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

In the Matter of JAS. W. GLOVER, LTD., Petitioner, vs. CITY & COUNTY OF HONOLULU, BOARD OF WATER SUPPLY, Respondent, and ROBISON CONSTRUCTION, INC., Intervenor.	PCH-2001-2 HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION [Consolidated]
In the Matter of JAS. W. GLOVER, LTD., Petitioner, vs. CITY & COUNTY OF HONOLULU, BOARD OF WATER SUPPLY, Respondent, and ROBISON CONSTRUCTION, INC., Intervenor.	PCH-2001-3

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

I. INTRODUCTION

On March 15, 2001, Jas. W. Glover, Ltd. ("Petitioner"), filed a request for an administrative hearing to contest the City & County of Honolulu, Board of Water Supply's ("Respondent"), March 6, 2001 denial of Petitioner's protest dated December 28, 2000, in conjunction with an invitation for bids ("IFB") for Job 00-80 Waipahu Wells IV, Waipahu, Oahu, Hawaii ("project"). This request was designated as PCH-2001-2. On March 16, 2001, a Notice of Hearing and Pre-Hearing Conference was issued and duly served on the parties. By agreement of the parties, the hearing was rescheduled from April 4, 2001 to May 14, 2001. On May 1, 2001, the parties filed a stipulation allowing Robison Construction, Inc. ("RCI"), to intervene in the case.

On April 26, 2001, Petitioner filed a request for an administrative hearing to contest Respondent's April 19, 2001 denial of Petitioner's March 9, 2001 protest over the apparent awarding of the contract for the project to RCI. This protest was designated as PCH-2001-3. On April 27, 2001, a Notice of Hearing and Pre-Hearing Conference was issued and served on the parties. On May 8, 2001, the parties filed a stipulation allowing RCI to intervene in the case and a stipulation to consolidate PCH-2001-2 and PCH-2001-3 for all purposes. On May 9, 2001, the parties filed a stipulation for the admission of joint Exhibits 1 to 26 into evidence.[1]

On May 14, 2001, the hearing in these matters commenced with William A. Cardwell, Esq. appearing on behalf of Petitioner; Reid M. Yamashiro, Esq. appearing for Respondent; and Nathan T. Natori, Esq. appearing for RCI. The hearing continued through May 15, 2001 and was completed on May 16, 2001.

At the conclusion of the hearing, the parties requested leave to file written closing arguments. Additionally, the Hearings Officer requested that the parties submit Proposed Findings of Fact and Conclusions of Law. Accordingly, on May 25, 2001, a closing brief was filed by Petitioner. On June 4, 2001, Respondent and RCI filed their

[1] Exhibits 27 through 29 were admitted into evidence during the hearing.

closing briefs and on June 8, 2001, Petitioner filed its reply. On June 29, 2001, Proposed Findings of Fact and Conclusions of Law were filed by Petitioner and jointly by Respondent and RCI.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision. The parties' proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

II. FINDINGS OF FACT

1. On or about November 9, 2000, Respondent issued an IFB, seeking sealed bids for the project.

2. The IFB, at page 1, listed the documents forming the Contract for the project which documents included the Proposal and Hawaii Administrative Rules, Title 3.

3. The IFB also included a section entitled "HAWAII ADMINISTRATIVE RULES", which stated that "[i]n the event of discrepancies between the 'GENERAL INSTRUCTIONS TO BIDDERS' or the 'GENERAL CONDITIONS OF CONSTRUCTION CONTRACTS OF THE CITY AND COUNTY OF HONOLULU' and the HAR, the latter document will govern."

4. The IFB, in Section SP-1 Instructions to Bidders, stated at paragraph 1.1.10: "All bids will be compared on the basis as specified in the Proposal."

5. Formatted bid proposal forms which the bidders used to submit their bids were provided by Respondent. Both Petitioner and RCI used the form to submit their bids, executing it and agreeing to the terms therein.

6. In the section of the form designated as "The undersigned also agrees as follows:" were listed provisions which included the following:

* * * *

> 3. That bids will be compared on the basis of Total Sum bid for all items contained in the Proposal, which shall

be considered to be the total sum of the actual or corrected amounts bid upon each item as the case may be.

4. *That if the product of the Unit Price multiplied by the number of units does not equal the total amount named by a Bidder of any item, it will be assumed that the error was made in computing the total amount and for the purpose of computing the lowest Bidder, the named Unit Price alone will be considered as representing the Bidder's intention and the total amount bid on such items shall be the amount arrived at by multiplying the Unit Price by the number of units.*

* * * *

8. That the Contractor has carefully read and understands the Proposal and the Special Provisions for this Contract and that the Board of Water Supply reserves the right to accept, or reject, any bid in the Proposal and to waive all defects.

(Emphasis added).

7. In its use of the formatted form provided by Respondent, RCI submitted its unit price and total amount bid for Item No. 23, which stated:

> 23. 750 [units] Lin. Ft., Furnish and install 3-inch copper pipe (buried) including gate valve and valve box, in place complete.

8. RCI's submission for Item No. 23 stated a unit price of $400.00 and a total amount of $30,000.00. If the number of units (750) for Item No. 23 is multiplied by the unit price as submitted by RCI ($400.00), the total amount is $300,000.00.

9. On December 21, 2000, the designated bid opening date for the project, Respondent opened the sealed bids, tabulated them and determined that the apparent lowest bid was submitted by RCI in the sum of $5,994,089.00.

10. Petitioner was the apparent second lowest bidder with its bid of $6,081,700.00. The difference between the two bids is $87,611.00.

11. Following the bid opening and between December 21, 2000 and December 26, 2000, Respondent evaluated the bids for the project in order to determine the lowest bid.

12. During the course of the evaluation, the discrepancy in RCI's bid relating to Item No. 23 (that the number of units multiplied by the stated unit price did not equal the total amount stated) was discovered by Respondent.

13. On December 26, 2000, Respondent called RCI and advised RCI of the error. Respondent then faxed RCI a copy of RCI's bid page with the error on it and a message advising RCI that pursuant to the terms of the proposal, the unit price listed on the proposal "has to be used for computing the lowest bid." Respondent further advised that RCI's new total for Item No. 23 was $300,000.00 and that RCI's bid was the third lowest bid for the project and that the "contract will have to be awarded to the lowest bidder according to the new totals."

14. On December 26, 2000, Respondent also called Petitioner and advised that Petitioner would be awarded the contract as the lowest bidder based upon Respondent's evaluation of the bids, and began preparing documents necessary to award the contract to Petitioner.

15. By letter dated December 26, 2000, and received by Respondent on December 27, 2000, RCI advised Respondent that RCI had made a mistake in its stated unit price and that it had intended to state $40.00 as its unit price which amount, when multiplied by the number of units, equals the total amount stated in RCI's bid for Item No. 23 of $30,000.00. RCI requested that Respondent use $40.00 as its unit price for Item No. 23.

16. On December 27, 2000, RCI submitted a worksheet to Respondent as well as a "certification" of the worksheet. The worksheet was marked confidential and was not disclosed to anyone other than Respondent and was not introduced as evidence at the hearing.

17. On December 27, 2000, Respondent advised Petitioner that the contract was going to be awarded to RCI and that Respondent was allowed to correct RCI's bid under the procurement laws.

18. By memorandum dated December 28, 2000, but signed on December 29, 2000, Respondent's chief procurement officer, Clifford S. Jamile ("Jamile"), allowed the correction as requested by RCI stating that as authorized by Hawaii Administrative Rules ("HAR") §3-122-31, he "hereby waive[d] a minor informality that does not affect price, quantity, quality, delivery, or contractual conditions in the subject bid." The memorandum

noted that the unit price for Item No. 23 was mistakenly written as $400/unit instead of the correct amount of $40.00/unit and that there was no error in the extension of the bid price of $30,000.00. Jamile stated that "waiver of the minor informality [was] in the best interest of [Respondent]."

19. A copy of the entire HAR §3-122-31 was attached to the memorandum as well as RCI's "certified" worksheets.

20. By letter dated December 28, 2000 and delivered to RCI on December 29, 2000, Respondent approved RCI's request to revise the unit price for Item No. 23 and notified RCI that RCI was being awarded the contract. Respondent delivered the unexecuted contract to RCI with the letter.

21. Respondent sought to award the contract for the project before the end of the year in order to encumber the funds necessary for the project. Otherwise, funding for the project would lapse.

22. By letter and fax transmittal dated December 28, 2000 and marked received by Respondent on January 2, 2001, January 3, 2001, and January 4, 2001, Petitioner filed a protest of Respondent's stated intention to award the contract to RCI. The stated basis for the protest was Respondent's allowance of RCI's change of the stated unit price in violation of paragraph 4 of the proposal.

23. After receipt of the contract on December 29, 2000, RCI executed the contract and returned it to Respondent. Thereafter, Respondent began processing the contract for final execution and continued to process the contract to at least March 8, 2001.

24. A copy of the December 28, 2000 letter awarding the contract to RCI was posted at Respondent's building from January 2, 2001 to January 9, 2001.

25. On January 3, 2001, Jamile met with John and Maile Romanowski, principals of Petitioner. The meeting had been arranged by John Romanowski and Jamile on December 28, 2000.

26. At the January 3, 2001 meeting, Jamile had the protest and fax coversheet in his possession.

27. Respondent submitted the protest to corporation counsel representing Respondent on or after January 9, 2001.

28. On March 1, 2001, while Petitioner's protest was pending with Respondent, Petitioner's attorney requested inspection and copying of Respondent's documents relating to the protest. Respondent allowed Petitioner to inspect the documents on March 8, 2001. One of the documents inspected by Petitioner was the letter dated December 28, 2000 by which Respondent notified RCI of the contract award.

29. By letter dated March 6, 2001, but faxed on March 14, 2001 and mailed on March 15, 2001, Respondent denied Petitioner's protest stating that the change of RCI's unit price was "in accordance with Hawaii Administrative Rules (HAR) Section 3-122-31(c)(3)", and that it was in the best interest of Respondent and Respondent's customers. The letter did not advise Petitioner of its right to administrative review.

30. On March 7, 2001, Petitioner requested that Respondent reconsider its March 6, 2001 denial.

31. By letter dated March 9, 2001, Petitioner protested the apparent awarding of the contract to RCI and the continuation of contract activities despite the filing of the protest dated December 28, 2000.

32. Only after its receipt of the March 9, 2001 protest did Respondent cease further processing of the contract.

33. At no time has Respondent's chief procurement officer made a written determination that the award of the contract without delay is necessary to protect substantial interests of the State or Respondent.

34. On March 29, 2001, Petitioner withdrew its March 7, 2001 request for reconsideration of Respondent's March 6, 2001 denial.

35. By letter dated April 19, 2001, Respondent denied Petitioner's March 9, 2001 protest as untimely. The letter did not advise Petitioner of its right to administrative review.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

A. Jurisdiction.

Hawaii Revised Statutes ("HRS") §103D-709(a) extends jurisdiction to the Hearings Officer to review 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, *de novo.* In doing so, 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 (1997).* And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f).

B. Correction of RCI's Bid.

The gravamen of Petitioner's December 28, 2000 protest concerns the correction of the stated unit price for Item No. 23 in RCI's bid to make it consistent with the stated extended price. Petitioner contends that the IFB (specifically paragraph 4 of the proposal), expressly prohibits the correction of unit prices and, instead, dictates that the *extended price* be revised to reflect the product of the stated unit price and the number of units. In other words, according to Petitioner, the IFB provision along with HAR §3-122-31(c)(1) resolve the apparent discrepancy and *automatically* set the intended price as the unit price. HAR §3-122-31(c) states:

> (c) Corrections to bids after opening but prior to award may be made under the following conditions:
>
> (1) If the mistake is attributable to an arithmetical error, the procurement officer shall so correct the mistake. *In case of error in extension of bid price, unit price shall govern.*
>
> (2) If the mistake is a minor informality which shall 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. The procurement officer shall prepare a written approval or denial in response to this request. Examples of mistakes include:

(A) Typographical errors;

(B) Transposition errors;

(C) Failure of a bidder 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.

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

(Emphasis added).

On the other hand, both Respondent and RCI assert that the correction of the unit price for Item No. 23 was permissible under HAR §3-122-31(c)(2) and (c)(3)[2]. Essentially, HAR §3-122-31(c)(3) authorizes the correction of a mistake if the chief procurement officer concurs in the determination that the mistake is obvious and the correction of the mistake would be in the best interest of the agency or for the fair treatment of the other bidders.

Neither HRS Chapter 103D ("Procurement Code"), nor its implementing rules defines the term, "obvious mistake." The commentary to the American Bar Association's Model Procurement Code for State and Local Governments ("ABA Model Procurement Code"), however, is insightful:[3]

> To maintain the integrity of the competitive sealed bidding system, a bidder should not be permitted to correct a bid

[2] According to Petitioner, HAR §3-122-31(c)(3) is inapplicable because both the IFB provision in question and HAR §3-122-31(c)(1) specifically address the type of mistake involved here, to wit, error in the extension of a bid price. A plain reading of the entire rule, however, confirms that HAR §3-122-31(c)(3) is applicable to correct a mistake, including an error in the extension of a bid price, provided that the mistake is an obvious one and meets the other requirements of HAR §3-122-31(c)(3).

[3] In 1992, the Legislature requested that the State Auditor conduct a study to provide information and recommendations for the enactment of a comprehensive procurement code. *Act 274, Session Laws of Hawaii, 1992.* In Act 274, the Legislature specifically asked that the study review among other things, the American Bar Association's *Model Procurement Code for State and Local Governments* and the procurement codes from the federal government and other states. Thus, where appropriate, the Hearings Officer will look for guidance in the commentaries to the ABA Model Procurement Code, the decisions of the federal government and the interpretations of the model code from other states.

> mistake after bid opening that would cause such bidder to have the low bid *unless the mistake is clearly evident from examining the bid document*; for example, extension of unit prices or errors in addition.

ABA Model Procurement Code §3-202(6), Commentary (2)(1979)(Emphasis added).

The commentary is consistent with prior rulings of the Comptroller General of the United States that the mistake sought to be corrected must be *obvious on the face of the bid*, that is, the contracting officer, without the benefit of advice from the bidder, must be able to ascertain the mistake *and* the intended bid. *Matter of Bay Pacific Pipelines, Inc., Ranger Pipelines, Inc., and F.W. Spencer & Son, a Joint Venture, U.S. Comp. Gen., B-265659 (1995); Matter of Action Serv. Corp., U.S. Comp. Gen., B-254861 (1994).* On the other hand, "the contracting officer may properly compare a firm's prices to the government's estimate and other prices received, and employ his or her logic and experience in determining that one price makes sense while another does not". *Matter of Bay Pacific Pipelines, Inc., Ranger Pipelines, Inc., and F.W. Spencer & Son, a Joint Venture, U.S. Comp. Gen. at pages 5-6.* And notwithstanding a solicitation provision that gives precedence to unit prices, an obviously erroneous unit price can be corrected to correspond to an extended total price where the corrected unit price is the only reasonable interpretation of the bid. *Matter of Engle Acoustic & Tile, Inc., U.S. Comp. Gen., B-190467 (1978).*

Similarly, the Maryland State Board of Contract Appeals[4] ("Maryland Board"), has previously held that a solicitation provision for determining price discrepancies "should not be applied with blinders so as to enforce an unconscionable result. The procurement officer should rely on his common sense and experience and consider prices submitted by other bidders, if pertinent, in determining whether an error and a bidder's intended correct bid are clearly evident on the face of the bid documents." *Appeal of Dick Corporation, No. 1321 (MSBCA June 10, 1987).* In *Dick Corporation*, the Maryland Board stated:

> In prior cases involving mistakes in bid, we have held that a procurement officer must exercise reasonable discretion in applying COMAR 21.05.02.12 and the IFB provisions that

[4] Maryland enacted legislation based upon the ABA Model Procurement Code on July 1, 1981.

> define the process required to correct an alleged bid mistake. These requirements are designed to prevent a bidder from having a second opportunity to bid, contrary to the fairness standards of competitive bidding, although they also protect a bidder from inadvertent bid errors by giving relief under circumstances where it would be unconscionable not to do so. Thus, the procurement officer from an examination of the bid documents may be able to reasonably determine the intended correct bid from the nature of a clear mistake on the face of the bid, e.g., from examination of typographical errors, unit price extension errors, transposition errors, and arithmetical errors, as well as from examination of other bids. Where the intended correct bid is clear it would be unconscionable not to permit correction.

Id. at 12. See also, *Appeal of P. Flanagan and Sons, Inc., No. 1068 (MSBCA Jan. 17, 1983).*

The Hearings Officer finds these sound principles to be consistent with the underlying intent of the Procurement Code[5] and its implementing rules and accordingly, concludes that these principles are applicable here. Thus, 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 Procurement Code and its implementing rules, including HAR §3-122-31(c)(3).[6] Moreover, 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

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[5] 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. *Standing Committee Report No. S8-93, 1993, Senate Journal at 39; HAR §3-120-1.* In addition, 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).*

[6] Generally, the Procurement Code and its implementing rules supercede any contrary agency contract general provision. See for example, HRS §103D-102(a)("This chapter shall apply to all procurement contracts . . . "); HAR §3-120-3 ("These rules shall apply to . . . [a]ll procurement contracts . . . "). However, the Hearings Officer is of the opinion that the provision in the IFB giving unit prices precedence over extended prices is in harmony with the procurement laws applicable here.

the other bids submitted and rely on his or her own experience and common sense.[7] By contrast, where the intended bid cannot be determined from the bid documents alone, a mistake is not correctable as an obvious mistake.

Here, the stated unit price of $400.00 is substantially higher than the other bid prices for this item. In fact, extending the bid on the basis of the unit price bid would result in an extended bid about six times greater than the second highest bid for the item.[8] Additionally, the extended total for this item of $30,000.00, when added to the other extended totals in the bid equaled the price RCI bid as its total bid price. On the other hand, the intended unit price of $40.00 is consistent with RCI's and the other bidders' prices which range from $16.00 to $65.50, and can easily be determined by dividing the extended total price of $30,000.00 for the line item by 750. Furthermore, a logical explanation for the discrepancy – that RCI had inadvertently inserted an extra zero in its unit price could be discerned from the face of the bid. Based on these considerations, the Hearings Officer concludes that the mistake in the unit price for Item No. 23 and its intended bid were obvious from the face of the bid[9] and susceptible to only one reasonable interpretation.[10]

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 the other bidders. In that regard, the allowance of a correction would *not* be in the best interest of the procuring agency where it would be unfair to the other bidders. *Southern Food Groups, L.P. v. Dept. of Educ., et. al., 89 Haw. 443 (1999).* Here, Jamile considered the saving of $87,611.00 to be in Respondent's best interest. Petitioner, however, asserts that Respondent's action was unfair to other bidders because it was contrary to Respondent's long-standing practice of considering the stated unit price as controlling and did not provide the other bidders with adequate notice of the deviation from

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[7] Resort to a procurement officer's experience may include consideration of such things as historical costs for such an item and the relative cost of such an item in similar procurements.

[8] The second highest bid for Item No. 23 was $49,125.00.

[9] In this regard, 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. Here, the intended bid was clearly determinable without resort to the worksheets. Thus, Respondent's reference to the worksheets was a harmless error.

this practice. This argument, however, ignores the fact that all bidders had access to the applicable procurement laws and as such, had the same opportunity as RCI to avail themselves of those laws to correct obvious mistakes.[11] Petitioner's argument is therefore without merit. On the contrary, the Hearings Officer must conclude based upon the evidence presented, that the mistake presented here was an obvious one and that the correction of the mistake was in Respondent's best interest and not unfair to other bidders.[12]

Petitioner also complains that correction of the mistake violates HRS §103D-302(g). That section provides:

> 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 mistakes, shall be supported by a written determination made by the chief procurement officer or head of a purchasing agency.

(Emphasis added).

Petitioner correctly points out that the public's interest includes an interest in ensuring the integrity of the procurement process and avoiding bid manipulation. According to Petitioner, however, Respondent's allowance of the unit price correction after bid opening would lead to the possibility of bidders claiming a mistake in their bid and submitting false worksheets to justify their "mistake". Petitioner also asserts that Respondent's looking beyond the bid documents and examining worksheets received after bid opening to determine the "correct" unit price would provide the dishonest bidder with an opportunity to manipulate the bidding process to his advantage and as such, is prejudicial to fair competition. Obviously, permitting the bidder to elect between two prices, only one of which will result in

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[10] In view of the Hearings Officer's conclusion, consideration of HAR §3-122-31(c)(2) is unnecessary.

[11] The evidence suggested that although mistakes in the extension of bid prices have been fairly common, RCI may have been the first bidder on a Board of Water Supply project to challenge, on the basis of HAR §3-122-(c)(3), the agency's practice of considering the stated unit price as controlling.

[12] The correction of the mistake was not unfair to the other bidders for the additional reasons set forth below in the discussion regarding HRS §103D-302(g) and fair competition.

an award to the bidder, after competitors' prices are revealed allows the bidder an unfair advantage contrary to the underlying intent of the Procurement Code. As previously established, however, correction of a mistake pursuant to HAR §3-122-31(c)(3) requires that the mistake and the intended bid be ascertainable independently rather than from information provided by the bidder after the bids are revealed. This independent scrutiny provides a reasonable degree of protection against the deliberate manipulation of the bidding process by unscrupulous bidders seeking to gain an unfair advantage over its competition.[13] All of these considerations lead the Hearings Officer to conclude that Petitioner has not shown that Respondent's action was prejudicial to the public interest or to fair competition, or that Respondent's determination in that regard was clearly erroneous, arbitrary, capricious, or contrary to law. HAR §3-122-31(f).[14]

Petitioner also asserts that the provision in the IFB that precludes the correction of unit prices in the bid is part of the evaluation criteria included in the IFB and is the only provision that addresses unit price mistakes. Thus, according to Petitioner, RCI's correction of the unit price in Item No. 23 of its bid was a violation of HRS §103D-302(f).[15]

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[13] In promulgating the mistake in bid rules in HAR §3-122-31, the Procurement Policy Board ("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.

[14] Petitioner also contends that Respondent's decision to allow the correction of the unit price was not supported by a written determination as required by HRS §103D-302(g). Jamile's December 28, 2000 memo to file (Exhibit 10), states, among other things, "The vendor's bid total for Item No. 23 remains unchanged, the total contract bid is unchanged, and waiver of the minor informality *is in the best interest of the BWS.*" (emphasis added). Although rather cursory, the Hearings Officer finds that this memo meets the requirement of HRS §103D-302(g).

[15] HRS §103D-302(f) states:

> Bids shall be evaluated based on the requirements set forth in the invitation for bids. These requirements may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.

This argument, however, ignores the fact that the IFB expressly made the Hawaii Administrative Rules, Title 3, a part of the contract documents. Moreover, aside from certain specified exceptions, all public procurement contracts are subject to the Procurement Code and its implementing rules.[16] Accordingly, the application of HAR §3-122-31(c)(3) here does not violate HRS §103D-302(f).

C. Violation of the Stay

Petitioner next contends that Respondent violated HRS §103D-701(f) when Respondent delivered the contract and a letter awarding the contract to RCI on or about December 29, 2000 and continued to process the contract upon its return notwithstanding the December 28, 2000 protest. HRS §103D-701(f) states:

> *In the event of a timely protest* under subsection (a), *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.

(Emphasis added).

Respondent denies having received Petitioner's protest on December 28, 2000 and instead, claims that it received the protest for the first time no earlier than January 2, 2001. Thus, Respondent argues that its "awarding" of the contract to RCI on December 29, 2000 was not in violation of HRS §103D-701(f) because no protest had been filed by that date. Moreover, according to Respondent, because it awarded the contract on December 29, 2000, when it delivered the contract and a letter "awarding" the contract to RCI, Respondent was no longer obligated to stay further processing of the contract and presumably the performance of work under the contract pending the outcome of the protest.

The significance of the stay required by HRS §103D-701(f) was explained in *In re Carl Corp. 85 Haw. 431 (1997)*. There, the Court noted that "because the award of the contract so severely limits the relief available," HRS §103D-701(f) requires that a timely

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[16] See HRS §103D-102(a) and HAR §3-120-3. In addition, it is the general rule in Hawaii that the existing law is part of the contract where there is no stipulation to the contrary. *Quedding v. Arisumi Bros., 66 Haw. 335 (1983).*

protest halt further "solicitation and contract activities until the protest is resolved". *In re Carl, 85 Haw. at 450:*

> 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.*

In re Carl, 85 Haw. at 453 (Emphasis added).

This is particularly true because, unlike the ABA Model Procurement Code, the remedies provided for in the Procurement Code are exclusive. HRS §103D-704. Consequently, once the contract is awarded, the only remedy available is ratification or termination of the contract pursuant to HRS §103D-707. Moreover, as the Court observed:

> *[T]he 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.

In re Carl, 85 Haw. at 449 (Emphasis added).

These considerations underscore the importance of the stay in preserving the remedies that might not otherwise be available to a successful protestor once the contract has been awarded and belie Respondent's suggestion that HRS §103D-701(f) is no longer applicable once the contract and a letter "awarding" the contract to the bidder is delivered. On the contrary, *In re Carl* makes clear that *all activities* relating to the procurement,[17] including activities relating to the solicitation, contract and performance of the contract must immediately cease once a timely protest is received, notwithstanding the deliverance of the contract and notice of award letter. Consequently, even assuming that Petitioner's December 28, 2000 protest letter was not received by Respondent until January 2, 2001, Respondent was required to stay any and all further contract activities. However, Respondent did not do so. It made no attempt to retrieve the contract from RCI. Moreover, after hearing from its attorneys, Respondent began processing the contract for its final execution after it was

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[17] As the commentary to ABA Model Procurement Code §9-101, which is substantively identical to HRS §103D-701(f), explains: "In general, the filing of a protest should halt the procurement until the controversy is resolved."

executed and returned by RCI on or about January 12, 2001. According to the evidence, the processing of the contract continued into March 2001 up to the time Petitioner filed its second protest on March 9, 2001. Based on the foregoing, the Hearings Officer must conclude that Respondent violated HRS §103D-701(f).

Respondent contends that the December 28, 2000 letter from Petitioner to Respondent protesting that the "project would be awarded to a different bidder," cannot qualify as a proper protest. HAR §3-122-3 requires that protests be filed "in duplicate[18] within five working days *after* the protestor knows or should have known of the facts leading to the filing of the protest." (emphasis added). According to Respondent's theory, because Petitioner's December 28, 2000 "protest" was filed *before* March 8, 2001 – the date Petitioner discovered that Respondent had "awarded" the contract to RCI, the protest was invalid and HRS §103D-701(f) was therefore inapplicable.

The evidence adduced, however, clearly established that the December 28, 2000 protest letter was filed after Petitioner was advised by Respondent on December 27, 2000 that the contract was going to be awarded to RCI and RCI would be allowed to correct its mistake. As such, Petitioner was required to submit its protest within five working days thereof. Nowhere in the Procurement Code or its implementing rules is there a requirement that protests be filed only after learning that the contract had actually been awarded.[19] See *GTE Hawaiian Telephone Co. Inc. v. County of Maui, PCH-98-6 (December 9, 1998)(HAR §3-126-3(b) neither authorizes nor requires a protestor to delay the filing of a protest concerning the award of a contract until after the award has been made).*

Respondent also claims that the March 9, 2001 protest was untimely because it was filed more than five working days after Petitioner should have known of the awarding of the contract to RCI on January 2, 2001.[20] This argument, however, erroneously assumes that Petitioner's March 9, 2001 protest was necessary. It was not. The December 28, 2000

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[18] Respondent and RCI also complain that the December 28, 2000 protest letter from Petitioner was not filed in duplicate. In *Big Island Recycling & Rubbish v. County of Hawaii, PCH-99-12 (December 19, 1999)*, however, the Hearings Officer found HAR §3-126-3(a) to be directory.

[19] On the contrary, the Procurement Code was designed to encourage the expeditious processing of protests. *GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH-98-6 (December 9, 1998).*

[20] According to the evidence, Respondent posted a notice of the awarding of the contract to RCI on January 2, 2001.

protest letter protested the award of the contract to another bidder and Respondent's decision to allow RCI to correct its mistake. It was also sufficient in and of itself to trigger the stay provision of HRS §103D-701(f). Thus, the March 9, 2001 protest added nothing new and was merely duplicative and unnecessary.[21]

D. Remedies

In determining an appropriate remedy for Respondent's violation of HRS §103D-701(f), the Hearings Officer looks to the pre-award remedies set forth in HRS §103D-706 since the contract involved here has not been executed.[22] HRS §103D-701(f) provides that the proposed award shall be cancelled or revised to comply with the law. In light of the Hearings Officer's conclusion that the correction of RCI's unit price was proper under HAR §3-122-31(c)(3), cancellation of the award to RCI, particularly after its bid has been revealed, would be unfair and therefore inappropriate. For the same reason, there is no need to revise the proposed award to RCI.

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[21] Petitioner also asserts and the Hearings Officer finds that Respondent violated HRS §103D-701(c) by failing to include in its written denials, information on Petitioner's right to an administrative proceeding under HRS §103D-709. 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. However, no such assertion has been made here and the Hearings Officer finds that Petitioner has not otherwise been prejudiced by the violation.

[22] In discussing the remedies available under the Procurement Code, the Court in *In re Carl stated:*

> **Had the contract not been executed,** the relief CARL seeks [that is, elimination of Dynix's proposal and award of the contract to CARL] would have been available. If the Hearings Officer had agreed with CARL, **prior to the award of the contract, he could either have ordered the cancellation of the solicitation and precluded [Dynix] from submitting a proposal on any subsequent solicitation based on the same specifications or have revised the solicitation to comply with law by eliminating [Dynix's] proposal from consideration, which would have had the same effect.** Id. at 450 (emphasis added).

In a footnote, the Court further explained:

> Even if he disagreed with CARL's contentions regarding the disqualification of [Dynix's] proposal, the Hearings Officer's conclusion that the evaluation of the proposals was not in compliance with the Code would have required him to **cancel the solicitation or revise it to comply with law, had the contract not been executed. In that case, his remand for a proper evaluation would have been appropriate.** Id. at 450, n. 18 (emphasis added).

The foregoing supports the proposition that the application of HRS §103D-706 (Remedies prior to award) and HRS §103D-707 (Remedies after an award) is contingent on whether a contract has actually been executed by the parties.

Petitioner also seeks reimbursement of its costs incurred in this solicitation. 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. *In re Carl, 85 Haw. at 456-58* (emphasis added). In this case, the correction of RCI's unit price was proper. Petitioner has therefore failed to show that it should have been awarded the contract and, as such, is not entitled to recover its bid preparation costs.

In addition, Petitioner requests its attorneys' fees in prosecuting this matter. Generally, "no attorney's fees may be awarded as damages or costs unless so provided by statute, stipulation, or agreement." *Food Pantry, Ltd. v. Waikiki Business Plaza, Inc. 58 Haw. 606, 618, 575 P.2d 869, 878 (1978).* In *In re Carl*, however, the Court carved out a limited exception to the general rule. There, the Court held that a protestor is entitled to recover its attorneys' 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. *In re Carl, 85 Haw. at 460.* As discussed previously, Petitioner has not proven that correction of the unit price for Item No. 23 in RCI's bid violated the Procurement Code. Additionally, HAR §3-126-36(c) requires that a finding of bad faith be supported by specific findings showing *reckless* disregard of clearly applicable laws.

The *In re Carl* Court's conclusion that head librarian Kane's conduct in executing the contract prior to the resolution of the protest amounted to bad faith, was apparently based on Kane's disregard of both HRS §103D-701(f) *and* the specific instructions of the administrator of the procurement office:

> Once CARL's timely protest was filed, and during its pendency, Kane was prohibited by the Code and its implementing regulations from executing the contract until the chief procurement officer made a written "substantial interest" determination. Kane was certainly aware of HRS § 103D-701(f) *and was specifically informed by Unebasami that, pursuant to HAR § 3-126-6, the Library was not to award the contract during the pendency of the protest.* Kane's disregard of the mandate of clearly applicable law, *as well as the specific directions of Unebasami, was, at best, reckless.* In his zeal to have the project completed

> before the end of the legislative session, Kane prematurely awarded the contract in violation of law, effectively restricting CARL's opportunity to participate in a fair solicitation should it prevail on its protest. We therefore hold that Kane's conduct was in bad faith.

In re Carl, 85 Haw. at 451-52 (emphasis added).

It is clear from the foregoing that a finding of recklessness requires more than a violation of HRS §103D-701(f). Very little evidence was presented in this case to show that Respondent's conduct in processing the contract following receipt of the protest amounted to anything more than a violation of HRS §103D-701(f). Unlike the circumstances in *In re Carl*, the record in this case does not establish the type of egregious conduct that was present in *In re Carl.*[23] Therefore, the Hearings Officer must conclude that Petitioner is not entitled to its attorney's fees in pursuing this matter.[24]

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that the protests in PCH- 2001-2 and PCH-2001-3 be dismissed and that the parties bear their own attorney's fees and costs incurred in this matter.

Dated at Honolulu, Hawaii: AUG 7 2001.

CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

[23] Although insufficient to prove bad faith, the evidence presented raised serious concerns over Respondent's overall handling of the protests, i.e., twice failing to inform Petitioner of its right to administrative review pursuant to HRS §103D-701(c) and failing to submit the December 28, 2000 protest to corporation counsel within three working days pursuant to HAR §3-126-3(e). Also of concern were the testimonies of Michael A. Fuke, the head of the engineering branch that issued the IFB, that he was unfamiliar with the stay requirement set forth in HRS §103D-701(f), and Clifford Jamile that it was not his understanding that "everything has to stop when that protest is made."

[24] Thus, under the Procurement Code as presently written, a violation of the stay provision set forth in HRS §103D-701(f) does not present an independent basis for the imposition of sanctions. Where, as here, the agency violates HRS §103D-701(f) but the protestor is unable to prove that (1) the solicitation itself was in violation of the procurement laws 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. It is also interesting to note that the opinion in *In re Carl* suggests that the contract must have been *executed* in bad faith and in violation of HRS §103D-701(f) before the protestor is entitled to recover its attorney's fees. Until then, the protestor would still be able to resort to the pre-award remedies of HRS §103D-706 and presumably, would suffer no prejudice. However, where the contract is executed in violation of the stay, the remedies available to the protestor would be limited to ratification or termination of the contract under HRS §103D-707, thereby justifying an award of attorney's fees.