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

In the Matter of SODERHOLM SALES AND LEASING, INC., Petitioner, vs. DEPARTMENT OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU, Respondent.	PDH-2012-005 HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION Senior Hearings Officer: David H. Karlen

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

I. INTRODUCTION

By petition submitted October 18, 2012, Petitioner Soderholm Sales and Leasing, Inc., (hereinafter "Petitioner" or "Soderholm") filed its Request for Administrative Hearing ("RFAH") in this matter, which Request was assigned case number PDH-2012-005. Respondent was the Department of Budget and Fiscal Services, City and County of Honolulu (hereinafter "Respondent" or "City").

A Notice of Hearing and Pre-Hearing Conference was filed on October 19, 2012. A pre-hearing conference was set for November 1, 2012, and the hearing was set for November 8, 2012.

A Pre-Hearing Conference in this matter was held on November 1, 2012. Soderholm was represented by Jeffrey P. Miller, Esq. The City was represented by Nicole R. Chapman, Esq. A Prehearing Order was filed on November 2, 2012.

On October 30, 2012, the City filed its Response to the RFAH. On that day, the City also filed its Motion for Summary Judgment ("City's Motion").

Soderholm filed its Motion for Summary Judgment ("Soderholm's Motion") on November 1, 2012.

Soderholm filed its Opposition to the City's Motion on November 7, 2012. The City filed its Opposition to Soderholm's Motion on November 7, 2012.

The motions came on for hearing on November 8, 2012. Soderholm was represented by Jeffrey P. Miller, Esq. Also present on behalf of Soderholm was Mr. Erik Soderholm. The City was represented by Nicole R. Chapman, Esq., and Ryan H. Ota, Esq. Also present on behalf of the City was Ms. Wendy K. Imamura.

At the conclusion of the hearing, the motions were taken under advisement. In addition, Soderholm was given the option of filing a supplemental memorandum responding to any argument raised by the City that was not contained in the City's initial memorandum in support of its Motion. If Soderholm filed such a supplemental memorandum, the City was provided the option of requesting additional oral argument. An Order Regarding Supplemental Briefing memorializing these options was filed on November 9, 2012.

On November 16, 2012, Soderholm filed its Supplemental Opposition to the City's Motion. Thereafter, by e-mail later in the day on November 16, 2012, the City declined to request any further oral argument.

II. FINDINGS OF FACT

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

1. On or about September 18, 2012, the City issued a request for bids, RFB-DTS-547510 (the "RFB"), for the furnishing and delivery of paratransit vehicles to the City.

2. Special Provision 8 of the RFB is entitled "Compliance with 'SAFETEA-LU' Provisions," and states in relevant part:

> The bid being offered shall be in compliance with the provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), which was signed into law by President Bush on August 10, 2005. Section 3025 of SAFETEA-LU states: (1) BUS DEALER REQUIREMENTS – No State law requiring buses to be purchased through in-State dealers shall apply to vehicles purchased with a grant under this chapter.
>
> ...
>
> The provisions of the State of Hawaii's Motor Vehicle Industry Licensing Act shall be preempted by Section 3025 of SAFETEA-LU.

City's Exhibit D (Emphasis supplied)

3. The "Instructions to Bidders" section of the RFB states that:

> All Federal Transit Administration (FTA) funded procurement must comply with FTA Circular 4220.1F or the latest revision thereof...[sic] pursuant to Hawaii Revised Statutes (HRS) Section 103D-102(a), the Hawaii Public Procurement code, HRS Chapter 103D, or the Hawaii Administrative Rules (HAR) adopted under Chapter 103D, shall not prevent the City from complying with the terms and conditions of any FTA grant, gift, bequest or cooperative agreement. The City shall comply with all applicable FTA requirements for FTA funded procurement.
>
> Should there be any conflict between the requirements of City policies and procedures, HAR, and HRS, the FTA requirements shall govern.

City Exhibit D (Emphasis supplied)

4. The RFB provided that the solicitation and resulting contract would be funded in part with federal financial assistance from the Federal Transit Administration.

5. By means of Addendum No. 1 to the RFB issued on September 20, 2012, the bid opening date was set for October 17, 2012.

6. On September 24, 2012, Soderholm filed a bid protest with the City regarding the specifications set forth in the RFB. The main points of Soderholm's bid protests were as follows:

a. The RFB does not require bidders to be licensed dealers pursuant to HRS §437-2(a).

b. The RFB does not require bidders to be a licensed manufacturer pursuant to HRS §437-2(a).

c. Federal law does not pre-empt H.R.S. Chapter 437

i. The RFB is in violation of the law because it does not require a prospective bidder to be licensed pursuant to HRS §437

ii. The SAFETEA-LU does not preempt Chapter 437.

d. H.R.S. §29-15 does not preempt H.R.S. §437

e. H.R.S. §29-15 is unconstitutionally vague and ambiguous and should not be applied herein.

7. The protest requested that the City revise the RFB to specifically require that any bidder must be a licensed dealer and comply with all requirements of HRS Chapter 437.

8. On October 12, 2012, the City responded to Soderholm's bid protest by its written determination dated October 12, 2012. The City first asserted that the same issues of protest were raised by Soderholm in a case involving a Kauai County procurement, that Soderholm's' bid protest with respect to that procurement had been denied by the Department of Commerce and Consumer Affairs hearings officer, and that the City's "conclusions and determination herein are consistent with the Hearings Officer's final decision. This notwithstanding," the City proceeded to respond, as summarized herein, to each of the protest arguments raised by Soderholm:

a. The RFB did not require bidders to obtain a Hawaii dealer license because federal requirements prohibit the inclusion of this requirement when, as here, federal funds are used to purchase the vehicles.

b. While the awarded dealer would presumably place the order with a licensed manufacturer, the City did not object to specifically including the requirement of a manufacturer's license and would do so by way of an addendum.

c. H.R.S. §29-15 does not preempt HRS Chapter 437. Rather, HRS §29-15 addresses the situation where a conflict exists between state and federal requirements—where there is such a conflict, federal requirements prevail.

d. On a bid protest, the City's chief procurement officer does not have the jurisdiction to determine the constitutionality of HRS §29-15.

9. Accordingly, the City denied every ground of Soderholm's protest letter except that it agreed to amend the RFB to specifically require that manufacturers of the paratransit vehicles must comply with the licensing requirements of HRS Chapter 437.

10. On October 18, 2012, Soderholm appealed the City's denial of its bid protest by filing its Request for Hearing ("RFAH") with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs.

12. Previously, on July 5, 2012, in Soderholm Sales and Leasing, Inc .vs. County of Kauai, Department of Finance, PCY-2012-017 (hereafter referred to as the "Soderholm Kauai" case), the Office of Administrative Hearings had dismissed Soderholm's appeal of the County of Kauai's denial of Soderholm's bid protest regarding a procurement of paratransit and other vehicles.

13. On March 30, 2012, a Transportation Program Specialist with the Federal Transit Administration Region IX office in San Francisco, California, sent an e-mail to two employees of the Department of Transportation, State of Hawaii, stating that ":various provisions" of HRS Chapter 437 conflict with applicable federal law and the Master Agreement. City's Exhibit K.

14. The e-mail stated that HRS §437-11 conflicts with federal law and the Master Agreement "because it imposes a local geographical preference and, in doing so, restricts full and open competition." The e-mail further stated that HRS §437-11 operates as a state law

requiring buses to be purchased through in-state dealers, and the e-mail concluded that this also conflicts with federal law.

15. The e-mail then finished with a warning that: "Should HDOT choose to apply HRS 437 provisions that conflict with federal law, as well as the Master Agreement, to a procurement process, then any contract awarded as a result of that process is ineligible for federal funds."

16. On June 15, 2012, an Assistant Regional Counsel of the Federal Transit Administration Region IX sent an e-mail to an employee of the City[1] forwarding to him a copy of the above-mentioned March 30, 2012 e-mail and stating: "Below is what FTA sent HDOT regarding our procurement statutes, regulations, and guidance." City's Exhibit K.

17. The City is purchasing the vehicles listed in the RFB using federal funds by means of being a sub-recipient of federal funds through that State of Hawaii, Department of Transportation's Master Agreement with the federal government. A copy of that Master Agreement was submitted as the City's Exhibit AA to its Opposition to Soderholm's Motion.

III. CONCLUSIONS OF LAW

A. General Considerations

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

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

[1] The Hearings Officer takes judicial notice from the online records of the Hawaii State Bar Association that this employee is an attorney with the City's Department of Corporation Counsel.

one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, must be viewed in the light most favorable to the non-moving party. Koga Engineering & Construction, Inc., v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

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

Summary judgment may be entered for the non-moving party on a motion for summary judgment where there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law. University of Hawaii v. City and County of Honolulu, 102 Haw. 440, 443-444, 71 P. 3d 478, 481-482 (2003). Such a result is possible, however, only if the moving party has had a full and fair opportunity to dispute the grounds supporting summary judgment for the non-moving party. Cf. Fuller v. Pacific Medical Collections, Inc., 78 Haw. 213, 227-228, 891 P.2d 300, 314-315 (1995).

The decision in the Soderholm Kauai case held that paratransit vehicles that were the subject of the procurement in question were vehicles within the meaning of HRS §437-1.1, and the successful bidder on the RFB in question would be a motor vehicle dealer under the terms of that statute. The decision also concluded that, when viewed solely from the perspective of Hawaii's licensing law, the successful bidder on that RFB would be required to have a Hawaii motor vehicle dealer license pursuant to the terms of HRS Chapter 437.

The parties in the present case have proceeded under the assumption that the paratransit vehicles that are the subject of the City's procurement are also vehicles within the meaning of HRS §437-1.1. The Hearings Officer concurs that the paratransit vehicles are

vehicles within the meaning of that statute. Accordingly, the successful bidder on the RFB at issue herein would also be a motor vehicles dealer, and, when viewed solely from the perspective of Hawaii's licensing law, the successful bidder on the City's RFB would be required to have a Hawaii motor vehicle dealer license pursuant to the terms of HRS Chapter 437.

B. Jurisdiction

Soderholm did not file a protest bond with its RFAH. The filing of such a bond can be a jurisdictional requirement for a procurement protest. Derrick's Well Drilling & Pump Services, LLC v. County of Maui, Department of Finance, PDH-2012-001 (July 26, 2012). The City has not objected to Soderholm's lack of a bond.

The question of lack of jurisdiction can be raised at any time in these proceedings. If not raised by the parties, it can be raised by the hearings officer *sua sponte*, as jurisdiction cannot be conferred by the stipulation, agreement, or waiver of the parties. Captain Andy's Sailing, Inc. v. Department of Natural Resources, 113 Haw. 184, 193-194, 150 P.3d 833, 842-843 (2006); Koga Engineering & Construction, Inc., v. State of Hawaii, supra, 122 Haw. at 84, 222 P.3d at 1003. While the City's failure to object to a lack of a bond is therefore not binding, the Hearings Officer independently concludes that the facts of this case demonstrate that a protest bond was not necessary.

Act 182 of the 2012 Legislature amended HRS §103D-709(e) to require that:

> the party initiating a proceeding [a procurement protest] falling within subsection (d) [HRS 103D-709(d)] shall pay to the department of commerce and consumer affairs a cash or protest bond in the amount of:
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> (1) $1,000 for a contract with an estimated value of less than $500,000;
>
> (2) $2,000 for a contract with an estimated value of $500,000 or more, but less than $1,000,000; or

(3) one-half per cent of the estimated value of the contract if the estimated value is $1,000,000 or more; provided that in no event shall the required amount of the cash or protest bond be more than $10,000.

Act 182 further added HRS Section 103D-709(j) which provided that the terms "estimated 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 more advantageous."

In this case, the bids were not opened before the protest was filed with the City. Therefore, it is impossible to determine what the "estimated value of the contract" or the "estimated value" is. It follows that no bond amount can be determined.

The Hearings Officer does not believe that the Legislature intended to eliminate procurement protests concerning the language of an RFB. There was, for example, no change to the statutory language requiring such a protest to be filed before the bids are opened. The Hearings Officer concludes that procurement protests concerning the language or contents of a solicitation filed prior to the opening of bids do not require the posting of a cash or protest bond.

C. Collateral Estoppel Does Not Preclude Soderholm's Claims

In its Opposition to Soderholm's Motion, filed November 7, 2012, at pages 4-7, the City argues that principles of collateral estoppel preclude the re-litigation of issues decided in a prior adjudication. The prior adjudication the City refers to is the "Soderholm Kauai" decision.

The City's collateral estoppel argument was not asserted in support of its own motion. If this defense resulted in a denial of Soderholm's motion, it would also result in dismissal of

Soderholm's RFAH. Accordingly, under the guidance of Fuller v. Pacific Medical Collections, Inc., supra, the Hearings Officer gave Soderholm an opportunity to brief this issue. Soderholm's Supplemental Opposition to the City's Motion, filed November 16, 2012, at pages 2-6, contests the City's collateral estoppel argument.

Soderholm asserts that the City has no standing to raise the collateral estoppel argument because it was not asserted by the City as a basis for the City's October 12, 2012 denial of Soderholm's bid protest. That letter said that the issues in this protest were "the same issues" raised by Soderholm in the Kauai procurement matter, and that the City's decision herein was "consistent with" the Hearings Officer's decision in the Soderholm Kauai decision. Such a statement is not definitive notice that the City was relying on a collateral estoppel argument as a basis for dismissing the protest.

Whether or not the procuring agency can rely upon certain grounds in advocating dismissal of an RFAH when the agency did not rely upon those grounds when earlier denying the bid protest is a challenging issue that has been adverted to by Soderholm but which has not been briefed by either party. In view of the Hearings Officer's conclusion herein that collateral estoppel does not apply in this case, there is no reason to decide this standing issue.

The Soderholm Kauai case involved the procurement of paratransit vehicles and wheelchair lift accessible passenger busses by the County of Kauai. The vehicles were to be purchased using federal funds.

Soderholm filed a procurement protest in that case on the ground, *inter alia*, that the County of Kauai's request for proposals did not require a prospective offeror to be licensed

pursuant to HRS Chapter 437. The County of Kauai responded that HRS Chapter 437 was not applicable to the procurement in question because it conflicted with federal law.

As noted in the Hearings Officer's decision in that case, the parties therein extensively briefed the law of federal preemption of state statutes under both the principles of the Commerce Clause and the Spending Clause of the United States Constitution. However, neither party mentioned HRS §29-15 until oral argument on the parties' cross-motions for summary judgment. The Hearings Officer requested the parties file post-hearing memoranda on a number of issues including the applicability of HRS §29-15.

The Hearings Officer's decision did not make a determination on any constitutional issues of pre-emption. Rather, the Hearings Officer decided that HRS §29-15 was the controlling statute in that situation. The vehicles were being purchased with federal funds through a Master Agreement between the State of Hawaii Department of Transportation and the federal government, and there was a federal directive within the terms of that Master Agreement that must be followed in order to obtain the federal funds. That federal directive precluded application of HRS Chapter 437 to the County of Kauai's procurement. That being so, HRS §29-15 mandated that HRS Chapter 437 could not apply to that procurement

Both parties herein cite the case of Dorrance v. Lee, 90 Haw. 143, 976 P.2d 904 (1999), as setting forth the parameters of applying the doctrine of collateral estoppel (also known as issue preclusion) to this case. "Issue preclusion, or collateral estoppel, on the other hand, applies to a subsequent suit between the parties or their privies on a different cause of action and prevents the parties or their privies from relitigating any issue that was actually

litigated and finally decided in the earlier action." 90 Haw. at 148, 976 P.2d at 909 (emphasis in original).[2] The test set forth in that case was summarized as follows:

> We therefore hold that the doctrine of collateral estoppel bars relitigation of an issue where: (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication.

90 Haw. at 149, 976 P.2d at 910.

Soderholm's Supplemental Opposition does not explicitly contest that the second, third, and fourth elements of the collateral estoppel test apply to its present procurement protest. Indeed, it would be fruitless to argue otherwise. There was a final judgment on the merits by the Hearings Officer in the Soderholm Kauai case, and the decision that HRS §29-15 precluded application of HRS Chapter 437 to the vehicle procurement in that case was essential to that final judgment. Similarly, Soderholm was a party in the Soderholm Kauai case and thus was subject to that final judgment.

However, Soderholm vigorously contests herein that the first part of the collateral estoppel test is not met in the present situation because the issue here is not identical to the issue decided in Soderholm Kauai. The basis of Soderholm's claim on this first part of the collateral estoppel test is that the Master Agreement in this case is not the same as the Master Agreement in the Soderholm Kauai case, and, furthermore, the Master Agreement in this case, as well as the facts surrounding federal financing asserted by the City, do not demonstrate a conflict between federal requirements and HRS Chapter 437 such that HRS §29-15 would mandate that HRS Chapter 437 is not applicable to the City's procurement.

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[2] This was in contrast to claim preclusion (or res judicata) which prohibits relitigation of a previously adjudicated cause of action. Id.

The only Master Agreement submitted by the City in the course of these proceedings was attached as Exhibit AA to the City's Opposition to Soderholm's Motion. Soderholm argues at pages 3-4 in its Supplemental Opposition that the City never identified the "contract" at issue which should be applied under HRS §29-15 and never relied on the language of the Master Agreement in its argument. However, the City did include a paragraph in its collateral estoppel argument (at page 5 of its Opposition to Soderholm's Motion) that necessarily brings into question the Master Agreement that is Exhibit AA when the City argued that "subsumed in this issue [of exclusion of dealer licensing requirements in federally-funded solicitations] in both Petitioner's prior Soderholm Sales (Kauai) appeal and the current RFH, is the question whether HRS §29-15 applies in the analysis of conflicting federal requirements and state requirements." Since the prior Soderholm Kauai decision explicitly rested on a conclusion that a federal contract and a federal directive pursuant to that contract would be contradicted by the application of HRS Chapter 437 and that, in such a situation, HRS §29-15 precluded application of HRS Chapter 437 to the procurement in question, this part of the City's Opposition memorandum implicitly states that the issue herein is whether the federal contract (the City's Exhibit AA) and a federal directive pursuant to that contract is contradicted by application of HRS Chapter 437 so that HRS §29-15 applies to preclude application of that licensing statute.

The City explicitly refers to its Exhibit AA in a later section of its Opposition Memorandum (pages 12-13) when arguing that federal pre-emption applies. Soderholm argues that this reference to a pre-emption argument is not founded on HRS §29-15. This assertion by Soderholm is technically correct. Nevertheless, the Hearings Officer cannot ignore the implicit basis of the City's argument summarized immediately above just because

the City's drafting of its Opposition memorandum was not as clear as it could have been. There is no doubt that the City was arguing the same issue involving HRS §29-15 that is present in both cases and that such issue involves a Master Agreement in both cases that mandates the same result when HRS §29-15 is applied.[3]

The Master Agreement relied upon by the City is attached as Exhibit AA to its Opposition to Soderholm's Motion. It is a Federal Transit Administration ("FTA") form dated October 1, 2011.

The Master Agreement that was the subject of the Soderholm Kauai decision is attached as Exhibit 6 to Soderholm's Supplemental Brief in Opposition to the City's Motion. It is a FTA form dated October 1, 2010. It is not the same Master Agreement form that is relied upon in this case by the City.[4]

Thus, while the legal issues concerning the interplay between the Master Agreement and FTA directives may be similar in the Kauai case and this case, the present case concerns a different Master Agreement that must be examined on its own terms. It may be that the result reached in the two cases will be the same. If so, however, that result must come from a "stand alone" analysis of the new Master Agreement that was never considered in the Kauai case.

Accordingly, the City has not met its burden of establishing that the first portion of the test for collateral estoppel set forth in Dorrance v. Lee, supra, namely the identity of issues, can be applied in this case. The City's opposition to Soderholm's motion on the

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[3] Further, Soderholm would appear to recognize the basis of the City's argument because it extensively argues in its Supplemental Opposition that the situation is not the same because of substantial differences in the Master Agreement involved in the two cases.

[4] The more recent form, City Exhibit AA, states on page 11 that "this edition" of the Master Agreement was "extensively rewritten to comply with the Plain Writing Act of 2010."

ground of collateral estoppel is without merit, and any motion by the City on that ground must be denied.

D. Soderholm's "Conflict Analysis" Argument is Without Merit

While Soderholm's bid protest is not collaterally estopped by the Soderholm Kauai decision, that decision nevertheless contains an analysis of Hawaii statutes that the City asserts is persuasive and should apply in this case because the same issues are involved

Soderholm argues that the Soderholm Kauai case was wrongly decided because it did not apply a "conflict analysis" in reaching the conclusion that HRS §29-15 applied to the procurement in question there such that the licensing provisions of HRS Chapter 437 could not apply. It follows from this argument, according to Soderholm, that the City incorrectly relies on the Soderholm Kauai decision when dismissing the protest herein. Soderholm Motion at pages 6-7.

The City's first response to this argument is that is too late for the City to make this claim. Instead, the City argues, Soderholm should have appealed the Soderholm Kauai decision and requested judicial review of the Hearings Officer's decision. City Opposition, pages 3-4.

If res judicata was involved in this situation, the Hearings Officer would agree with the City's position. Res judicata would preclude the raising of an argument herein that was raised, or should have been raised, in the prior proceeding. However, res judicata is not involved in the present situation.

Application of the principles of collateral estoppel are, however, pertinent here. At oral argument on the motions, the Hearings Officer observed that he had no recollection of Soderholm's "conflict analysis" argument being raised, much less decided, in the Soderholm

Kauai case. The City did not contradict or refresh this recollection with any citation to the record in the prior case where the "conflict analysis" argument was at issue. Since the collateral estoppel test of Dorrance v. Lee, supra, requires, at a minimum, a decision on the identical issue in the prior proceeding, and since there was no decision on an identical "conflict analysis" issue, the Hearings Officer concludes that Soderholm is entitled to raise the "conflicts analysis" issue in this case.

The substantive basis of Soderholm's claim here is the three-step conflicts analysis stated in Kewalo Ocean Activities v. Ching, 124 Haw. 313, 316, 243 P.3d 273 (Haw. App. 210):

> First, legislative enactments are presumptively valid and "should be interpreted [in such a manner] as to give them effect." Second, "[l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." Third, "where there is a 'plainly irreconcilable' conflict between a general and a specific statute concerning the same subject matter, the specific will be favored. However, where the statutes imply overlap in their application, effect will be given to both if possible, as repeal by implicates is disfavored."

(Internal citations omitted; opinion cites to Richardson v. City and County of Honolulu, 76 Hawaii 46, 54-55, 868 P.2d 1193, 1201-1202, *reconsideration denied*, 76 Haw. 247, 871 P.2d 795 (1994), *judgment aff'd* 124 F.3d 1150 (9th Cir. 1997).

Here, Soderholm relies primarily on the second and third parts of this analysis, claiming that the two statutes are in *pari materia* but are "plainly irreconcilable" and that HRS Chapter 437 must be applied because it is the more specific statute concerning the subject matter.

The first problem with this argument is that the two statutes are not *in pari materia*, because they are not dealing with the same subject. As relevant herein, HRS Chapter 437 deals with the licensing of motor vehicle dealers. HRS §29-15, on the other hand, does not

deal with licensing at all. Instead, it deals with the State's federal contracts and the State's ability to obtain federal funds.

Second, the statutes are not in "irreconcilable conflict" even if they do pertain to the same subject matter. If the two statutes arguably cover the same subject matter, it is apparent that the general-specific dichotomy is not implicated here because there is no "irreconcilable conflict." HRS Chapter 437 does not contain any provisions regarding procurements utilizing federal funds. HRS §29-15, on the other hand, specifically deals with procurements utilizing federal funds and specifically establishes an "order of precedence" concerning other state statutes. If there is a conflict, HRS §29-15 specifically establishes that HRS Chapter 437 does not prevail. HRS §29-15 does not allow for any common law method of statutory interpretation such that the three-pronged conflicts analysis approach can be applied. Instead, HRS §29-15 specifically establishes how the conflicts analysis should be decided.

What Soderholm's argument ignores here is the directive in Kewalo Ocean Activities v. Ching, supra, that where two statutes overlap, effect will be given to both if possible. The Hearings Officer's interpretation gives effect to HRS §29-15. It does not "repeal HRS Chapter 437" by implication—it holds HRS Chapter 437 to be inapplicable because it is specifically and literally, not implicitly, made inapplicable by HRS §29-15. Accordingly, Soderholm's "conflict analysis" argument in this case is without merit.

E. HRS §29-15 Precludes Application of HRS Chapter 437

The City readily admits that the RFB did not require bidders to have a Hawaii dealer's license pursuant to HRS §437-2(a) and then presents several arguments in its motion as to why that is appropriate:

1. The Hawaii licensing requirement is prohibited by 49 U.S.C. Section 5325(i), 49 C.F.R. Section 18.36, and FTA Circular 4220.1F. City's Motion, pages 4-5.

2. HRS Chapter 437's location requirements create a local geographical preference. City's Motion, pages 6-8.

3. HRS §29-15 resolves the situation when there are conflicts between state and federal requirements. Alternatively, the provisions of HRS Chapter 437 are pre-empted by 49 U.C.C. 5325(i). City's Motion, pages 9-10.

4. FTA Circular 4220.1F is a "binding obligation" on the City as a recipient of FTA funds. City's Motion, pages 11-13.

Soderholm obviously views the legal landscape from a different perspective. It starts with the proposition that normally motor vehicle dealers in Hawaii must be licensed. According to Soderholm, bidders on the procurement in question must therefore be licensed pursuant to HRS Chapter 437 unless the Hawaii licensing law is "trumped" by HRS §29-15 or preempted by federal law.

In the Soderholm Kauai decision, the Hearings Officer found that there was a federal directive that must be followed in order to obtain federal funding for the vehicle procurement in question. That federal directive was the e-mail of April 30, 2012 that is also part of the City's Exhibit K to its Motion in this case. Summarizing the Soderholm Kauai decision, per the terms of HRS §29-15, that directive had to be followed. That statute did not contemplate the hearings officer making a determination on the appropriateness of a federal directive, especially when the federal government was not a party to the case. When the federal government, rightly or wrongly, said that there would be no funding if HRS Chapter 437 were to be applied, HRS §29-15 established that it was the policy and law of the State of

Hawaii to follow federal directives so as not to jeopardize federal funding. The Soderholm Kauai opinion made no decision on whether or not Hawaii law had been pre-empted by a federal statute, federal regulation, or FTA Circular.

The City's motion recognizes how HRS §29-15 fits into the analytical framework that should be considered with respect to the Motions at issue. As stated at pages 9-10 of its Motion, the Legislature has provided a statutory solution for situations where a conflict exists between State and federal requirements, and this statutory solution obviates the need to decide any constitutional pre-emption issues.

The next question to be answered in the present case, therefore, is whether HRS §29-15, in essence, authorizes the City to exclude an HRS Chapter 437 licensing requirement from the vehicle procurement in question.

HRS §29-15 provides that:

> **Conflict between federal and state requirements.** In the case of any contract, the funds for which have been wholly or in part promised, loaned, or furnished by the United States, or any instrumentality thereof, if the United States, or its instrumentality, requires that the advertisement for tenders, tenders, performance bond, or contract contain terms or provisions contrary to any state law, then as to the advertisements, tenders, bonds, or contracts the terms and provisions required by the United States, or its instrumentality, shall govern and are made applicable, and the officer expending the funds shall conform to such requirements as the United States, or its instrumentality, shall provide or require, any other law or laws of the State to the contrary notwithstanding. The provisions of this section shall be liberally construed so as not to hinder or impede the State in contracting for any project involving financial aid from the federal government.

The FTA Master Agreement form dated October 1, 2011, the City's Exhibit AA, is the "contract, the funds for which have been wholly or in part promised, loaned or furnished by the United States."

At pages 11-12, the Master Agreement provides that

FTA and recipient understand and agree that they both must comply with all applicable Federal laws and regulations, and should follow applicable Federal directives, except as FTA determines otherwise in writing.
In addition, the Recipient needs to be sure that others participating in its Project, whether as subrecipients, lessees, third party contractors, third party subcontractors, or otherwise (third party participants) comply with Federal laws, and regulations, and follow directives to the extent that the Recipient's compliance with Federal requirements will not be compromised. A Recipient or a third party participant that violates a Federal law or regulation, or fails to follow a Federal directive that applies to itself or the Project, may incur penalties.

In turn, "Federal Directive" is defined at page 15 of the Master Agreement to "include":

(1) Any Executive Order of the president of the United States,
(2) Any Federal document signed by an authorized Federal official that provides official instructions or advice about a Federal program, such as:
  (a) FTA or U.S. DOT Directives, and
  (b) Published policies,
  (c) Administrative practices,
  (d) Circulars,
  (e) Guidelines,
  (f) Guidance, or
  (g) Letters signed by an authorized Federal official

Section 15 of the Master Agreement, at pages 62-63, entitled "Procurement," provides in part:

The Recipient agrees not to use FTA funds for third party procurements unless they comply with Federal requirements. Therefore:
a. Federal Laws, Regulations, and Guidance. The Recipient agrees:
(1) To comply with the requirements of 49 U.S.C. Chapter 53 and other applicable Federal laws and regulations now in effect or later that affects its third party procurements,
(2) To comply with US. DOT third party procurement regulations, specifically 49 C.FR. 18.36 or 49 C.F.R. 19.40-10.48, and other applicable Federal regulations that affects third arty procurements as may be later amended,
(3) To follow the most recent edition and any revisions of FTA Circular 4220.1F, "Third Party Contracting Guidance," except as FTA determines otherwise in writing, and
(4) That although the FTA "Best Practices Procurement Manual" provides additional third party contracting guidance, the Manual may lack the necessary information for compliance with certain Federal requirements that apply to specific third party contracts at this time.

b. Full and Open Competition. The Recipient agrees to conduct all its third party procurements using full and open competition as provided in 49 U.S.C. 5325(a), and as determined by FTA.

c. Exclusionary or Discriminatory Specifications. The Recipient agrees not to use any FTA Project funds for any procurement based on exclusionary or discriminatory specifications, as provided by 49 U.S.C. 5325(h), unless authorized by other applicable Federal law or regulations.

d. Geographic Restrictions. The Recipient agrees not to use any State or local geographic preference, except:

(1) A preference expressly mandated by Federal law, or

(2) A preference permitted by FTA. *For example,* in procuring architectural engineering, or related services, the contractor's geographic location may be a selection criterion, provided that a sufficient number of qualified firms are eligible to compete.

HRS Chapter 437 requires a motor vehicle dealer licensed in Hawaii to have a facility in Hawaii because HRS §437-11(a) imposes the following requirements on license applicants:

(a) Requirements to be met before issuance of dealer's and auction's license.

(1) The following requirements shall be met by an applicant for a dealer's license before a license may be issued by the motor vehicle industry licensing board:

(A) The applicant has a site which will be used primarily for the purpose of selling, displaying, offering for sale, or otherwise dealing in motor vehicles;

(B) The site has a permanent building thereon suitable for the display at any one time of at least three motor vehicles having an average base of at least ninety inches; and

(C) The site has suitable sanitation facilities.

The e-mail of March 30, 2012, asserted that HRS §437-11 was in conflict with 49 USC Section 5325, 49 CFR Section 18.36 and the Master Agreement because it imposed a local geographical preference. Application of HRS §437-11 to a procurement would result in that procurement being ineligible for federal funds. In the Soderholm Kauai case, the e-mail of March 30, 2012 was determined to be a federal "directive." Under the terms of the Master Agreement in question in that case, that directive had to be followed in order to obtain

federal funding. Accordingly, under the terms of HRS §29-15, the Hawaii licensing law could not be applied.

In that decision, the Hearing Officer expressed some concern over the "definitiveness" of the e-mail because there was no evidence that its legal determinations had been reviewed by a federal attorney. In this case, however, that concern is no longer an issue because the e-mail of the Assistant Regional Counsel of June 15, 2012 is, in essence, an approval of the determinations of the March 30, 2012 e-mail. Contrary to the arguments at page 6 of Soderholm's Supplemental Opposition, the Hearings Officer does not believe the Assistant Regional Counsel would send an e-mail such as the one of June 15, 2012 merely to exercise a clerical function of passing on a previously sent document without agreeing with the contents of the document being passed on.

Soderholm also contends that neither of the e-mails were "signed" as required by the current Master Agreement's definition of "federal directive" because there is no handwritten signature or electronic signature. The Hearings Officer disagrees.

Section 2 of the Uniform Electronic Transactions Act, entitled "Definitions," defines "electronic signature" as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." Comment 7 to this definitional section states:

> A digital signature using public key encryption technology would qualify as an electronic signature, as would the mere inclusion of one's name as part of an e-mail message—so long as in each case the signer executed or adopted the symbol with the intent to sign." (Emphasis supplied).

It is apparent from the string of e-mails comprising the City's Exhibit K plus the inclusion of signature blocks with the name, title, address, and contact numbers of the program specialist

and the Associate Regional Counsel that these e-mails were "signed" within the meaning of the term "electronic signature."

Additionally, although not discussed in the Soderholm Kauai decision, HRS §29-15 does not necessarily require a "federal directive" within the terms of the Master Agreement in order to make the motor vehicle dealer licensing requirements of HRS Chapter 437 inapplicable. In the terms of the statute, "if the United States, or its instrumentality, requires that the advertisement for tenders, tenders, performance bond, or contract contain terms or provisions contrary to any state law, then as to the advertisements, tenders, bond, or contracts the terms and provisions required by the United States, or its instrumentality, shall govern and are made applicable, and the officer expending the funds shall conform to such requirements." The statute is not limited to "signed" written requirements.

In this case, there is no doubt that, rightly or wrongly, the FTA will not provide federal funds if licensing under Chapter 437 is part of the RFB. There is a "requirement" within the terms of HRS §29-15, "and the officer expending the funds shall conform to such requirement."

Furthermore, despite Soderholm's considerable efforts to demonstrate that the FTA is legally incorrect, this is not the appropriate forum to make such a determination. As was stated in the Soderholm Kauai case:

> More problematic is the inability of this proceeding to declare that a federal agency action or directive is not appropriate. That would, on first impression, be beyond the capabilities of a procurement protest decision pursuant to HRS Chapter 103D, especially when the federal government is not a party herein. Moreover, HRS §29-15 establishes that it is the policy of the State of Hawaii to follow federal directives so as not to jeopardize federal funding. If the State (or another party) believes a federal directive is wrong, the policy behind this statute would require the complaining party to seek to have the federal government change its directive. The statute does not contemplate a hearings officer making a decision on the appropriateness of a federal

> directive. That is especially the case here where a federal directive already says that any State action in contravention of the directive means federal funding will be lost.

In this procurement situation, Soderholm faces a difficult dilemma. It seeks enforcement of a Hawaii licensing provision that, if applicable, presumably gives it some advantage over out of state firms unwilling to pay for the rent or purchase of a "showroom" facility. Ironically, however, if Soderholm were to succeed in that quest, there would be no procurement in the first place because the FTA would refuse to provide the necessary federal funds, and any competitive advantage Soderholm might have would be irrelevant. Such a situation, however difficult for Soderholm, would be even more difficult for the citizens of the State who need the services of paratransit vehicles. HRS §29-15 points the way out of this potential dilemma for the State's citizens:

> The provisions of this section shall be liberally construed so as not to hinder or impede the State in contracting for any project involving financial aid from the federal government.

The decision herein follows this public policy of the State.

F. The Hearings Officer Has No Jurisdiction to Declare HRS §29-15 Unconstitutional

Finally, Soderholm seeks a declaration that HRS §29-15 is unconstitutionally vague. The Hearings Officer does not have the power to declare a state law unconstitutional. HOH Corp. v. Motor Vehicle Licensing Board, 69 Haw. 135, 736 P.2d 1271 (1987).

IV. DECISION

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

a. The City's Motion is granted for the reasons stated above.

b. Soderholm's Motion is denied.

c. The City's denial of Soderholm's procurement protest is affirmed for the reasons stated herein. Soderholm's Request for Administrative Hearing herein is dismissed.

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

DATED: Honolulu, Hawaii, NOV 30 2012.

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