of the purchasing agency within seven calendar days after the final decision if an administrative appeal will be filed". Petitioner's failure to comply with HAR §3-126-7(c) constitutes a failure to perfect its appeal of the denial of its protest and therefore requires the dismissal of Petitioner's Request for Administrative Review. *Soderholm Sales and Leasing, Inc. v. Department of Transportation, City and County of Honolulu, PDH-2022-002 (June 6, 2022).*

No jurisdiction to hear untimely protest; Petitioner had five working days to protest the content of the Solicitation. The Hearings Officer does not have jurisdiction to hear Petitioner's Request for Administrative Review because the protest was untimely. *Soderholm Sales and Leasing, Inc. v. Department of Transportation, City and County of Honolulu, PDH-2022-002 (June 6, 2022).*

B. ***Minimum Amount in Controversy***; Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that:

(1) For contracts with an estimate value of less than $1,000,000, the protest concerns a matter that is greater than $10,000; or

(2) For contracts with an estimate value of $1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimate value of the contract.

(3) "Estimate value of the contract" or "estimated value," with respect to a contract, means the lowest responsible and responsive bid under section 103D-302, or the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous under section 103D-303, as applicable.

HRS §§103D-709(d); 103D-709(k)[1].

Cases:

Estimated value of contract; Whether a protest satisfies the amounts required by HRS §§103D-709(d) and (e) depends on a consideration of the lowest responsible, responsive bid or the bid amount from the responsible offeror whose proposal has been deemed to be the most advantageous. This, of course, presumes that all bids or offers have been submitted and are available for inspection. Where, however, a protest is filed prior to the date set for the submission of bids, as in the case of a protest over the contents of a solicitation, it would be impossible to determine the estimated value of the contract. Because the estimated value of the contract cannot be determined for protests over the content of the solicitation, the requirements set forth in HRS §103D-709(d) and (e) are inapplicable and therefore, protests over the contents of a solicitation do not need to meet the requirements in subsections (d) and (e) as prerequisites to the protestor's ability to pursue a request for administrative review. *Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010).*

Standing, minimum amount in controversy; Pursuant to HRS § 103D-709(d), the matter at issue must be of a certain monetary value or a party may not initiate a proceeding with the Office of Administrative Hearings. *Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii and Hawaiian Dredging Company, Inc.,* PCX 2011-2 and *Goodfellow Bros., Inc. v. Department of Transportation, State of Hawaii and Hawaiian Dredging Construction Company, Inc., PCX 2011-3 (consolidated cases) (*June 6, 2011).

Jurisdiction; determination of the matter of concern; Under HRS §103D-709(d), the matter of concern is not the difference between the value of the protestor's bid or proposal and the estimated value of the contract. This would lead to an unacceptable result at odds with the Legislature's intent of eliminating protests involving relatively minor issues so that the procurement is not delayed. Such an interpretation would allow a bid protest over a minor, even trivial matter, to hold up the procurement if there was a big difference in price between the first and second bidder but not if there was less than a ten percent price difference. Not only would this interpretation delay the procurement on account of minor issues, a meritorious protest would result in the State having to pay more to the winning protestor only if that winning protestor's bid was more than ten percent higher than the low bid. *Air Rescue Systems Corp. v. Finance Department, PDH 2012-006 (December 12, 2012); Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Jurisdiction; request for proposals; estimated value of the contract*;* HRS §103D-709(j) specifically defines "estimated value" when a request for proposal is involved, as "the bid amount of the responsible offeror whose proposal is determined in writing to be the most advantageous

[1] HRS §103D-709(f)-(j) were renumbered to §103D-709(g)-(k) respectively by Act 73 (2019).

under section 103D-303." The "bid amount" clearly refers to the amount the agency would pay, not save, under the contract. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Jurisdiction; determination of matter of concern*;* The protestor's contention that the total value of the savings or the net value of the savings to the agency from the competing offerors determines the amount of the matter of concern is incorrect and unacceptable. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014); 57 Engineering, Inc. v. Dept. of Education, State of Hawaii, PDH-2018-009 (October 23, 2018).*

Jurisdiction; determination of matter of concern; Where the protest concerns a matter involving the failure to submit a subcontractor's certification with its bid, the amount in controversy is not the difference between the lowest bid and the lowest responsible, responsive bid. The amount in controversy is the value of the subcontractor's work. Because the subcontractor's work was valued less than 10% of the estimated value of the contract, the Hearings Officer lacked jurisdiction. *57 Engineering, Inc. v. Dept. of Education, State of Hawaii, PDH-2018-009 (October 23, 2018).*

Jurisdiction; determination of matter of concern; Protester failed to list a subcontractor on its bid rendering the bid nonresponsive. The matter of concern was the value of the subcontractor's work. Where Protestor stated that the value of the missing subcontractor's work was less than 1% of the total amount of the bid, the matter of concern was not equal to no less than 10% of the estimated value of the contract. Therefore, the Hearings Officer did not have jurisdiction in the matter. *Mei Corporation v. Dept. of Budget and Fiscal Services, City and County of Honolulu and C C Engineering & Construction Inc., PDH-2019-004 (September 27, 2019).*

Jurisdiction; determination of matter of concern; challenge to entire offer*;* The protest on the ground that the proposal is ambiguous and does not clearly identify the proposer is a direct challenge to the entire offer. The failure to unambiguously identify the proposer means that there is no proposal to consider. The entire proposal is therefore the "matter" of "concern". *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Jurisdiction; determination of matter of concern; challenge to entire proposal*;* The claim that the offer form makes the proposal both conditional and non-responsive is a challenge to the entire proposal. Thus the "matter" of "concern" is one of "all or nothing." Similarly, a challenge asserting there has been a submission of two prices goes to the very heart of the entire proposal. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Jurisdiction; determination of matter of concern; denial of apprenticeship preference is an "all or nothing" matter of concern*; The* Hearings Officer makes a *reasonable inference* that Alpha's Bid was *responsive* to the Solicitation *at the time of bid opening*. Both Alpha and Goodfellow claimed the *apprenticeship preference* in their respective Bids. By comparison, Alpha was the *lowest responsive bidder* at the time of bid opening. It wasn't until *after* Goodfellow's Protest, that the County determined that Alpha's Bid did *not* qualify for the 5% *apprenticeship preference*, resulting in Alpha being the *second* lowest bidder. In the instant case, the issue of whether Alpha qualified for the *apprenticeship preference* determines whether Alpha should have been awarded the contract. The matter of concern is "all or nothing". (Footnote omitted). *Alpha, Inc. v. County of Maui, Dept. of Finance, et al*., PDH-2024-003 (August 14, 2024).

Matter of concern; blank line item; jurisdictional amount inapplicable*;* A blank line item is worth zero, and the amount of the "matter of concern" is also zero. Since the "matter of concern" as appropriately considered in light of the relevant contract provisions has no value, the jurisdictional minimum amount of ten percent of the contract's estimated value is not involved here. *Nan, Inc. v. Department of Public Works, County of Hawaii, et al., PDH-2014-017 (December 29, 2014).*

Matter of concern; validity of bid bond*;* The matter of concern is the validity of the protestor's bid bond. The protest "concerns a matter" that, at a minimum, is valued at $43,016 (5% of the protestor's bid), which value is above the jurisdictional minimum amount. *Certified Construction, Inc. v. Dept. of Accounting and General Services, State of Hawaii, PDH-2014-013 (November 21, 2014).*

Minimum amount in controversy must be based on claims over which Hearings Officer has jurisdiction; The Hearings Officer assumed that the minimum amount in controversy requirement pertained only to the allegations stage of the request for an administrative hearing. Even so, the Hearings Officer must have jurisdiction over those allegations so that the protest meets the minimum amount in controversy requirement. A protestor cannot bootstrap itself into compliance with the minimum amount in controversy requirement by relying on claims over which there is no jurisdiction. *Sumitomo Corporation of America v. Director, Department of Budget and Fiscal Services, City and County of Honolulu, PCX-2011-5 (August 13, 2011; Nan, Inc. v. HART, PDH-2015-004 (May 28, 2015).*

Minimum amount in controversy; "matter"; A protestor is entitled to aggregate claims, even if factually unrelated, in order to meet the minimum jurisdictional amount. The word "matter" when used in the singular in HRS §103D-709(d) can refer to multiple claims by one party that makes up one "matter." The language of the 2012 amendments to the Procurement Code is the primary evidence of the Legislature's intent, and that language supports accumulation or aggregation of claims as long as the total exceeds the minimum jurisdictional amount. *Nan, Inc. v. HART, PDH-2015-004 (May 28, 2015).*

Minimum amount in controversy; Individual claims can be aggregated in order to determine if a protest brings into question matters totaling the required jurisdictional amount (10% of the estimated value of the contract for contracts with an estimated value of $1,000,000 or more.) Here, however, the aggregation of Nan′s claims totals well below the required jurisdictional amount, accordingly the RFAH should be dismissed for lack of jurisdiction. *Nan, Inc. v Department of Budget and Fiscal Services, City and County of Honolulu, PDH-2015-005 (July 14, 2015).*

Minimum amount in controversy; When there are multiple claims that, in the aggregate, exceed the jurisdictional amount, and one or more of those claims are without merit such that the remaining undecided claims are below the jurisdictional amount, there is no longer jurisdiction to consider the remaining undecided claims. *Hensel Phelps Construction v. Department of Transportation, State of Hawaii, PDH-2016-004 (October 14, 2016).*

Minimum amount in controversy; A bidder protesting an award of a contract under HRS § 103D-303(sealed proposals) may initiate a proceeding under HRS § 103D-709 provided the protest concerns a matter that is greater than $10,000. Pursuant to HRS § 103D-709(e), Petitioner's $100 bond represents that the estimated value of the contract is $10,000. OAH does not have jurisdiction over a protest concerning a contract valued at $10,000. Estimating the value of the contract at $69,578.67 also renders Petitioner's $100 protest bond insufficient under HRS § 103D-709(e). *Soderholm Sales & Leasing v. Department of Education, PDH 2022-001 (May 26, 2022).*

Estimated value of contract; low bid determinative; Where the protestor's bid was the apparent lowest responsible and responsive bid, its bid amount determined the estimated value of the contract. *Certified Construction, Inc. v. DAGS, et al., PDH-2020-009 (January 29, 2021).*

C. Procurement Protest Bond; The party initiating a proceeding falling within section 103D-709(d) shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of one per cent of the estimated value of the contract.

The cash or protest bond shall be returned to that party, minus administrative costs as determined by the office of administrative hearings of the department of commerce and consumer affairs; provided that full forfeiture of the cash or protest bond shall occur if the initiating party does

not prevail in the administrative proceeding and the office of administrative hearings finds that the appeal was frivolous or made in bad faith, in which case the cash or protest bond shall be deposited into the general fund.

HRS §103D-709(e).

Cases:

Jurisdictional requirements to perfect appeal; purpose; In addition to expediting the overall appeals process, the amendments to HRS §103D-709, as provided by Act 175, were obviously designed to limit the filing of appeals. *Hi-Tech Rockfall Construction, Inc. v. County of Maui, PCH-2008-1 (May 5, 2008). Friends of He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii, PCX-2009-4 (November 19, 2009).*

Bond required to complete appeal; In order to file an appeal with OAH, the protest must meet the jurisdictional amounts set forth in subsection (d), and the protestor must submit a bond meeting the criteria set forth in subsection (e). Until such bond is posted, the request for administrative review is incomplete and the time limitation for filing a valid request for administrative review continues to run. Thus, a request for administrative review was untimely filed where a cash bond was posted eight days after the issuance of the denial. *Friends of He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii, PCX-2009-4 (November 19, 2009); Whale Environmental Services, LLC v. State of Hawaii, Department of Land and Natural Resources, PDH-2017-006 (October 6, 2017).*

Untimely protest; failure to file bond with request for hearing; The bond must be filed with the Office of Administrative Hearings along with the request for hearing within the seven-day limit of HRS § 103D-712(a). *Derrick's Well Drilling and Pump Services, LLC v. County of Maui, Department of Finance,* PDH 2012-001 (July 26, 2012); *A's Mechanical Builders, Inc. v. Department of Accounting and General Services, State of Hawaii, PDH 2013-004 (May 7, 2013).*

Estimated value of contract; Whether a protest satisfies the amounts required by HRS §§103D-709(d) and (e) depends on a consideration of the lowest responsible, responsive bid or the bid amount from the responsible offeror whose proposal has been deemed to be the most advantageous. This, of course, presumes that all bids or offers have been submitted and are available for inspection. Where, however, a protest is filed prior to the date set for the submission of bids, as in the case of a protest over the contents of a solicitation, it would be impossible to determine the estimated value of the contract. Because the estimated value of the contract cannot be determined for protests over the content of the solicitation, the requirements set forth in HRS §103D-709(d) and (e) are inapplicable and therefore, protests over the contents of a solicitation do not need to meet the requirements in subsections (d) and (e) as prerequisites to the protestor's ability to pursue a request for administrative review. *Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010).*

Time to file continues to run until bond posted; written request for hearing by itself is not sufficient; In order to file an appeal with OAH, the protest must meet the jurisdictional amounts set forth in subsection (d), and the protestor must submit a bond meeting the criteria set forth in subsection (e). Until such bond is posted, the request for administrative review is incomplete and the time limitation for filing a valid request for administrative review continues to run. *Friends of He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii, PCX-2009-4 (November 19, 2009).*

Applicability of bond requirement; Protestor's right to maintain an appeal vests only upon its filing of a request for administrative review that meets the requirements imposed by the laws in effect at the time the request is filed. In this case, because Petitioner initiated the instant appeal in October 2009, well after the Act took effect in July, the Act is clearly applicable, and as such, Petitioner was obligated to comply with the bonding requirement imposed by the Act. *Friends of*

He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii, PCX-2009-4 (November 19, 2009).

Protestor not entitled to use lack of advice from OAH as an excuse for failure to file a bond*;* Because some procurement protests do not require a protest bond, OAH clerical personnel accept all requests for hearings in procurement protests for filing even if a bond is not provided. OAH is not obligated to provide legal advice to those filing requests for hearings. A protestor cannot use the lack of notification from OAH that a bond was required upon filing a request for hearing as an excuse for not filing a bond or a waiver of the bond requirements. *Air Rescue Systems Corp. v. Finance Department County of Hawaii, PDH 2012-006 (December 16, 2012).*

Bond requirement; no bond, no jurisdiction; Ignorance of the law is no excuse for not satisfying the jurisdictional requirement of filing a protest bond. The failure to submit a protest bond when such bond is required means that there is no jurisdiction to consider Petitioner's claims. *Rolloffs Hawaii, LLC v. Department of Education, State of Hawaii, PDH-2016-003 (August 24 2016).*

Bond requirement; cash bond requires payment by legal tender or cashier's check**;** HRS §103D-709(e) requires the party initiating the proceeding to submit a cash or protest bond. A cash bond requires payment by legal tender or cashier's check. Payment by corporate check (that can be withdrawn or cancelled) does not satisfy the payment requirement as it fails to impose a "monetary consequence" for filing an appeal. *Mira Image Construction, LLC v. Dept of Transportation, State of Hawaii, PDH-2021-014 and PDH 2021-015 (January 20, 2022).*

Bonding requirement; inapplicable to procurement of professional services*;* By its terms, the bonding requirement in HRS §103D-709(e) does not apply to protests involving the procurement of professional services under HRS §103D-304. *GMP International, LLC v. Dept. of Budget and Fiscal Services, City and County of Honolulu, et al., PDH-2014-016 (December 15, 2014).*

Bond requirement; inapplicable to protest over contents of solicitation; Whether a protest satisfies the amounts required by HRS §§103D-709(d) and (e) depends on a consideration of the lowest responsible, responsive bid or the bid amount from the responsible offeror whose proposal has been deemed to be the most advantageous. This, of course, presumes that all bids or offers have been submitted and are available for inspection. Where, however, a protest is filed prior to the date set for the submission of bids, as in the case of a protest over the contents of a solicitation, it would be impossible to determine the estimated value of the contract. Because the estimated value of the contract cannot be determined for protests over the content of the solicitation, the requirements set forth in HRS §103D-709(d) and (e) are inapplicable and therefore, protests over the contents of a solicitation do not need to meet the requirements in subsections (d) and (e) as prerequisites to the protestor's ability to pursue a request for administrative review. *Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010); Soderholm Sales and Leasing, Inc. vs. Department of Budget and Fiscal Services, City and County of Honolulu, PDH-2012-005 (November 30, 2012); Robert's Hawaii School Bus, Inc. v. Kathryn S. Matayoshi, in her capacity as Superintendent of the Department of Education, PDH 2013-009 (October 29 2013).*

D. Filing Fee Requirement; The party initiating a proceeding falling within section 103D-709(f) shall pay to the department of commerce and consumer affairs a non-refundable filing fee:

(1) $200 for a contract with an estimated value of $500,000 or more, but less than $1,000,000; or

(2) $1,000 for a contract with an estimated value of $1,000,000 or more.

Failure to pay the filing fee shall result in the rejection or dismissal of the request for review.

E. Powers of Hearings Officers; Hearings Officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision not later than forty-five days from the receipt of the request for hearing which shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the circuit court of the circuit where the case or controversy arises under. *HRS §103D- 709(b).*

Cases:

> ***Hearings Officer's decision final and conclusive****;* The Code directs the Hearings Officer to expeditiously issue a decision that disposes of the underlying protest. When issued, that decision is final and conclusive and constitutes a final adjudication of the merits of the protest. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH-2002-12 (October 18, 2002).*
>
> ***Jurisdiction following issuance of decision; reconsideration of decision****;* Neither HRS Chapter 103D nor its implementing rules provide the Hearings Officer with the authority to retain jurisdiction over a matter after a request for review has been decided. There is no provision in either HRS Chapter 103D or its implementing rules that allow an aggrieved party to seek reconsideration of the Hearings Officer's decision. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH-2002-12 (October 18, 2002).*
>
> ***No jurisdiction to declare a state law unconstitutional or preempted by federal law;*** The Hearings Officer does not have jurisdiction to declare a state law unconstitutional or to declare a state law preempted by federal law. *HOH Corp v. Motor Vehicle Licensing Board, 69 Haw. 135, 736 P.2d 1271 (1987); Soderholm Sales and Leasing, Inc. v. County of Kauai, Department of Finance, PCY 2002-017 (July 5, 2012).*
>
> ***Hearings Officer has no power to compel pre-hearing discovery;*** The Hawai'i Rules of Civil Procedure providing for pretrial discovery do not apply to procurement protest hearings before the OAH. Those proceedings are governed by Subchapter 5 of Chapter 126 of Title 3 of the Hawai'i Administrative Rules. Those rules provide for only a very limited production of potential exhibits prior to the hearing, while compelling production of documents in general can only be required pursuant to a subpoena duces tecum for production at the hearing itself. Accordingly, the Hearings Officer has no power to compel pre-hearing discovery. *Safety Systems and Signs Hawaii, Inc. v. Department of Transportation, State of Hawaii, PDH 2013-012 (December 19, 2013).*

F. Authority of Hearings Officers; Hearings Officers shall decide whether the determinations of the chief procurement officer were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract and shall order such relief as may be appropriate. *HRS §103D-709(i)*[2].

Cases:

> ***Authority; generally***; In reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accord with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract.

[2] HRS §103D-709(h) was renumbered to §103D-709(i) by Act 73 (2019).

Okada Trucking Co., Ltd. v. Board of Water Supply et al, PCH 99-11 (November 10, 1999) (reversed on other grounds); Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999); Hawaii Newspaper Agency, et. al, v. State Dept. of Accounting & General Services, and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999); GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998); Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998); and Standard Electric, Inc. v. City & County of Honolulu, et. al, PCH 97-7 (January 2, 1998); Abhe & Svoboda, Inc. v. Dep't of Accounting and General Services, PCX-2009-5 (Dec. 3, 2009); Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010); Realty Laua, LLC v. HPHA, PCH-2011-1 (Nov. 18, 2011); Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Dec. 28, 2011); Enviroservices & Training Center, LLC v. Dept. of Environmental Management, County of Maui, PDH-2020-001 (April 6, 2020).

Hearings Officer has authority to act in same manner as contracting officials; In reviewing the determinations of the contracting officials, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997); Abhe & Svoboda, Inc. v. Dep't of Accounting and General Services, PCX-2009-5 (Dec. 3, 2009).*

Authority to ratify or terminate contract; Hearings Officer had authority only to decide whether to ratify or terminate contract, and did not have authority to dictate the method or manner of contract termination. *Carl Corp. v. State, 93 Haw. 155, 997 P.2d 567 (2000).*

Impartiality of Hearings Officers; Rulings that are in the opposing party's favor do not equal a lack of impartiality. *Southern Food Group, L.P. v. Dept. of Educ., et al., 89 Haw. 443, 974 P.2d 1033 (1999).*

Hearings Officer's scope of review; limited to issues raised in protest; In light of HRS §103D-709(f), in order for the Hearings Officer to review Petitioner's claims, Petitioner must have first raised those issues in a timely bid protest to the agency. Because Petitioner's protest did not identify these issues to Respondent, the Hearings Officer concludes that Petitioner is barred from raising these issues in the administrative proceedings. *Akal Security, Inc. v. Dept. of Transportation; PCH-2004-10 (August 23, 2004); Access Media Services, Inc. v. Hawaii State Legislature, PDH-2018-001 (February 13, 2018).*

Hearings Officer's scope of review; limited to issues raised in protest and response; Petitioner was not precluded from contesting Respondent's reliance on HAR §3-122-53 even though Petitioner did not raise the issue in its protest where Respondent raised the issue for the first time in its denial of the protest. *Access Service Corp. v. City and County of Honolulu, et al., PCX-2009-3 (November 16, 2009).*

Jurisdiction of Hearings Officer; The Hearings Officer's jurisdiction is limited by HRS §103D-709(h) and therefore can only make decisions about the "determinations" of the chief procurement officer who can only make "determinations" about complaints before him/her. 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. *Hawaii Specialty Vehicles, LLC v. Wendy K. Imamura, PCH-2011-7 (Jan. 20, 2012), Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Order Granting in Part and Denying in Part Motions for Summary Judgment) (Dec. 1, 2011); Ohana Flooring v. Dep't of Transportation, PCH-2011-12 (Nov. 18, 2011); Kiewit Infrastructure West Co. v. Dep't of Transportation and Goodfellow Bros., Inc. v. Dep't of Transportation and Hawaiian Dredging Construction, Co., PCX-2011-2/PCX-2011-3 (June 6, 2011); Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Jurisdiction of Hearings Officer; limited to issues raised in protest*;* Because it does not appear that the issue of the protestor's lack of standing due to alleged defects in the protestor's own proposal was raised in a timely bid protest and as such, was not the subject of a determination by the chief procurement officer, the Hearings Officer does not have jurisdiction to address the issue. *Maui Master Builders, Inc. v. Dept. of Public Works, County of Maui, et al., PDH-2014-014 (December 9, 2014), citing Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Jurisdiction of Hearings Officer cannot be conferred by stipulation*;* Jurisdiction cannot be conferred by stipulation, or absence of objection, by the parties. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014), citing Koga Engineering & Construction, Inv. v. State, 122 Hawaii 60, 222 P.3d 979 (2010).*

Jurisdiction of Hearings Officer extends to allegation in protest; Petitioner's allegation that a violation of HAR §3-122-16.08 occurred made it incumbent upon Respondent to determine when bidder's bid was received. Accordingly, the Hearings Officer concludes that this issue was included in Petitioner's protest and the Hearings Officer has jurisdiction to address this issue. *Maui Master Builders, Inc. v. Dept. of Public Works, County of Maui, PDH-2014-014 (December 9, 2014).*

Hearings Officer has no authority to determine constitutionality of statute; The Hearings Officer has no power to declare any statutory provision unconstitutional much less impose new impediments on procurement protests that have not been mandated by the Legislature. *GMP International, LLC v. Dept. of Budget and Fiscal Services, City and County of Honolulu, et al., PDH-2014-016 (December 15, 2014), citing HOH Corp. v. Motor Vehicle Licensing Board, 69 Hawaii 135, 736 P.2d 1271 (1987).*

Hearings Officer may grant summary judgment sua sponte to non-moving party. When deciding a summary judgment motion brought by one party, the Hearings Officer may deny that motion and, *sua sponte*, grant summary judgment to the non-moving party. If the legal issues are fully briefed, no additional relevant evidence can be anticipated, adequate notice has been provided to the moving party, and there is an absence of prejudice to the moving party, summary judgment for the non-moving party can be appropriate. *Robert's Hawaii School Bus, Inc. v. Kathryn S. Matayoshi, in her capacity as Superintendent of the Department of Education, PDH 2013-009 (October 29, 2013), citing Querubin v. Thronas, 107 Haw. 48, 109 P.3d 689 (2005).*

Hearings Officer's jurisdiction; no authority over UIPA matters. With regard to Petitioner's request for information under UIPA, whether the DOT complied with the request is moot because the Hearings Officer concludes that he does not have jurisdiction over disputes regarding the UIPA. Petitioner's remedies under Chapter 92F include requesting administrative review with the Office of Information Practices and/or bringing an action in court. *Securitas Security Services, USA, Inc. v. Dept. of Transportation, et al., PDH-2021-005 (May 14, 2021).*

G. Standing to request administrative review; Only parties to the protest may initiate an administrative review. *HRS §103D-709(c); 103D-709(d).*

Cases:

Standing issue may be raised sua sponte; The question of standing to bring an action may be raised sua sponte by the Hearings Officer having jurisdiction over the case. *Hawaii Newspaper Agency, et al., v. State Dept. of Accounting & General Services, et al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, PCH 99-2 and PCH 99 -3 (consolidated) (April 16, 1999).*

Intent to submit proposal insufficient to create standing; The protestor's stated intention to submit a proposal in response to any resolicitation, and its efforts to secure resolicitation by filing a protest, can do nothing to create the necessary interested party status.

MCI Telecommunications Corp. v. United States, 878 F.2d 362 (Fed. Cir. 1989), cited in Hawaii Newspaper Agency, et al., v. State Dept. of Accounting & General Services, et al., and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et al., PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999).

Standing; aggrieved party; Because Milici no longer had any realistic expectation of submitting a proposal and being awarded the contract, it was not an "aggrieved" party when the contract was subsequently awarded to RFD. *Hawaii Newspaper Agency, et al., v. State Dept. of Accounting & General Services, and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, PCH 99-2 and PCH 99-3(consolidated) (April 16, 1999).*

No standing to protest if no bid or proposal is submitted and there is no realistic expectation of submitting a bid or proposal; The rights and remedies under HRS Chapter 103D were intended for an available only to those who participated in or still have a realistic expectation of submitting a bid or offer in response to a solicitation by a procuring agency. In this case, the Petitioner was, at most, a prospective supplier of roofing material to a winning bidder. It therefore had no standing to protest the solicitation's specifications regarding roofing materials. *Hawaii Supply, LLC v. Department of Education, State of Hawaii, PDH 2014-009 (August 14, 2014).*

Challenges to the validity of the protestor's bid or proposal; necessity of exhausting administrative remedies; Allegations that the protestor's bid or offer was itself fatally flawed such that the protestor could not be awarded the bid or offer even if it was successful in its protest may preclude the protestor from having standing to pursue the protest. However, such a claim cannot be raised for the first time in an OAH proceeding. There must first be a protest by the otherwise successful bidder or offeror that is first reviewed and decided upon by the procuring agency before the issue can be raised as a defense in the protestor's appeal to the OAH. *Greenpath Technologies, Inc. v. Department of Finance, County of Maui, PDH 2014-002 (March 20, 2014).*

Standing; subcontractor intervenor; timeliness; A subcontractor of a winning bidder does not have standing to intervene. A motion to intervene is untimely under HRCP Rule 24 and HAR §3-126-51 if filed less than 72 hours before the hearing on the case-in-chief. *FV Coluccio Construction Co., Inc. v. City & County of Honolulu, Department of Environmental Services and Department of Budget and Fiscal Services. PDH-2018-005 (May 8, 2018).*

Standing; parties that may initiate a proceeding; HRS § 103D-709(d) is not a prudential standing requirement that an administrative hearings officer or court may waive. Rather, the procurement code's ten percent limit is the legislature's jurisdictional command - a fixed and firm threshold to initiate a protest. *Alpha v Board of Water Supply, PDH-2022-003, (July 26, 2022). (Circuit Court affirmed September 6, 2022, Intermediate Court of Appeal affirmed the Circuit Court decision, 153 Hawaii 564 (December 29, 2023), Hawaii Supreme Court reversed the Intermediate Court of Appeals, 154 Hawaii 486 at 490 (September 4, 2024).*

H. Time/Place to File; Requests for administrative review shall be made within seven (7) calendar days of the issuance of a written determination directly to the Office of Administrative Hearings. HRS §103D-712(a).

Cases:

Time to file; from issuance of written determination; The mandatory language in HRS §103D-712(a) specifies that requests for administrative review be made within seven calendar days of the *issuance* of a written determination rather than specifying either the date of mailing or date of receipt to be the time from which the seven calendar days begin to run. *Nihi Lewa Inc. v. City & County of Honolulu, PCH 99-13 (December 17, 1999)*; *Friends of He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii, PCX-2009-4 (November 19, 2009); Whale Environmental Services, LLC v. State of Hawaii, Department of Land and Natural Resources, PDH-2017-006 (October 6, 2017).*

Issuance of written determination; date of mailing; "Issuance" in Public Procurement Code statute allowing for administrative review if made "within seven calendar days of the issuance of a written determination" by purchasing agency means the date of mailing, as evidenced by the postmark date, rather than receipt of the mailing. *Nihi Lewa, Inc. v. Dept. of Budget & Fiscal Services, 103 Haw. 163, 80 P.3d 984 (2003); Aloha Tool & Rental, Inc. v. Department of Budget & Fiscal Services; PCH-2004-13 (September 15, 2004); American Marine Corp. v. DOT, et al., PCH-2005-12 and PCH2006-1 (March 30, 2006); Akamai Roofing, Inc. v. Dept. of Transportation, et al., PCH-2009-5 (April 21, 2009); Friends of He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii, PCX-2009-4 (November 19, 2009); Alpha Inc. v. Dept. of Finance, County of Maui, PDH-2021-011 (November 29, 2021). Kuhio 5G LLC v. Dept. of Hawaiian Homelands, PDH-2023-003 (July 5, 2023) (affirmed August 4, 2023, case no. 1CCV23-0000923).*

Request for administrative review filed with purchasing agency untimely; Bidder failed to file request for review within seven days of issuance of final determination and thus request was untimely, where request was hand-delivered to purchasing agency rather than hearings office prior to the seventh day after issuance and request was only delivered to hearings office two days after deadline. *Nihi Lewa Inc. v. Dept. of Budget & Fiscal Services; PCH-99-13 (December 17, 1999).*

Time to file; generally; Both HRS §103D-712 and HAR §3-126-8(e) require that a request for administrative review be made within seven calendar days of the issuance of a written determination [under HRS §§ 103D-310, 103D-701, or 103D-702]. A failure to comply with this mandatory time requirement precludes the pursuit of an administrative hearing. *Soderholm Sales and Leasing, Inc. v. County of Kauai, PCH-99-4 (March 9, 1999).*

Timeliness requirement jurisdictional in nature; It is worth noting that the statutory language of HRS § 103D-712(a) differs in significant respects from the regulatory language in HAR §3-126-3. This statute does establish a particular date (the issuance of a written determination) from which to calculate the seven calendar days within which a request for administrative review must be made. Furthermore, the mandatory language of this provision is jurisdictional in nature and, unlike a failure to comply with HAR §3-126-3, precludes an untimely protestor from pursuing an administrative hearing. *Environmental Recycling of Hawaii, Ltd. v. County of Hawaii, PCH 95-4 (March 20, 1996); Brewer Environmental Industries, Inc. v. County of Kauai, PCH 96 -9 (November 20, 1996).*

Timeliness requirement jurisdictional in nature; no waiver; The jurisdictional provisions of HRS §103D-712 (relating to the timeliness of a request for an administrative hearing) are mandatory in nature and cannot be waived by a party. *Environmental Recycling of Hawaii, Ltd. v. County of Hawaii, PCH 95-4 (March 20, 1996).*

Place to file; directly with DCCA; The mandatory language in HRS § 103D-712(a) (as amended) specifies that requests for administrative review hearings shall be made directly to the office of administrative hearings. This statutory requirement can neither be enlarged nor diminished by the independent receipt, and transmittal, of such a request by another office of a county or state government. *Nihi Lewa Inc. v. City & County of Honolulu, PCH 99-13 (December 17, 1999); Soderholm Sales and Leasing, Inc. v. Department of Budget and Fiscal Services, City and County of Honolulu, PCY 2012-003 (March 6, 2012).*

Request for review is "made" upon being file-stamped by OAH; under HRS §103D-712(a), a request for administrative review is "made" upon being file stamped by OAH. Such a conclusion provides a protestor with a clear understanding and confirmation of when its appeal has been perfected, avoids factual disputes over when a protestor entered the confines of OAH to file its appeal, and, above all, discourages last minute filings. *Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010).*

Notification of administrative appeal; The provision within HAR §3-1 26-8(e) which states that a protestor shall inform the state within five working days after the final decision if an administrative appeal will be filed is fulfilled when such notification is given to the agency which has taken the action being protested so long as the agency would fall within the very broad definition of " state" as set out in HAR §3-120-2. *Solderholm Sales and Leasing, Inc. v. County of Kauai, PCH 99-4 (March 9, 1999).*

***Notification to purchasing agency of appeal; manner*;** HAR §3-126-7 requires notification of the purchasing agency of the appeal to OAH. It does not require service of the appeal, as service requirements are covered by a different rule, HAR §3-126-48(b). The rule requires only that the head of the purchasing agency be notified in a reasonable manner, and it does not preclude informing a representative of the head of the purchasing agency such as an attorney representing the agency. *InformedRx v. State of Hawaii Department of Budget & Finance Employer-Union Health Benefits Trust Fund, PCY 2012-004 (March 9, 2012).*

Service of copy of request for hearing on procuring agency; Service of a copy of the appeal to OAH on the procuring agency is not a prerequisite to the Hearings Officer's subject matter jurisdiction over the appeal. A failure to serve the procuring agency gives rise to a claim of lack of personal jurisdiction. This is a defense "personal" to the procuring agency and can be waived. *InformedRx v. State of Hawaii Department of Budget & Finance Employer-Union Health Benefits Trust Fund, PCY 2012-004 (March 9, 2012).*

HAR §3-126-49 inapplicable*;* While HAR §3-126-49 has general applicability to time sensitive requirements within the Code, its purpose is to further define the generic use of the term "days" where that term is not further defined within the statute or rule where it appears. Significantly, HAR §3-126-49 begins with the limiting language that it applies "Unless otherwise provided by statute or rule. ." and HAR §3-126-8(e) does provide otherwise – by specifically stating that requests for administrative review shall be made "within seven calendar days*." RCI Environment al, Inc. v. State Dept. of Land and Natural Resources, PCH 2000-10 (January 2, 2001); Eckard Brandes, Inc. v. Dept. of Finance, County of Hawaii; PCH-2003-14 (July 15, 2003); Maui Auto Wrecking v. Dept. of Finance, PCH-2004-15 (October 27, 2005); Pacific Recycling & Salvage, Inc. v. Dept. of Finance; PCH-2005-2 (April 11, 2005); American Marine Corp. v. DOT, et al., PCH-2005-12 and PCH 2006-1 (March 30, 2006).*

Petitioner's reliance on Respondent's incorrect letter does not remedy late filing*;* Petitioner's reliance on a portion of Respondent's letter incorrectly stating that the time for filing such a request as within seven calendar days after receipt of the decision does not remedy the late filing. While that letter might or might not constitute a basis for some other action, its content is not cognizable as a basis for this forum to do otherwise than correctly apply the correct law. *RCI Environmental, Inc. v. State Dept. of Land and Natural Resources, PCH 2000-10 (January 2, 2001).*

Untimely protest; failure to file bond with request for hearing; The bond must be filed with the Office of Administrative Hearings along with the request for hearing within the seven day limit of HRS §103D-712(a). *Derrick's Well Drilling and Pump Services, LLC v. County of Maui, Department of Finance,* PDH 2012-001 (July 26, 2012); *A's Mechanical Builders, Inc. v. Department of Accounting and General Services, State of Hawaii, PDH 2013-004 (May 7, 2013).*

Time for filing commences upon issuance of decision; The statute identifies the operative event as "the issuance of a written determination" and the rule is in accord by also focusing on the "determination" as the operative event. In addition, it has been consistently held that the term, "date of issuance" is distinguishable from the terms "date of receipt" (although it is possible that under a given set of circumstances both could refer to the same calendar date), and that compliance with the provisions of the statute and/or rule is mandatory – with the result that a failure to make a timely filing deprives this forum of jurisdiction to conduct further proceedings. *RCI Environment al, Inc. v. State Dept. of Land and Natural Resources, PCH 2000-10 (January 2, 2001). See also, Matt's Transmission Repair, Inc. v. City & County of Honolulu, et al., PCH-2001-6 (October 29, 2001).*

Failure to properly inform protestor of its right to review; estoppel; Respondent's violation of HRS §103D-701(c) may have been a basis for estopping Respondent from claiming that Petitioner's request for administrative review was untimely. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

Failure to properly inform protestor of the time for appeal; The decision by Chief Procurement Officer must notify the protestor of the correct time limitations under HRS §103D-712(a). Where the decision erroneously states that the time for appeal is seven days from the date of receipt of the written decision when the statute provides that the time for appeal is for seven days from the date of the issuance of the decision, the decision failed to comply with HRS §103D-701(c)(2). *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated) (First Circuit Court, 5/28/02).*

Failure to properly inform protestor of the time for appeal; Where the decision erroneously states that the time for appeal is seven days from the date of *receipt* of the written decision rather than seven days from the issuance of the decision, a protest filed within the time provided in the decision is nevertheless timely. *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated) (First Circuit Court, 5/28/02).*

Failure to properly inform protestor of the time for appeal; denial of due process; Where the decision erroneously states that the time for appeal is seven days from the date of *receipt* of the written decision rather than seven days from the issuance of the decision, a protest filed more than seven days after the issuance of the decision but within the time provided in the decision would constitute a denial of the appellant's right to due process. *Matt's Transmission Repair, Inc. v. Department of Budget & Fiscal Services, et al., Civil No. 01-1-3242-11; 01-1-3309 (Consolidated) (First Circuit Court, 5/28/02).*

Failure to timely appeal; time to appeal commences upon mailing of decision; HRS §103D- 712(a) requires that a request for administrative review be made within seven calendar days after the decision is *mailed*. *Stoneridge Recoveries, LLC v. City & County of Honolulu, PCH 2002-11 (September 23, 2002).*

Time to appeal; postmarked date may raise factual issue; A material factual issue may arise where the protestor can show that the decision was postmarked well after the alleged mailing date. *Stoneridge Recoveries, LLC v. City & County of Honolulu, PCH 2002-11 (September 23, 2002).*

Failure to protest prior to requesting administrative review; estoppel; Respondent is estopped from claiming that the DCCA lacks jurisdiction to hear this matter as Petitioner's failure to first protest was the direct result of Respondent's erroneous instruction to file a complaint with the DCCA rather than to file a protest. *Harry Marx Chevrolet/Cadillac v. Maui County; PCH-2002-19 (March 17, 2003).*

Timely appeal; protester's responsibility; Petitioner was responsible to ensure that its request for review was filed with OAH in a timely manner. *Apex Software, Inc. v. State Procurement Office; PCH-2003-29 (July 8, 2004).*

Timely appeal; made directly to DCCA; Request for hearing sent to the Respondent who then transmitted request to DCCA did not meet the requirements of HRS §103D-712 and did not confer jurisdiction on DCCA. *Superior Protection, Inc. v. Department of Transportation; PCH-2004-12 (August 18, 2004).*

Timely appeal; facsimile transmission; There is no authority to support the contention that the filing of a request for administrative review by facsimile transmission to the DCCA is acceptable. Requests for hearing received by facsimile transmission are considered to be courtesy

copies and no action is taken by DCCA unless and until an original is received. *Superior Protection, Inc. v. Department of Transportation; PCH-2004-12 (August 18, 2004).*

Requirement that request for administrative review be received by DCCA within prescribed time; Pursuant to HRS §103D-712(a), requests for administrative review must be received by OAH as evidenced by the file-stamp date, within the prescribed 7 calendar day period. *Maui Auto Wrecking v. Dept. of Finance, PCH-2004-15 (October 27, 2005); Friends of He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii, PCX-2009-4 (November 19, 2009); Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010).*

Request for administrative review untimely; At the latest, Petitioner was required to have filed its request by November 4, 2004 assuming that Respondent's letter dated October 28, 2004 was mailed on October 28, 2004. *Robert's Hawaii School Bus, Inc. v. DOE; PCH-2004-17 (December 9, 2004).*

No jurisdiction to consider HAR §3-125-50; Because Petitioner's request for administrative review was untimely, the Hearings Officer lacked jurisdiction over the case and therefore HAR §3- 125-50 cannot be utilized to extend the mandatory filing deadline imposed by HRS §103D-712. *Robert's Hawaii School Bus, Inc. v. DOE; PCH-2004-17 (December 9, 2004)*

Excusable neglect as basis to extend time to file appeal; Although counsel's illness during the relevant time periods would provide a basis for excusable neglect regarding certain kinds of professional responsibilities, the current case law regarding procurement hearings does not yet recognize excusable neglect as a basis to extend the time period for requesting an administrative review pursuant to HRS §103D-712. *Robert's Hawaii School Bus, Inc. v. DOE; PCH-2004-17 (December 9, 2004).*

Petitioner precluded from raising issue for first time on appeal; Because Petitioner did not file a protest on the issue of Otis' labor costs on or before November 15, 2004, five working days after the pre-hearing conference on November 8, 2004, Petitioner is precluded from raising the issue on appeal. *Oceanic Companies, Inc. v. Dept. of Budget & Fiscal Services; PCH-2004-16 (December 23, 2004); Maui Master Builders v. DOT; PCH-2007-8 (February 25, 2008).*

Request for administrative review untimely; Respondent's denial was issued on March 10, 2005. Thus, any request for administrative review had to be filed by March 17, 2005. *Pacific Recycling & Salvage, Inc. v. Dept. of Finance; PCH-2005-2 (April 11, 2005).*

Request for administrative review untimely; Respondent's denial of Petitioner's protest was issued on May 28, 2010. This Petitioner's appeal to OAH was due on or before the close of business on June 4, 2010. Petitioner's request for administrative review, having been file-stamped at 4:31 p.m. on June 4, 2010, was therefore late, and accordingly, the Hearings Officer lacked jurisdiction over the matter. *Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010).*

Issuance of denial by facsimile transmission; timely appeal; A procuring agency may issue its decision under HRS §103D-701(c) by facsimile transmission and, in that event, the term "issuance" as used in HRS §103D-712(a) means the date of the transmission, as evidenced by the confirmation sheet. *Diversified Plumbing & Air Conditioning v. Hawaii Public Housing Authority, et al., PCH- 2009-4 (March 9, 2009); Friends of He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii, PCX-2009-4 (November 19, 2009).*

Timely appeal; complete request contemplated; In addition, HRS Chapter 103D contemplates and requires the timely filing of a *complete* request for administrative review. Like protests, requests for administrative review must be complete when filed. In *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH 98-6 (December 9, 1998)*, for instance, this Office held that the time limitation for filing a valid protest is not tolled by an initial incomplete filing.

There, the Hearings Officer noted the importance the Legislature placed on the expeditious processing of protests through an efficient and effective procurement system so as to minimize the disruption to procurements and contract performance, and concluded that the time limitation for the filing of a protest was not tolled by the filing of an incomplete protest letter. This conclusion applies equally to the filing of a request for administrative review. *Friends of He'eia State Park v. Dept. of Land and Natural Resources, State of Hawaii, PCX-2009-4 (November 19, 2009); 57 Engineering, Inc. v. Dept. of Education, State of Hawaii, PDH-2018-009 (October 23, 2018).*

I. Content of Request for Hearing; Any person entitled to request an administrative hearing shall file a written request for hearing which shall state plainly and precisely the facts and circumstances of the person's grievance, the laws and rules involved, and the relief sought. HAR §3-126-59.

Cases:

Content of request for administrative review; adequate notice of laws and rules; While Petitioner's request for hearing was technically defective because it did not state the laws and rules involved, the attachment of the protest letter and response from Respondent gave sufficient notice of the issues raised. *Kauai Builders, Ltd. v. County of Kauai, et al., PCH-2009-8 (May 6, 2009); Maui County Community Television, Inc. dba Akaku Maui Community Television, PCX-2010-3 (July 9, 2010).*

Content of request for administrative review; not strictly governed by all of the principles of notice pleading; Procurement protests before the OAH, with their special rules, expedited time limits, and lack of discovery that is available in Circuit Court proceedings, are not strictly governed by all of the principles of notice pleading. Instead the sufficiency of the request for administrative hearing must be analyzed in terms of HAR §3-126-59. *HMP, Inc. dba Business Services, Inc. v. Department of Environmental Management, County of Hawaii, PDH-2015-012 (February 1, 2016).*

Content of request for administrative review; notice of facts and circumstances and relief sought required; A request for administrative review of a protest denial must include the facts and circumstances for the protest and the relief sought. A submission of a request for hearing stating Petitioner received a rejection letter and subsequent protest denial is not sufficient notice under HAR §3-126-59. *57 Engineering, Inc. v. Dept. of Education, State of Hawaii, PDH-2018-009 (October 23, 2018).*

Content of request for administrative review; notice of facts and circumstances and relief sought required; Petitioner's request for administrative review of a protest denial does state plainly and precisely the facts and circumstances of the grievance, the laws and rules involved and the relief sought. Therefore, the Hearings Officer has jurisdiction in this matter. *SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-2021-001 (February 25, 2021)*.

J. Time for Hearing; Hearings shall commence within twenty-one (21) calendar days of receipt of the request, and be completed within 45 days from the receipt of the request. HRS §103D-709(b).

Cases:

Request for reconsideration of Hearings Officer's prehearing ruling on motion not timely. A Hearings Officer's oral ruling on a motion was later subsumed into a written order. An evidentiary hearing was then held. A party's attempt to obtain reconsideration of the earlier order on the motion was untimely when the request was brought in the party's post-hearing memorandum. The request should have been made prior to the evidentiary hearing so that the

other parties would have had a chance to respond. *Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii, PCX-2011-001 (June 6, 2011).*

K. Burden of Proof; The party initiating the proceeding shall have the burden of proof. The degree of proof shall be a preponderance of the evidence. HRS §103D-709(c).

Cases:

Burden of proof; generally; In addressing the burden of proof for administrative proceedings, HRS §103D-709(c) and HAR § 3-126-56(c) state that the party initiating the proceeding (Petitioner) must establish its claim by a preponderance of the evidence. *Island Recycling, Inc. v. City & County of Honolulu, PCH 99-5 (April 15,1999); Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998); PRC Public Sector, Inc. v. County of Hawaii, PCH 96-3 (May 31, 1996); The Systemcenter, Inc. v. State Dept. of Transportation, PCH 98-9 (December 10, 1998); Maui Kupono Builders, LLC v. Dept. of Transportation, PDH-2019-006(December 23, 2019); Enviroservices & Training Center, LLC v. Dept. of Environmental Management, County of Maui, PDH-2020-001; Certified Construction, Inc. v. DAGS, et al., PDH-2020-009 (January 29, 2021).*

Burden of proof; As the party initiating this action, Petitioner has the burden of proof. *Stoneridge Recoveries, LLC v. City and County of Honolulu; PCH-2003-5 (June 26, 2003).*

Burden of proof; preponderance of the evidence*;* Petitioner has the burden of proving by a preponderance of the evidence that Respondent's determinations were not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation or contract. *Maui Master Builders, Inc. v. DOT; PCH-2007-8 (February 25, 2008)*.

Burden of proof; preponderance of the evidence*;* Petitioner did not prove by a preponderance of the evidence that Respondent's determination/decision to issue Addendum No. 4, stating that it will accept metal frame buses as opposed to composite only, was unreasonable or in violation of HAR § 3-122-13(b)(2). Petitioner failed to show by a preponderance of the evidence that metal framed busses will rust before the end of its federal useful life. Accordingly, the Hearings Officer finds that by expanding the pool of possible bidders, Respondent is acting in the public interest by encouraging competition and ensuring that all persons are afforded an equal opportunity to compete in a fair and open environment. *Soderholm Sales and Leasing, Inc. v. Department of Finance, County of Kauai, PDH-2016-002 (June 29, 2016).*

Agency's interpretation of rules; deference to agency; An agency's interpretation of its own rules is entitled to deference unless plainly erroneous or inconsistent with the underlying legislative purposes. *Big Island Scrap Metal, LLC v. Dept. of Environmental Management, County of Hawaii, PDH-2014-003 (April 10, 2014).*

Summary judgment; standard; Summary judgment is appropriate if the record shows that there is no genuine issue of 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. The evidence, and all reasonable inferences from the evidence must be viewed in light most favorable to the non-moving party. Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact. *Safety Systems and Signs Hawaii, Inc. v. DOT, et al., PDH-2014-005 (April 30, 2014); Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014); Big Island Scrap Metal, LLC v. Dept. of Environmental Management, University of Hawaii, et al., PDH-2014-003 (April 10, 2014); GMP International, LLC v. Dept. of Budget and Fiscal Services, City and County of Honolulu, et al., PDH-2014-016 (December 15, 2014); Certified Construction, Inc. v. DAGS, et al., PDH-2020-009 (January 29, 2021); Securitas Security Services, USA, Inc. v. Dept. of Transportation, et al., PDH-2021-005 (May 14, 2021).*

Summary judgment; non-moving party entitled to summary judgment*;* A party's opposition to a motion for summary judgment can demonstrate that it is itself entitled to summary judgment on the issue under contention. In that situation, the Hearings Officer can, sua sponte, grant summary judgment to the non-moving party as long as the moving party has had adequate notice and an opportunity to respond to the possibility that its motion will instead result in a ruling against it. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014), citing Robert's Hawaii School Bus, Inc. v. Matayoshi et al., PDH-2013-009 (October 29, 2013).*

Summary judgment; denied even absent genuine issues*;* Even in the absence of issues of disputed fact, the Hearings Officer has the power to deny summary judgment when there is reason to believe that the better course of action would be to conduct a full hearing with a full development of the record. *Big Island Scrap Metal, LLC v. Dept. of Environmental Management, University of Hawaii, et al., PDH-2014-003 (April 10, 2014), citing Lind v. United Parcel Service, Inc., 254 F.3d 1281 (11th Cir. 2001) and Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975); HMP, Inc. dba Business Services, Inc. v. Department of Environmental management, County of Hawaii, PDH-2015-012 (February 1, 2016).*

L. Evidence; The formal rules of evidence do not apply. Fact finding under HRS Section 91-10 shall apply. HRS §103D-709 (c).

Cases:

Evaluation of Evidence; The Hearings Officer is not obligated to accept as true all testimony which is unchallenged. *Kiewit Infrastructure West Co. v. Department of Transportation, State of Hawaii, PCX 2011-2 (June 6, 2011); JBH, Ltd. v. William Aila, Jr., in his capacity of Chairman and Contracting Officer of Div. of Forestry and Wildlife, Dept. of Land and Natural Resources, PDH 2013-007 (August 15, 2013).*

Summary judgment; affidavits; The use of declarations by movant in support of its motion for summary judgment is authorized, and the declarations can be considered. The Hearings Officer considers a proper declaration as the substantial equivalent of an affidavit and would not penalize movant for relying upon declarations. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Fact finding under HRS Section 91-10 rather than the rules of evidence*;* As part of the streamlining process made permanent by the 2012 Code amendments, the rules of evidence no longer apply. Fact finding under HRS Section 91-10 means that "any oral or documentary evidence" is allowed. Evidence cannot be excluded even though not presented in declarations or affidavits. *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH 2014-002 (March 29, 2014), citing Diamond v. Dobbin, 132 Haw. 9, 319 P.3d 1017 (2014).*

Expert testimony; Expert or non-expert testimony as to legal conclusions should not be admitted into evidence since the determination of legal questions is solely the province of the Hearings Officer. *Nan, Inc v. Department of Transportation, State of Hawaii, PDH-2015-006 (September 4, 2015).*

M. ***Record;*** The Hearings Officers shall ensure that a record of each proceeding which includes the following is compiled:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;

(3) Offers of proof and rulings thereon;

(4) Proposed findings of fact;

(5) A recording of the proceeding which may be transcribed if judicial review of the written decision is sought.

HRS §103D-709(g).

N. ***Stay of Proceedings***; No action shall be taken on a solicitation or award of a contract while a proceeding is pending, if the procurement was previously stayed as a result of the filing of a timely protest. HRS §103D-709(h).

Cases:

Procurement officer may lift automatic stay during pendency of procurement protest before OAH. Under the terms of the automatic stay provision of HRS §103D-701(f), all procurement activity must cease once a protest is filed with the procuring agency. Pursuant to HRS §103D-709(f), that stay is continued while a procurement protest proceeding is pending before the OAH. However, under HRS §103D-701(f), the automatic stay can be lifted upon a written determination of the chief procurement officer that the award of the contract without delay is necessary to protect the substantial interests of the State. Such a written determination can be made either while the protest is pending before the procuring agency or while the procurement protest is proceeding before the OAH. *Robert's Hawaii School Bus, Inc. v. Kathryn Matayoshi, in her capacity as Superintendent of the Department of Education, PDH 2013-009 (October 27, 2013).*

Automatic stay does not preclude procuring agency from terminating or cancelling contract while bid protest is pending. The procuring agency's cancellation of a solicitation or project while a bid protest is pending before OAH is not a violation for the automatic stay provision of HRS §103D-701(f). Said statute precludes action in furtherance or establishing or completing the contract, but not actions to terminate or cancel the contract. *International Display Systems v. Okimoto, 129 Haw. 335, 300 P.3d 601 (Haw. App. 2013).*

XIV. REMEDIES

A. Prior to Award; If prior to award it is determined that a solicitation or proposed award of a contract is in violation of the law, then the *solicitation* or proposed award shall be:

(1) Cancelled; or

(2) Revised to comply with the law.

HRS §103D-706; HAR §3-126-37.

Cases:

Solicitation defined; Courts elect to apply a broad definition to the term "solicitation" so as to incorporate the process of soliciting bids rather than restricting its definition to the actual document soliciting proposals. *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998).*

Remedies; authority of Hearings Officer; "revise" includes remand/reconsideration*;* The term "revise" in the context of HRS §103D-706 includes remand and reconsideration. *Arakaki v. State, 87 Haw. 147, 952 P.2d 1210 (1998).*

Revision inappropriate when only other bidder was nonresponsive; A revision of the solicitation would not be appropriate where the only other bidder's bid was deficient and nonresponsive. Responsiveness is determined at the time of bid opening and defects in terms of responsiveness normally cannot be remediated at a later date. It would be contrary to the purposes and objectives of the Procurement Code to order a remand to allow consideration of a bid already determined to be deficient on its face. *Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Dec. 28, 2011).*

Remand for reevaluation appropriate prior to award*;* Where the determination that the solicitation or award was in violation of the law is made prior to the award of the contract, one of the remedies is to revise the solicitation or award to comply with the law. HRS § 103D-706(2). Had the contract not been awarded to Ameritech before the Hearings Officer issued his decision, then remand to the Library for reevaluation of the proposals would have been appropriate under HRS § 103D-706(2). Because the contract was already awarded, this remedy was inapplicable and obviously futile. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997).*

Application of HRS §103D-706 and HRS §103D-707 is contingent on whether contract has been executed*. In re Carl* made clear that HRS §103D-706 is applicable prior to the execution of a contract by the parties. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH 2001-002 (August 7, 2001); SITA Information Networking Computing USA, Inc. v. Dept. of Transportation, PDH-2021-001 (February 25, 2021)*.

Remedies limited to bidders and prospective bidders*;* The Petitioner is no longer entitled to any relief under HRS Chapter 103D because it no longer was a bidder or prospective bidder in this solicitation. *Stoneridge Recoveries, LLC v. Dept. of Budget and Fiscal Services, City and County of Honolulu, PCH-2003-5 (March 6, 2007).*

Hearings Officer declines to order an award to successful protestor; When only two parties submitted proposals and a successful protest disqualified one proposal, the Hearings Officer nevertheless declined to order the procuring agency to award the contract to the one remaining offeror. The remand order must be made in a context where the objectives of the Code are met. The procuring agency had not had an opportunity to evaluate the offeror's final proposal. In addition, there was no way for the Hearings Officer to evaluate the reasonableness of the price of the final

remaining offer. It was not for Hearings Officer to say that the one remaining proposal must be accepted at any price because it was the only proposal left to consider. *Aon Risk Services, Inc. v. Honolulu Authority for Rapid Transportation, PDH 2013-011 (November 27, 2013).*

B. After an Award: *(a)* If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) If the person awarded the contract has not acted fraudulently or in bad faith:

(A) The contract may be ratified and affirmed, or modified; provided that it is determined that doing so is in the best interests of the State; or

(B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination.

(2) If the person awarded the contract has acted fraudulently or in bad faith:

(A) The contract may be declared null and void; or

(B) The contract may be ratified and affirmed, or modified, if the action is in the best interests of the State, without prejudice to the State's rights to such damages as may be appropriate.

(b) If the award of the contract was made in violation of law, and the award is rescinded and the contract, if executed, is terminated or declared null and void, then:

(1) For solicitations issued pursuant to section 103D-302, the contract may be awarded to the next lowest responsive and responsible bidder; provided that all prices remain the same as originally bid; or

(2) For solicitations issued pursuant to section 103D-303, the contract may be awarded to the next responsive and responsible offeror whose proposal is determined in writing to be the next most advantageous, taking into consideration the evaluation factors set forth in the solicitation; provided that all prices remain the same as originally offered.

HRS §103D-707; HAR §3-126-38.

Cases:

Termination of contract; Where the respondent did not act in bad faith, but the violation cannot be waived without prejudice to the Respondent or the other bidders, and there was no evidence presented that performance had begun and that there was no time for resoliciting offers, the companies to which the contracts were awarded to shall be compensated for actual expenses, other than attorney's

fees, reasonably incurred under the contract plus a reasonable profit, with such expenses and profit calculated to the point of termination. *Okada Trucking Co., Ltd. v. BWS and City & County of Honolulu, PCH-2011-4 and PCH-2011-5 (consolidated cases) (Nov. 1, 2011).*

Termination of contract renders ratification determination moot; Hearings Officer was not required to consider interest of State in accepting parties' termination of contract, and Hearings Officer properly found that contracting agency's termination of contract rendered moot the determination of whether contract should be terminated or ratified. *Carl. Corp. v. State, 93 Haw. 155, 997 P.2d 567 (2000).*

Award limits remedies*;* The award of a public contract before it has been determined whether the solicitation or proposed award is in violation of the law effectively limits the relief available to the person aggrieved by the solicitation or award. *Carl. Corp. v. State, 93 Haw. 155, 997 P.2d 567 (2000).*

No authority to dictate method or manner of termination. Nothing in HRS §103D-707 authorizes the Department of Commerce and Consumer Affairs Hearings Officer to dictate the method or manner of contract termination. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997).*

Remand inappropriate after award*;* Nothing in the Code or its implementing regulations gives the Hearings Officer authority to remand to the Library for reevaluation of the proposals. Presumably because of the obvious need for expeditious review of the public contracting decisions, the Code simply does not authorize the Hearings Officer to remand to the contracting agency under these circumstances. Instead, the Hearings Officer's written decisions are to be final and conclusive and any request for judicial review must be filed within ten days of such written decision. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997).*

Termination of contract appropriate; Where bidder had been notified of its being awarded the project but a notice to proceed had not been issued, and the evidence did not establish that there was not time to resolicit the project, the appropriate remedy would be termination of the contract and the bidder being compensated for actual expenses, if any, that were reasonably incurred under the contract and reasonable profit based upon any performance on the contract up to the time of termination. *Okada Trucking Company, Ltd. v. Board of Water Supply, et. al, PCH 99-11 (November 11, 1999) (reversed on other grounds)*.

Termination of contract, violation that cannot be waived without prejudice to petitioner; Violations directly affecting price and project duration, material requirements under the RFP, are violations that cannot be waived without prejudice to the Petitioner. *Hawaiian Dredging Construction Co. v. DOT and Goodfellow Bros., Inc., PCH 2009-1 (April 3, 2009).*

Factors in determining best interest of State; When, after finding and concluding that an agency had violated a provision(s) of the Code, the Hearings Officer must determine whether the remedy of contract ratification (as opposed to termination) would be in the best interest of the State – and in doing so must consider not only the evaluative factors in HAR §3-126-38(a)(4) but also such underlying purposes for the Code. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998) citing Carl Corp. v. State, 85 Haw. 431, 946 P.2d 1(1997); Carl Corp. v. State, 95 Haw. 155 (2000); Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Ratification of contract not in City's best interest; Allowing awardee to supply conforming vehicles despite statements to the contrary in its bid materials, would compromise the integrity of the public bidding process and would not be in the public's best interest. *Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Dec. 28, 2011).*

Factors in considering City's best interest; The potential for the City paying more than the low bid is not in itself a deciding factor in determining whether ratifying the contract is in the best interest of the City. If that factor alone were considered critical, all or virtually all post-award bid protests would result in ratification of the contract because to eliminate the lowest bid would almost

always result in a higher price being paid. *Soderholm Sales and Leasing, Inc. v. City & County of Honolulu, Dep't of Budget and Fiscal Services, PCH-2011-10 (Dec. 28, 2011).*

Best interest of State; determination not necessary after bid rejected as nonresponsive; DOE, having correctly rejected bid as nonresponsive, was not obligated to determine that rejection was in its best interest. *Southern Food Group, L.P. v. Dept. of Educ., et al., 89 Haw. 443, 974 P.2d 1033 (1999).*

Ratification of illegally awarded contract not in State's best interest; Ratification of an illegally awarded contract can only undermine the public's confidence in the integrity of the system and, in the long run, discourage competition. Any concerns Respondent may have had in avoiding the additional expenses and inconvenience that may result in having to engage in a second solicitation must give way to the State's interest in promoting and achieving the purposes of the Code. As such, ratification of the KTW contract would not be in the best interest of the State. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2,1998); Kiewit Pacific C. v. Dept. of Land and Natural Resources et al., PCH-2008-20 (February 20, 2009)*.

Protestor not entitled to award of balance of contract; There is no authority to support an award of the balance of the contract to the protestor. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998)*.

Bid preparation costs; elements; Where the contract has been awarded before the resolution of a protest, HRS §103D-701(g) entitles the protestor to recover its bid preparation costs provided (1) the protest is sustained; (2) the protestor should have been awarded the contract; and (3) the protestor is not awarded the contract. *Carl Corp. v. State Dept. of Educ., 85 Haw. 41, 946 P.2d 1 (1997); Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001); Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008); Marsh USA Inc. v. City & County of Honolulu, et al., PCX-2010-1 (February 11, 2010); Hawaiian Dredging Construction Co. v. DOT, PCH 2009-1 (April 3, 2009).*

Bid preparation costs; bad faith; Requiring a determination that the protestor should have been awarded the contract, where the evaluation was so fundamentally flawed that the results are invalid and the required determination cannot be made, unfairly punishes the successful protestor. Thus, where the evaluation is so fundamentally flawed that the determination of who should have been awarded the contract was not, and cannot be, made, and the contract has already been awarded in bad faith and in violation of HRS §103D-701(f), a successful protestor who was not awarded the contract is entitled to recover its bid preparation costs pursuant to HRS §103D-701(g). *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997); American Marine Corp. v. DOT, et al., PCH-2005-12 and PCH-2006-1 (March 30, 2006); Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Attorney's fees awarded; Where corporation was deprived of any meaningful relief under the procurement code by the award of the contract to a competing company in bad faith violation of the Code, corporation was entitled to recover its attorneys' fees incurred in successfully challenging the award of the contract before the Hearings Officer and on appeal. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997).*

Attorney's fees; elements. Protestor is entitled to recover its attorney's fees incurred in prosecuting its protest if (1) the protestor has proven that the solicitation was in violation of the Code; (2) the contract was awarded in violation of HRS §103D-701(f); and (3) the award of the contract was in bad faith. *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997); Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001); Marsh USA Inc. v. City & County of Honolulu, et al., PCX-2010-1 (February 11, 2010).*

No award of bid preparation costs and attorney's fees; Petitioner is not entitled to its bid preparation costs and attorney's fees when Petitioner's bid remains under consideration by Respondent and Respondent has yet to determine who the lowest responsive, responsible bidder is and there remains the possibility that Petitioner could be awarded the contract. *Okada Trucking Co., Ltd. v. Dep't of Education, PCH-2009-18 (Oct. 30, 2012), upon remand from the First Circuit Court*.

Bad faith; standard; A finding of bad faith must be supported by specific findings showing reckless disregard of clearly applicable laws and rules. HAR §3-126-36(c). *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997); Environmental Recycling v. County of Hawaii, PCH-98-1 (July 2, 1998); Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

Head of purchasing agency chargeable with knowledge of regulations*;* By virtue as head of a purchasing agency with authority to enter contracts, Kane is certainly chargeable with knowledge of the regulations applicable to public procurement. *Carl Corp. v. State Dept. of Educ. 85 Haw. 431, 946 P.2d 1(1997).*

"Contract award" defined; There are generally multiple events (or stages) that make up the "contract award" process, and thus a determination of whether HRS § 103D-706 pre-award or HRS §103D-707 post-award remedies should be applied under the circumstances in a particular matter may require focusing on the execution of a contract as the critical factor in the overall process in order to fashion appropriate relief. *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998)*.

"Contract award"; intent to award; Under HAR §3-122-1, an "award" is defined as "the written notification of the State's acceptance of a bid or proposal, or the presentation of a contract to the selected offeror". In this case, there has not been any presentation of a contract to the offeror and there has not been any notification of acceptance. An "intent to accept" or "intent to award" is not an "acceptance" or an "award." *Greenpath Technologies, Inc. v. Dept. of Finance, County of Maui, et al., PDH-2014-002 (March 20, 2014).*

Pre-award remedies appropriate up to execution of contract; If the award of a contract were to be construed as a process, with the operative event being the execution of a contract, a more liberal construction could allow for an order remanding the matter to the Respondent for reconsideration of the two areas in which Murphy's bid cannot currently be said to be responsive. *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998)*.

Cancellation of contract not in public's best interest; To order cancellation of BWS's contract with Okada and order BWS to award a new contract to Inter Island to complete the remaining work for the Project would not be in the best interest of BWS and the public. Not only would the Project be delayed while Okada closed and Inter Island mobilized operations at the Project site, but the Project would be completed on a piecemeal basis, leading to accountability questions in the event problems ensued after the Project was completed. Moreover, Inter Island has already been awarded compensation "for actual expenses, if any, that were reasonably incurred under the contract and reasonable profit based upon any performance on the contract up to the time of termination." *Okada Trucking Co. v. Board of Water Supply, et al., 97 Haw. 544, 40 P.3d 946 (App. 2001).*

***Violation of Stay; Basis for sanctions*;** Under the Code as presently written, a violation of the stay does not present an independent basis for the imposition of sanctions. Where the agency violates the stay but the protestor is unable to prove that (1) the solicitation itself was in violation of the Code or that (2) the agency's actions in awarding the contract amounted to bad faith, the Hearings Officer is powerless to impose sanctions for the violation or award attorney's fees. *Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

Cost or price analysis; bad faith; Where Respondent attempted to manipulate both the data and the facts in order to justify its award of the contract to Intervenor rather than prepare an objective analysis of the reasonableness of the offered price, Respondent's conduct amounted to a reckless disregard of clearly applicable laws, including HRS §103D-312 and its implementing rules, and HRS §103D-101, which requires all parties to act in good faith. After careful consideration of the totality of the circumstances, including the unfounded conclusions and misleading and false representations in the COPA, the Hearings Officer is compelled to conclude that Respondents demonstrated bad faith in the preparation of the COPA and the awarding of the contract to the Intervenor. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Ratification of illegally awarded contract not in State's best interest; Ratification would effectively bind the State and its taxpayers to fund a clearly unreasonable contract price and deprive Petitioner of any meaningful relief. Moreover, ratification of an illegally awarded contract can only undermine the public's confidence in the integrity of the procurement system and, in the long run, discourage competition. For these reasons, the Hearings Officer concludes that ratification of the contract would not be in the State's best interest. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Termination of contract not in State's best interest; Where performance of the contract has already commenced and there is no time to resolicit the contract, termination would not be in the State's best interest. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Modification of contract in State's best interest; Modification of the contract would be in the State's best interest where modification would allow the preparations for the 2008 elections to continue and protect the rights of Petitioner and the interests of the public. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Modification of contract; mutual assent not required; Nothing in HRS §103D-707 requires the mutual assent of the parties and consideration before the Hearings Officer can modify a contract. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008)*

Modification of contract; no authority to equitably adjust price; Nothing in the Code provides the Hearings Officer with the authority to "equitably adjust" the contract price. *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Bid preparation costs; bad faith violation of Code; While *Carl* involved a bad faith violation of HRS §103D-701(f), the *Carl* holding is applicable in cases where the protestor's bid was not given fair consideration as a result of the procuring agency's bad faith violation of the Code, including, but not limited to, HRS §10 3D-701(f). *Election Systems & Software, In c. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Attorney's fees; bad faith violation of HRS §103D-701(f) required; The *Carl* court based its award of attorney's fees on the procuring agency's unilateral decision to award the contract to Ameritech in violation of HRS § 103D-701(f), and the recognition that once the contract is awarded, "there is no 'remedy' for the protestor who later proves that the process was in violation of the Code." Specifically, the court found that "Carl's lack of remedy stems from Kane's unilateral bad-faith decision to award the contract to Ameritech in violation of H RS § 103D-701(f)". Therefore, under *Carl*, a successful protestor is entitled to the recovery of its attorney's fees only where the contract has been awarded in violation of HRS § 103D-701(f). *Election Systems & Software, Inc. v. Office of Elections, et al., PCH-2008-3 (August 7, 2008).*

Ratification of illegally awarded contract not in State's best interest; cost savings; Ratification of an illegally awarded contract can only undermine the public's confidence in the integrity of the system and, in the long run, discourage competition. On balance, the Hearings Officer concludes that the potential cost savings to the State in this case does not justify the ratification of the

contract with Intervenor. *Kiewit Pacific Co. v. Dept. of Land and Natural Resources et al., PCH-2008-20 (February 20, 2009)*.

Termination of contract appropriate remedy where Petitioner would otherwise be denied opportunity to have bid properly evaluated; Unless contract is terminated, Petitioner would be denied the opportunity to have its bid properly evaluated by Respondent. Moreover, termination would be consistent with HAR §3-126-38(a)(3), which requires termination of the contract where, among other things, performance has not begun and there is time for resoliciting bids, as well as HAR §30-126-38(a)(4) which provides that even where performance has begun, termination is the preferred remedy. *Kiewit Pacific Co. v. Dept. of Land and Natural Resources et al., PCH-2008-20 (February 20, 2009); Access Service Corp. v. City and County of Honolulu, et al., PCX-2009-3 (November 16, 2009).*

HRS §§103D-706 and 103D-707 conditioned on determination that "solicitation or (proposed) award of a contract is in violation of the law"; The applicability of HRS §§103D-706 and 103D-707 are expressly conditioned on a determination that "a solicitation or (proposed) award of a contract is in violation of the law." Because there has been no such determination here, these sections are inapplicable. *Marsh USA Inc. v. City & County of Honolulu, et al., PCX-2010-1 (February 11, 2010).*

Ratification of contract; waiver of violation; HAR §3-126-38(a)(2) provides that "[if} a violation can be waived without prejudice to the State or other bidders or offerors, the preferred action is to ratify and affirm the contract." The rule recognizes that not all violations of the Procurement Code should result in termination of the contract. Rather, in order to justify termination, the protestor must have suffered or will suffer some prejudice or have a reasonable chance of receiving the contract had the agency made no errors. This conclusion is consistent with the intent underlying the Procurement Code to allow flexibility and the use of common sense by purchasing officials to implement the law in a manner that will be economical and efficient and will benefit the people of the State. It is also consistent with HRS §103D-701 which limits standing to bring a protest to any actual or prospective offeror who is *aggrieved* in connection with the solicitation or award of a contract. In this case, the undisputed evidence established that even if Petitioner had received the maximum number of points on its Technical Proposals, the results would have been the same because Petitioner's pricing was too high. *Roberts Hawaii School Bus, Inc. v. Kathryn S. Matayoshi, in her capacity as Superintendent/Chief Procurement Officer, Department of Education, State of Hawaii, PDH-2017-001 and 2017-002 [Consolidated] (April 13, 2017).*

Ratification of a contract where the soliciting agency did not follow the evaluation process as set forth in the RFP is not in State's best interest; Ratification of a contract where the soliciting agency did not follow the evaluation process as set forth in the RFP (proposals to be evaluated by an evaluation committee) in violation of administrative rule *is not* in the State's best interest because it can "only undermine the public's confidence in the integrity of the system and, in the long run, discourage competition." The Hearings Officer also concludes that Petitioner should be given the opportunity to have its proposal evaluated properly by the soliciting agency. Termination of the award is the only reasonable remedy. *Access Media Services, Inc. v. Hawaii State Legislature, PDH-2018-001 (February 13, 2018).*

Bad faith; standard; A finding of bad faith must be supported by specific findings showing reckless disregard of clearly applicable laws and rules. HAR §3-126-36(c). *Carl Corp. v. State Dept. of Educ., 85 Haw. 431, 946 P.2d 1 (1997); Environmental Recycling v. County of Hawaii, PCH-98-1 (July 2, 1998); Jas. W. Glover, Ltd. v. Board of Water Supply, PCH-2001-002 (August 7, 2001).*

C. Exclusivity of Remedies; These remedies shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract. HRS §103D- 704.

XV. APPEAL

A. Standing; Only parties to the proceeding for administrative review who are aggrieved by a final decision of a Hearings Officer may apply for review of that decision. *HRS §103D-710(a)*.

B. Judicial Review; Prior to June 19, 2001, original jurisdiction to review the final decisions of the Hearings Officer was vested in the Supreme Court. On June 19, 2001, HRS § 103D-710(a) was amended to transfer to the circuit courts original jurisdiction to review the Hearings Officer's final decision. *HRS §103D-710(a)*

C. Time to appeal; Requests for judicial review shall be filed in the circuit court of the circuit where the case or controversy arises within ten (10) calendar days after the issuance of a written decision by the Hearings Officer. *HRS §103D-712(b)*.

Cases:

> ***Time to appeal; extend time***; In considering the procedural timeliness of a party's motion to extend time nunc protunc for filing a notice of appeal from a final order, the appropriate guideline for DCCA Hearings Officers in HRS Chapter 103D procurement matters is HRAP Rule 4(a)(5) which, in addition to requiring a showing of "excusable neglect or good cause," sets out mandatory deadlines for the filing of such motions. *Niu Construction v. County of Kauai, PCH 96-1 (April 11, 1996).*

D. No Stay; An application for judicial review shall not operate as a stay of the decision. *HRS §103D-710(b).*

Cases:

> ***No stay after partial remand by Circuit Court;*** On an appeal to the Circuit Court, a partial remand to the Hearings Officer was ordered with respect to a limited number of issues. The remaining portions of the Hearings Officer's decision were not stayed by the Circuit Court's order. *InformedRx v. State of Hawaii Department of Budget & Finance Employer-Union Health Benefits Trust Fund, PCY 2012-4 (March 9, 2012).*

E. Transmission of Record; Within ten (10) calendar days of the filing of an application for judicial review in the circuit court, the Hearings Officer shall transmit the record of the administrative proceedings to the circuit court. *HRS §103D-710(c).*

F. Authority of the Court; No later than thirty (30) days from the filing of the application for judicial review, based upon review of the record, the court may affirm the decision of the Hearings Officer or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of a purchasing agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Provided that if an application for judicial review is not resolved by the thirtieth day from the filing of the application, the court shall lose jurisdiction and the decision of the hearings officer shall not be disturbed. *HRS §103D-710(e)*

Cases:

No written decision to review; disqualification from bidding on subsequent contracts; Successful bidder to contract terminated by contracting agency could not be disqualified by supreme court from bidding in agency's subsequent Request for Proposals, since there was no "written decision" under HRS § 103D-709, on subject of bidder's debarment, which court could review under HRS §§103D-710(a) and 103D-712(b). *Carl Corp. v. State, 93 Haw. 155, 997 P.2d 567 (2000).*

Standard of review; Reviewing court will reverse a Hearings Officer's finding of fact if it concludes that the finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; on the other hand, Hearings Officer's conclusions of law are freely reviewable. *Carl Corp. v. State, 93 Haw. 155, 997 P.2d 567 (2000); Okada Trucking Co. v. Board of Water Supply, et al., 97 Haw. 544, 40 P.3d 946 (App. 2001).*

Presumption of validity afforded to agency decision; In order to preserve the function of administrative agencies in discharging their delegated duties and the function of this court in reviewing agency determinations, a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. *Southern Food Group, L.P. v. Dept. of Educ., et al., 89 Haw. 443, 974 P.2d 1033 (1999).*

Court should not substitute its own judgment for that of the agency; Insofar as an administrative Hearings Officer possesses expertise and experience in his or her particular field, the appellate court should not substitute its own judgment for that of the agency either with respect to questions of fact or mixed questions of fact and law. *Okada Trucking Co. Ltd. v. Board of Water Supply, et al., 97 Hawaii 450, 40 P.3d 73 (2002).*

Court should grant significant deference to the Hearings Officer's decision; Under HRS §103D-710(e), when reviewing an appeal from a decision made under HRS §103D-709, the Circuit Court is to grant significant deference to the Hearings Officer decision. *Dept. of Transportation v. Dept. of Commerce and Consumer Affairs, et al., Civil No. 1CCV-21-0000270 (April 5, 2021).*

Court should grant significant deference to the Hearings Officer's decision; When mixed questions of law and fact are presented, an appellate court must give deference to the agency's expertise and experience in the particular field. Thus, a Hearings Officer only abuses his or her authority where he or she clearly exceeds bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party. *Dept. of Transportation v. Dept. of Commerce and Consumer Affairs, et al., Civil No. 1CCV-21-0000270 (April 5, 2021).*

Presumption of validity; When reviewing a final administrative decision, a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Accordingly, a presumption of validity must be accorded to the Hearings Officer's Decision, which could only be disturbed if DOT had met its heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequence. In order to meet that burden, DOT needed to show that the Decision was clearly erroneous or arbitrary . . . capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Dept. of Transportation v. Dept. of Commerce and Consumer Affairs, et al., Civil No. 1CCV-21-0000270 (April 5, 2021).*

G. Costs of Appeal; HRS §103D-701(g) does not authorize award of costs associated with an appeal. *Carl Corp. v. State, 93 Haw. 155, 169, 997 P.2d 567, 581 (2000).*