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

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| In the Matter of<br><br>HI-TEC ROOFING SERVICES, INC.,<br><br>Petitioner,<br><br>vs.<br><br>DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES, STATE OF HAWAII,<br><br>Respondent. | PCH 2002-1<br><br>HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION |

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

## I. INTRODUCTION

On January 30, 2002, Hi-Tec Roofing Services, Inc. (Petitioner) filed a Request for Hearing to contest the January 23, 2002, denial of five protests which it had filed with the State Procurement Office and the Department of Accounting and General Services (Respondent). On February 1, 2002, a Notice of Hearing and Prehearing Conference was filed by the Office of Administrative Hearings, Department of Commerce and Consumer Affairs. The prehearing conference was set for February 8, 2002, and the Hearing was set for February 14, 2002.

On February 8, 2002, the Respondent filed a response to the petition and the prehearing conference was also held on that date, with the Petitioner represented by Matt A. Tsukazaki, Esq. and with the Respondent represented by Patricia T. Ohara, Esq. It was somewhat helpful in promoting an exchange of information, and discussing procedural issues - particularly as to the Petitioner's need to obtain further documentation relating to the allegations in the petition. At that time it was agreed that the hearing would commence as scheduled on February 14, 2002, but its initial focus would be on the production of documents pursuant to various subpoenas issued on behalf of the Petitioner.

On February 11, 2002, the Respondent filed a motion for a protective order to quash the subpoenas, and that motion was heard on February 14, 2002. The motion

was granted in part and denied in part, and thereafter the hearing was set to continue on February 28, 2002. However, since the production of documents was not fully resolved at the time of the February 28, 2002 proceedings, an order was issued on that date regarding further proceedings (including the production of documents and the filing of exhibits), and a new date of April 9, 2002, was set for a continuation of the hearing.

On April 4, 2002, the Respondent filed a Motion to Dismiss, and on April 8, 2002, the Petitioner filed a memorandum in opposition to that motion. On April 9, 2002, the hearing resumed, with consideration first being given to the Respondent's Motion to Dismiss. The motion was denied on the basis that there appeared to be material, factual questions that precluded summary disposition of the matter at that time. The substantive hearing then proceeded with respect to the allegations in the petition, and continued on April 10-12, 17-19, 23, 24, 26, and 30, 2002, as well as on May 1, 3, 7-9, 14-16, and 22, 2002.[1] Throughout the parties' presentations on each of those dates Mr. Tsukazaki continued to represent the Petitioner and Ms. Ohara continued to represent the Respondent.

At the close of the Petitioner's case in chief the Respondent made an oral motion for a directed verdict on substantially the same grounds upon which it had earlier presented its motion to dismiss the proceedings. The motion was denied on the basis that there still appeared to be material, factual questions that precluded summary disposition of the matter. The Respondent then proceeded to present its case in chief, which was followed by a short rebuttal by the Petitioner. At the conclusion of the hearing the parties made their closing arguments and the matter was taken under consideration.

The undersigned Hearings Officer, having considered the evidence and arguments presented during the course of the hearing in light of the entire record in this matter, hereby renders the following findings of fact, conclusions on law, and decision. The findings of fact have been presented in a generally chronological format, while the conclusions of law have been presented in a more topical sequence. It should also be noted that even though the focus of the hearing was on the Petitioner's allegations about specific projects, it became obvious that any effort to understand them would require addressing limited elements of the Respondent's unique procurement program with which the projects were inextricably linked. At the same time, numerous portions of the Petitioner's presentation were oriented toward a general critique of the Respondent's procurement program. While they were of peripheral relevance and perhaps worthy of consideration in other forums – they had only limited applicability in this case, or were oriented toward details which, while supportive of larger factual determinations, did not warrant repetition herein.

## II. FINDINGS OF FACT

### The Requests for Proposals and the Protests

1. During the month of September 2001 the Respondent, by its chief

[1] The extended length of, and frequent divergences in, the presentation of this case appear to be due in large part to the absence of provisions in the Hawaii Public Procurement Code and/or in its regulations providing for mandatory discovery procedures to be used by parties *prior to* a hearing. The lack of such prehearing mechanisms for expediting what is fundamentally a jury-waived civil trial constitutes a significant procedural deficiency that adversely affects all participants and warrants a modification of the existing law in this respect.

procurement officer, issued 3 separate Requests for Proposals (RFPs) for design and build reroofing projects covering maintenance and repair work to be performed at:

a) the Honolulu and Windward School Districts - Aikahi Elementary School, Kalaheo High School, and Kuhio Elementary School, (advertised September 26, 2001),
b) the Department of Health - Kinau Hale (advertised October 8, 2001), and
c) the Central School District - Wahiawa Elementary School (advertised November 14, 2001).

2. By a letter dated October 2, 2001, the Petitioner, by its attorney, submitted a protest regarding the RFP for Aikahi Elementary School, Kalaheo High School, and Kuhio Elementary School to the Respondent. By a similar letter dated October 12, 2001, the Petitioner also submitted a protest regarding the RFP for Kinau Hale to the Respondent.

3. During the month of October 2001 the Respondent, by its chief procurement officer, issued two separate RFPs for design and build reroofing projects covering maintenance and repair work to be performed at:

a) the Department of Agriculture and Conservation's Buildings C & D (advertised November 2, 2001), and
b) the Leeward, Central and Honolulu School Districts – Nanakuli High/Intermediate School, Aiea Intermediate School, Kipapa Elementary School, and Lincoln Elementary School (advertised October 16, 2001)

4. By a letter dated October 22, 2001, the Petitioner, by its attorney, submitted a protest regarding the RFP for Nanakuli High/Intermediate School, Aiea Intermediate School, Kipapa Elementary School, and Lincoln Elementary School to the Respondent. Except for its date, however, the first page of this October 22, 2001, letter was exactly the same as the first page of the Petitioner's October 2, 2001 letter. Furthermore, this October 22, 2001, letter stated that it was "a protest of the three procurements" and its list of them began with the names of the same three procurements that it had protested in the October 2, 2001, letter. Only by an examination of the continuation of the list (on the second page) would the addition of four more procurements become apparent and would the contextual difference between these two superficially similar letters become distinguished.

5. On October 30, 2001, the Petitioner's attorney sent a follow-up letter to the Respondent noting that it had not received any reply to its letter of October 2, 2001, protesting the Aikahi, Kalaheo, and Kuhio projects, and requesting information on the status of those projects. The Respondent, however, did not reply to this request.

6. By a letter dated November 7, 2001, the Petitioner, by its attorney, submitted a protest regarding the RFP for the Department of Agriculture and Conservation's Buildings C & D. By a similar letter dated November 19, 2001, the Petitioner also submitted a protest regarding the RFP for the Wahiawa Elementary School.

7. On November 7, 2001, the Petitioner's attorney also sent two follow-up letters to the Respondent noting that it had not received any reply to its letters of October

12, 2001, and October 22, 2001, protesting the Kinau Hale, Aikahi, Kalaheo, Kuhio, Nanakuli, Aiea, Kipapa, and Lincoln projects. The Respondent, however, did not reply to these letters.[2]

8. Each of the Petitioner's five protest letters were routed by the Respondent through its Public Works Division Administrator who perfunctorily forwarded them to the Chief of its Staff Services Branch for attention and the preparation of a reply. Each of the Petitioner's protest letters had concluded with the following one sentence paragraph:

> As you know, Haw. Rev. Stat. Section 103D-701 and Haw. Admin. Rules Section 3-126-5 prohibit taking any further action on the solicitation or award of the contracts until this timely protest has been settled.

9. Approximately 16 weeks after the Petitioner's first protest and 10 weeks after its last protest, the Respondent replied to all five protests by a single letter dated January 23, 2002.[3] The Respondent's letter stated that "DAGS initially concluded that all of these protests should be denied because they are untimely under Hawaii Revised Statutes § 103D-701 (a), ... and so would be denied [,]" but continued by saying:

> However, notwithstanding the initial decision to deny the protests, upon consideration of the entire circumstances surrounding this matter, DAGS has concluded that it will be canceling all of the above-captioned projects, because to do so would be in the best interests of the State. Therefore, we consider these protests to now be moot, and the issues contained in the protests will not be addressed.

10. By a reply letter dated January 25, 2002, the Petitioner contested the Respondent's initial conclusion that the protests should be denied as untimely, and asked for the basis of the Respondent's anticipated cancellation of the protested projects. The Petitioner's letter also reiterated a demand that the Respondent correct purported errors in its performance rating.

11. By a second letter dated January 28, 2002, the Petitioner stated that it had learned that the Respondent had allowed certain of the reroofing projects under protest to go forward after it had received the protests, despite their supposedly having been stayed by the protests. The letter sought an explanation of how this was allowed to happen, raised allegations of procurement fraud, and asked that the appropriate authorities be informed of the situation.

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[2] Unfortunately, neither the code nor its regulations specify any time limitations within which a government agency must provide a response to a person's protest, or even provide an acknowledgment that the protest has been received and that the effected project has been stayed.

[3] This letter has been referred to, and treated, by the parties as constituting the Respondent's "denial" of the Petitioner's protests despite its actual language being less than specific on this point. After setting out an opinion that the protests should be denied (future tense) it went on to state, however, that the projects would be cancelled (future tense again) and as a result concluded that the protests need not be further addressed.

12. On January 30, 2002, the Petitioner filed a Request for Hearing with the Department of Commerce and Consumer Affairs asserting that the Petitioner was aggrieved by the Respondent's January 23, 2002, letter "denying the October 2, 12, 22, November 7, and 19, 2001, Notices of Protest." The Request for Hearing also stated that "The protests were based on DAGS' failure to correct Protestor's performance ratings, which it learned about within a 5-day period before the filing of the initial October 2, 2001, protest."

The Development of the PIPS – RFP Approach

13. The RFPs for each of the projects protested by the Petitioner were issued by the Respondent under a Performance Information Procurement System (PIPS) program that had recently been adopted by the Respondent. The PIPS program was a proprietary, research based initiative centered on an information measurement and management theory developed by Arizona State University (ASU) under the auspices of Dean Kashiwagi, Director, Performance Based Studies Research Group, at the College of Engineering and Applied Sciences.

14. In early 1998 Gordon Matsuoka, the Respondent's Public Works Division Administrator, and Stephen Miwa, the Chief of the Staff Services Branch for the Public Works Division, attended a PIPS orientation presented by Mr. Kashiwagi at Honolulu International Airport. Shortly thereafter, Mr. Matsuoka unilaterally decided that the Respondent would adopt the PIPS program for certain types of public works projects and instructed Mr. Miwa to gather additional information about it.

15. The Respondent's rationale for adopting PIPS as an alternative to the low-bid system was to better define the responsibility of contractors and manufacturers on projects by requiring them to "partner" on the submission of proposals. Although only contractors actually submitted proposals, a key element in the PIPS program was the requirement that the contractors - and the manufacturers whose products they intended to use - obtain a "performance rating" in order for the contractors to participate in the competition for projects. The performance ratings also became critical factors in the subsequent evaluation of any proposals that contractors submitted in response to an RFP.

16. In May of 1998 Mr. Matsuoka and Mr. Miwa received individualized explanations of the PIPS program from Mr. Kashiwagi at the Department of Accounting and General Services ("DAGS") building in Honolulu. At about the same time, the Respondent contacted various entities within the roofing industry to discuss the PIPS program, and held a meeting with them to get early feedback on initiating such a program. The Respondent also reached an informal, cooperative understanding with Mr. Kashiwagi whereby his group at ASU would (without a contract or compensation) help gather and compile data on contractors and manufacturers in order to establish their performance ratings.

17. In late 1998, without any written analysis/determination of replacing the existing low-bid system with the proposed PIPS program, Mr. Matsuoka decided to implement PIPS on an ad hoc basis for a limited number of RFPs for design and build reroofing projects. This was done with the knowledge and cooperation of Mr. Kashiwagi, but without any contractual agreement with ASU permitting the Respondent to use the program. The implementation involved gathering and using contractors' and manufacturers' performance ratings in ranking the proposals that contractors submitted for specific projects.

18. The intention of the Respondent was to reevaluate contractors' and manufacturers' performance ratings on a regular basis by including updated evaluations of their performance on subsequent public works projects. The base rating was to be weighted at 75% and the subsequent rating was to be weighted at 25% to obtain the new rating. The reevaluations were done by the Respondent on a "time-available" basis, however, and were not always available for application to outstanding RFPs.

19. The initial compilation of performance ratings began with a request to contractors and manufacturers for a self-selected listing of their past jobs (public or private) as a basis for gathering data about their performance. This was followed by an inspection and/or written inquiries about topics such as the quality of their work and the merit of their warranties. No written guidelines were used in performing evaluations, but as a general rule graders were instructed that projects which came in on time, on budget, and met owner expectations should be rated at 10, while those that did not should receive lower ratings.

20. The overall collection of data and the calculation of performance ratings were initially performed for the Respondent by Mr. Kashiwagi's group at ASU. In late 1999 or early 2000, however, the Respondent assumed these functions for rating roofing contractors and manufacturers after receiving complaints focusing on conflict of interest and manipulation of figures. The collection of data and the calculation of performance ratings for other types of public works projects such as general engineering or construction, painting, and electrical remained with Mr. Kashiwagi's group at ASU.

21. The contractor performance ratings consisted of multiple categories within three main sections: the application profile, the performance profile, and the customer evaluation profile. Each of these sections contained between 9 and 17 categories designed to reflect objective and subjective data for rating the contractor. Not all categories were rated on a scale of ten - many required input requiring other entries (e.g. the amount of square footage installed, the types of decking involved, the percentage of leaks, and the number of days to respond to emergencies). In some cases, however, raters did not provide ratings for certain categories, and in other cases their entries appeared to be inconsistent with the underlying factual data.

22. In or about mid-2000 the Respondent adopted a "15% Rule" as a result of criticism from certain contractors who felt that raters might be expressing an unfavorable bias in their ratings. This rule was supposed to be applied by combining all scores for a category except for the lowest one, calculating the average for the remaining scores, and determining whether the lowest score was within 15% of that average. Then, the lowest score was disregarded if it was not within 15% of the average, or else it was included with the other scores and a new average was calculated. This rule, however, was not applied consistently which caused mathematical errors in various ratings - and these errors were frequently compounded by subsequent calculations.

The Formalization and Application of PIPS

23. On October 26, 2000, the Respondent executed a non-transferable, non-exclusive, three-year contract with ASU (in the form of a licensing agreement) that provided the Respondent with the right to use the PIPS program in return for annual payments of $25,000. Also, at or about the same time, the Respondent negotiated a related contract with ASU (in the form of services/training agreement) for an annual term in return for a payment of $75,000. Neither agreement provided any express or implied

warranty by ASU on any matter regarding the PIPS program or its fitness for any particular purpose.

24. At or about this same time the Respondent established a small working group within DAGS to coordinate the administration of the PIPS program and to report directly to Mr. Matsuoka. This group consisted of Mr. Miwa as PIPS Administrator, Christine Kinimaka as PIPS Manager, and Gaylyn Nakatsuka as PIPS Projects Coordinator.[4] The PIPS group monitored the program's projects from start to finish - both within DAGS (where multiple branches could be involved at different stages of the program) and as a liaison between DAGS and outside participants.

25. Although Mr. Miwa was the titular head of the PIPS group, and although the members were located in separate offices within the DAGS building, direct communication and interaction took place between all members on a frequent and relatively unstructured basis. One or more members would usually meet daily to discuss the status of projects, protests, and similar events. This team approach with a flat organizational setup existed because each member tended to have specialized functions, with no single member having a complete knowledge of the total PIPS program. This interactive team approach also extended, to a lesser degree, to the members' contacts with Mr. Matsuoka.

The Suspended RFPs for Protested Projects

26. The September 2001 RFPs for reroofing projects at Aikahi Elementary School, Kalaheo High School, Kuhio Elementary School, the Department of Health's Kinau Hale, and Wahiawa Elementary School, as well as the October 2001 RFP for reroofing at the Department of Agriculture and Conservation's Buildings C & D were, for the most part, suspended shortly after the Respondent received the Petitioner's protests of these projects. The Respondent subsequently treated these RFPs/projects as at least being postponed if not cancelled.

27. On October 9, 2001, the Respondent (through its retained architectural consultant) issued a notice that, as a result of the protests, the pre-proposal walk-throughs at Aikahi, Kalaheo, and Kuhio schools that had been set earlier in the year for October 10, 2001, were cancelled.

28. On October 19, 2001, the Respondent issued Addendum No. 1 to the RFP for the Department of Health's Kinau Hale stating that the project had been postponed until further notice.

29. On October 24, 2001, the Respondent issued Addendum No. 1 (dated October 19, 2001) to the RFP for the Aikahi Elementary School, Kalaheo High School, and Kuhio Elementary School projects, stating that the projects had been postponed until further notice.

30. On November 23, 2001, the Respondent issued Addendum No. 1 to the RFP for the Department of Agriculture and Conservation's Buildings C & D stating that the project had been postponed and that the scheduled submittal of proposals had been

[4] At a considerably later date David Dupont was added to this group as a staff assistant for data management.

cancelled. On this same date the Respondent also issued a similar addendum to the RFP for the Wahiawa Elementary School project.

The RFP for Nanakuli, Aiea, Kipapa & Lincoln

31. Although the October 2001 RFP for reroofing projects at the Nanakuli, Aiea, Kipapa, and Lincoln schools were also PIPS design and build projects, they progressed in a markedly different manner from the other protested projects. Therefore, in examining them it is worth noting that the RFP included language that:

> The projects will be awarded and done using the Performance Information Procurement System (PIPS) technology developed by Arizona State University. Under this method, the bidder will propose which roofing or waterproofing system or systems it will use, unless specifically restricted in the Project Scope, and guarantee the performance of the system or systems for a stated warranty period during which it will make all necessary repairs and touch-ups. The Criteria Weighting is included in the Proposal as "Appendix B" of the Proposal.

32. The RFP's "Appendix 6" entitled Weighting Criteria consisted of three sections designated as Overall Criteria, Roofing Contractor Criteria, and Roofing/Waterproofing Manufacturer Criteria. The weighting criteria were selected by an informally appointed evaluation committee drawn from DAGS, the user agency, and consultants that assembled the criteria. Each section of the Weighting Criteria had multiple subcategories with weights ranging from 0 to 10,000 - although the measured units consisted of different elements (e.g. %, sq. ft., years, points, #s, days, and scales). The two subcategory criteria with the greatest assigned weights were 1) the roofing manufacturer warranty period, and 2) the contractor's management plan - both of which had a weight of I0,000.[5]

33. The RFP required that contractors intending to submit proposals had previously registered for, and attended, a PIPS registry meeting and a PIPS training session; had provided the Respondent with performance information for evaluative purposes; and had attended the mandatory pre-bid [sic] meeting and the site walk-through scheduled for October 26, 2001. The RFP also required that sealed proposals were to be submitted not later than 2:00 p.m. on November 20, 2001, and contractors were allowed to submit one or more alternative proposals for each project by separate Supplemental Proposal Forms.

34. At or about the time the Respondent received the Petitioner's October 22, 2001, letter protesting the RFP for these four projects it was routinely routed through Mr. Matsuoka to Mr. Miwa. Normally, Mr. Miwa would have then forwarded it to Ms. Kinimaka who would have made a copy for Ms. Nakatsuka. Either Mr. Miwa or Ms. Kinimaka would have then reminded Ms. Nakatsuka to stop all work on the project. The standard PIPS practice also included discussing the status of such matters with Mr. Matsuoka and the Respondent's assigned Deputy Attorney General in preparation for drafting a reply. In light of the confusing similarity of the October 2, 2001, and October 22,

[5] Six of the other 74 subcategory criteria had an assigned weight of 5,000, and each of the remaining subcategory criteria had weights of 2,000 or less.

2001, protest letters, however, Mr. Miwa failed to recognize the October 22, 2001, letter as a separate protest and did not forward it to Ms. Kinimaka for normal handling.

35. The Respondent did understand that an appropriate response to any protest included stopping further work on the protested project, unless the chief procurement officer (i.e. the DAGS' Comptroller) made a written determination that proceeding was necessary to protect substantial State interests and that all parties involved in the RFP process were to be notified of the stay. The chief procurement officer did not make any such written determination at any time, but on Friday, October 26, 2001, the Respondent held a pre-bid [sic] meeting and conducted an on-site walk through with the contractors that were considering submitting proposals for the four projects.

36. Then, on November 9, 2001, the Respondent continued post-protest activities by issuing an Addendum No. 1 to the existing RFP that modified the "Description of Work", and on or about November 20, 2001, the Respondent accepted and began tabulating the proposals and supplemental proposals that had been submitted by contractors seeking awards. At this point it appeared that Mr. Miwa was still under the impression that the Petitioner's October 22, 2001 letter did not reflect a separate protest from the Petitioner's October 2, 2001 letter and thus had failed to separately address its contents, to forward it to Ms. Kinimaka for appropriate action, or to inform Mr. Matsuoka that it required his attention.

37. In late November and December of 2001 the Respondent's review of the proposals involved stripping the contractors' management plans from their proposals for separate review by the evaluation committee. The overall assessment included making (sometimes incorrect) determinations on whether warranties contained exclusions for which deductions were required by the RFP. The overall assessment also focused on the subjective breakdown between performance and price factors, as well as on input data for the "model (displaced ideal) formula" (relative distance x information factor x weight factor = minimum distance) seemingly familiar only to Ms. Kinimaka (who inputted the data) and understood only by Mr. Kashiwagi (who originated the mathematics).

38. Nevertheless, the data and calculations that were used in the overall evaluative steps for the assessment of each of these four projects did not reflect any errors in the Petitioner's own performance rating nor any other errors that were significant enough to have changed the ranking of the contractors that submitted proposals.[6] Ms. Kinimaka did meet with Alan Meier, the Petitioner's President/Secretary on multiple occasions to address his general concerns about the PIPS program, but the Petitioner's questions were not specifically about errors in, or corrections to, its performance line.

39. The Respondent's "Method of Award" involved examining the three top rated proposals for each project - without regard to price - to see if the top rated proposal was within budget. The contractor submitting the proposal was then invited to a pre-award meeting to discuss any desired changes to the scope of the work or other RFP requirements and any desired changes to the contractor's proposal. There was then a discussion to confirm whether or not the contractor would be willing to accept an award.[7]

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[6] Of the ten projects that had been protested by the Petitioner, the only project for which the Petitioner had actually submitted a proposal was the Lincoln project. This was due, in part, by the Petitioner's belief that its protests would have stayed all activity on the RFP and thus precluded the need to submit proposals.

[7] If there was a change in the scope of the work desired by either party it could be negotiated, but the RFP would not be reopened for the resubmission of new proposals on the new scope of work by other contractors.

If an agreement could not be reached at this stage, the procedure would be repeated for the next highest rated proposal (which could actually have been submitted by the same contractor).[8]

40. In December of 2001 the Respondent held pre-award meetings with the contractors who had been initially selected for the Nanakuli (Commercial Roofing), Aiea (Certified Construction), Kipapa (Tory's Roofing), and Lincoln (Commercial Roofing) projects, and on or about December 13, 2001, Ms. Nakatsuka prepared the Respondent's internal recommendations for awards on these projects. The recommendations, however, did not necessarily reflect the Respondent's first ranked choice for a particular project since – after the discussions at the pre-award meetings – contractors had the option of declining to accept a potential award.

41. Later in December of 2001, the Respondent held pre-construction meetings with the selected contractors in an effort to arrange for most of the work at the schools to be accomplished during the time of the students' Christmas vacation. During the latter part of 2001, Mr. Miwa and/or Ms. Kinimaka, as well as Ms. Nakatsuka, had also met with various contractors and manufacturers' representatives who were, or had been, participating in these or other PIPS projects. The contractors and manufacturers' representatives were generally supportive of the Respondent's PIPS program and were concerned about what negative impact the Petitioner's protests might have on the specific projects that had been protested as well as on the overall status of the program.

42. Once the internal recommendations for awards were approved in later December, the manner of proceeding set out in the RFP was for the Respondent to issue a letter of award to the selected contractor, followed by the contractor providing notice of its acceptance. This was to be followed by the Respondent's issuance of a notice to proceed to the contractor and, at or about the same time, the execution of a written contract (that included both a performance bond and a payment bond). These timely requirements were not followed with respect to the Aiea, Kipapa and Lincoln projects - but in their absence the Respondent allowed the contractors to proceed with work "at their own risk."

43. The Nanakuli project was not scheduled for work until the summer of 2002, and although the Respondent continued with limited preparatory activities after the date of the Petitioner's protest, no activity took place with respect to that project after the Respondent had prepared its mid-December recommendation for an award.

44. During December of 2001 Ms. Kinimaka and Ms. Nakatsuka exercised minimal monitoring of the Aiea, Kipapa, and Lincoln projects, with routine communications between the Respondent and the contractors being handled by the inspection branch (and later the contracts branch) of the Respondent's Public Works Division. The PIPS group, however, continued with its usual practice of holding meetings and discussions about projects, protests, and other related events. Mr. Miwa, Ms. Kinimaka and Ms. Nakatsuka were aware that work was underway at these projects, but may have still been unaware that the projects had been protested.

45. The construction activities at the Aiea, Kipapa, and Lincoln projects went forward despite the Respondent's lack of compliance with the basic, required pre-

[8] If none of the contractors submitting the top three proposals agreed to accept an award, or if none of the top three proposals were within budget, then other rules for selecting another proposal would go into effect.

construction documentation, including the notification (and acceptance) of awards, the issuance of notices to proceed, and the execution of contracts (including bonding) for the actual reroofing work.

46. In late December of 2001 the Respondent prepared a memorandum to the State Procurement Office recommending cancellation of the projects for Wahiawa Elementary School, the Department of Agriculture Buildings C & D, Aikahi Elementary School, Kalaheo Elementary School, and Kuhio Elementary School.[9] The memorandum in its final form was dated December 26, 2001, and was addressed from Glenn M. Okimoto, the State Comptroller, to Aaron Fujioka, the Administrator of the State Procurement Office. The preparation of such a memorandum was unusual since the procurement office was not a participant in the Respondent's PIPS program, was not a part of nor mentioned in the RFPs, and was not otherwise involved in the protest process. The memorandum's recommendation was neither approved, nor disapproved by Mr. Fujioka.

The Post-Completion Paperwork

47. In early January 2002, Mr. Miwa worked on the preparation of another unusual memorandum from the Respondent to the State Procurement Officer. Its purpose was to provide background information on the status of all of the Petitioner's protests and to request approval to cancel the protested projects as an alternative to opposing them in anticipated administrative proceedings. The memorandum in its final form was dated January 9, 2002, and was addressed from Glenn M. Okimoto, the State Comptroller, to Aaron Fujioka, the Administrator of the State Procurement Office.

48. In this memorandum the Respondent specifically requested approval to cancel each of the ten projects that had been protested by the Petitioner in accordance with the provisions of Hawaii Revised Statutes (HRS) § 103D-308 and Hawaii Administrative Rules (HAR) § 3-122-96.[10] The memorandum stated that all of the projects involved RFPs solicited under the PIPS program and that all of the protests had been made by the Petitioner. The memorandum also stated that: "Because of the protests, there has been no action on these projects since the receipt of the protests."

49. The memorandum also stated that all of the projects (except Kinau Hale and the Department of Agriculture buildings) involved reroofing projects at public schools, and that the Respondent believed "it is imperative to proceed with these projects because the maintenance of the roofs involved is critical to the health and safety of the students and faculty." The memorandum went on to say that the Respondent believed the proceedings anticipated to accompany any administrative resolution of the protests would be counterproductive to this end and commented that:

> However, in order to complete these projects and in light of the Governor's order to stimulate the economy and complete as many school repair projects as possible, we were considering resoliciting these projects under the authority of Act 5, Third Special Session, 2001, which increases the small

[9] The RFP for Nanakuli, Aiea, Kipapa, and Lincoln was noticeably not mentioned in this draft (which also did not mention the RFP for Kinau Hale).

[10] This memorandum has been referred to and treated by the parties as constituting the Respondent's "cancellation" of the protested projects. Nevertheless, its actual language demonstrates that it was prepared and approved as a request for authorization to cancel the projects rather than constituting a cancellation.

purchase limit to $250,000. These projects would then be solicited as small purchases.

50. On January 10, 2002, Mr. Fujioka signed this memorandum approving the Respondent's request to cancel all the RFPs for the ten protested projects and routed it back to the Respondent. Nevertheless, at the time Mr. Fujioka gave his approval to cancel these projects, post-protest activity on four of them (Nanakuli, Aiea, Kipapa, and Lincoln) had already taken place from November of 2001 into January of 2002, and the actual work on three of them (Aiea, Kipapa, and Lincoln) had been completed - after the receipt of the Petitioner's protests but prior to the date of the memorandum.

51. The approved memorandum was later transmitted through channels to the PIPS unit where Mr. Miwa gave it to Ms. Kinimaka who passed it along to Ms. Nakatsuka. This was the first time it was seen by Ms. Nakatsuka, who was surprised by its contents since she had been unaware of the protests although she had been aware that construction had gone forward on the Aiea, Kipapa, and Lincoln projects. She expressed her surprise to Ms. Kinimaka, as well as to Mr. Miwa - who commented that although he had not specifically stayed the projects, he thought they had been stayed as a consequence of PIPS' standard operating procedures.

52. Mr. Miwa, Ms. Kinimaka, and Ms. Nakatsuka then talked about how to handle the situation, and contacted their assigned Deputy Attorney General for guidance. Mr. Miwa also informed Mr. Matsuoka that the situation reflected violations of the procurement law, and held additional meetings/discussions to further assess the problem. At this point Mr. Miwa did tell Ms. Nakatsuka to stop any work on the projects, but she reminded him that final inspections had already been carried out on January 17, 2002, for the Aiea and Lincoln projects. Ms. Nakatsuka was able to notify the inspection branch to stop the final inspection for the Kipapa project which had been scheduled for January 18, 2002, but the PIPS members did not otherwise directly inform contractors – or other branches of DAGS – that all activity on the protested projects was to stop.

53. On January 15, 2002, three days before the planned final inspection date for the Kipapa project, the Respondent sent an informational letter to the Principal of the Kipapa Elementary School stating that construction on the project would be initiated shortly, that a pre-construction conference would be scheduled, and that if the contractor were to appear with the intention of starting work before the necessary arrangements were made, the contractor should be referred to the Respondent's inspection branch.

54. On the same date (January 15, 2002), however, the Respondent issued a notice of award letter to the contractor for that project - authorizing the contractor to begin work on December 26, 2001 and setting a project completion date of January 18, 2002. And, on January 16, 2002, the Respondent executed a contract for the performance of the already completed work at Kipapa - which had previously been scheduled for a final inspection on January 18, 2002. The final inspection for the Kipapa project was subsequently rescheduled for January 30, 2002.

55. Since the final inspection for the Lincoln project had resulted in a punchlist of minor work to be done and/or corrected, the contractor had been given until January 31, 2002, to take care of these deficiencies. Nevertheless, on January 24, 2002, the Respondent issued an (Advanced) Project Acceptance Notice stating that "This is to

serve notice that your performance of the contract[11] for the project listed above is hereby accepted as of the date noted." The notice made further reference to the "contract documents" and other documents for closing the contract. Thereafter, the project was reinspected by the Respondent on February 1, 2002 - and accepted as satisfactory.

56. Similarly, on January 31, 2002, the Respondent issued an (Advanced) Project Acceptance Notice for the Aiea project stating that "This is to serve notice that your performance of the contract[12] for the project listed above is hereby accepted as of the date noted." The notice also made further reference to the "contract documents" and other documents for closing the contract.

57. On March 14, 2002, the Respondent issued a memorandum from Mr. Okimoto to Mr. Fujioka entitled: "Report on Procurement Violation, Request for Affirmation of Contracts, and Approval of Corrective Actions [for the Aiea, Kipapa, and Lincoln projects]." The memorandum presented the Respondent's explanation that these three completed projects had been allowed to go forward because of inadvertent miscommunications, and requested after-the-fact payment approval for them. On March 18, 2002, Mr. Fujioka approved the request, and on March 27, 2002 the Respondent approved full payment (less a $1,000 retention amount) to the contractor for the Kipapa project.

58. It is unclear what, if any, final payments have been made for the Aiea and Lincoln projects, but by separate memoranda dated March 21, 2002, the Respondent resubmitted its prior, internal recommendations for awards (adjusted for allowances in calculation discrepancies or breakout costs) for the Aiea and Lincoln projects, as well as for the Nanakuli project. Each of these recommendations was approved on the following day.

## III. CONCLUSIONS OF LAW

The Petitioner's request for an administrative hearing raised allegations that the Respondent had 1) based its performance rating on subjective data which was improperly inputted/calculated, 2) failed to provide a factual basis/analysis of its "in the best interests of the State" determination[13], 3) refused requests to correct mistakes in the performance ratings of itself and others, and 4) acted in bad faith during its handling of the protests. In subsequent pleadings/proceedings the Petitioner also alleged that the Respondent had generally violated the procurement code by using the PIPS program as the basis for issuing its RFPs for the protested projects.

These allegations have been evaluated in light of the requirement of the Hawaii Public Procurement Code ("Code") (HRS Chapter 103D) as set out in HRS § 103D-709(c) that a petitioner has the burden of proof to establish its allegations by a preponderance of the evidence. They have also been examined with a view toward the

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[11] As noted above, no contract had actually been executed between the contractor and the Respondent for the Lincoln project.

[12] As noted above, no contract had actually been executed between the contractor and the Respondent for the Aiea project.

[13] In the absence of clarification by the Petitioner, this reference appeared to be in relation to the Respondent's use of the phrase in its January 23, 2002 "denial" letter as the basis for its proposed cancellation of the protested projects.

legislative goal of clarifying, enhancing, and simplifying procurements, as well as the requirement in HRS § 103D-101 that "All parties involved in the negotiation, performance, or administration of state contracts shall act in good faith." At the same time, the solicitation/contract/construction process for public works projects is a complicated process under even the best of circumstances, and in a time of economic downturn it is also a process which has seen both legislative adjustments in an effort to spur the economy and agency modifications in an effort to enhance program effectiveness. The focus of this proceeding was on the allegations raised by the petition and not on conducting an overall inquiry into the merit or legality of DAGS using a PIPS program for public works projects.

The Data Collection/Application for Performance Ratings

The preponderance of the evidence did show that a number of the weighting criteria which the Respondent used in developing performance ratings were inherently subjective in nature, but the fact that they involved human estimates of work quality did not render them inappropriate or inapplicable. Not all of the measured categories lent themselves to a strict application of impersonal mechanical formulas. In addition, it was not factually established that the Petitioner's own performance rating was improperly inputted or miscalculated - or that the errors which were subsequently discovered in the performance ratings of others would have altered the rank of any of the contractors in regard to the protested projects.

In considering any deliberate actions by the Respondent to manipulate the collection of data or to improperly adjust calculations, the best that could be said is that the Respondent attempted to minimize collection errors; the use of its 15% rule and the rounding of numbers were not unreasonable; and the PIPS complex mathematical formulas were not shown to be improperly applied. Much of the frequently contradictory and contentious testimony in this regard consisted of a "he said, she said, they said" type of presentation, which left no preponderance of the evidence in favor of either party.[14] Furthermore, although various contractors and manufacturers were, at one point, concerned with the potential for bias in their performance ratings, the possibility or suspicion of wrongdoing falls short of the factual evidence necessary to conclude that a violation of law has actually occurred.

The Respondent's "Best Interests of the State" Determination

Although the Respondent used the phrase "in the best interests of the State" in its January 23, 2002, "denial" letter without providing a factual basis/analysis of this determination in that letter, it is by no means clear that the Respondent was required to do so. The provisions of HRS § 103D-308, which address the cancellation of invitations for bids or requests for proposals, provides that:

> An invitation for bids, a request for proposals, or other solicitation may be cancelled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the governmental body which issued the invitation, request, or other solicitation,

[14] Unfortunately, the inherent complexity of the PIPS mathematical formulas made it equally difficult to tell if they were properly applied, but the burden of proving otherwise rested with the Petitioner.

in accordance with rules adopted by the policy board. The reasons therefor shall be made part of the contract file.

This provision is restated in substantially the same language in the rules adopted by the policy board. It is expanded somewhat, however, by HAR § 3-122-95(b) (Cancellation of solicitations and rejection of offers) which requires that:

> (b) The reasons for the cancellation or rejection shall:
> (1) Include but not be limited to cogent and compelling reasons why the cancellation of the solicitation or rejection of the offer is in the purchasing agency's best interest; and
> (2) Be made part of the contract file.

The reasons for the Respondent's action in this respect, while not specified in the January 23, 2002, "denial" letter, were clearly set out in its January 9, 2002, memorandum from the State Comptroller to the Administrator of the State Procurement Office. That memorandum requested approval to cancel all of the protested projects (as an alternative to opposing them) because of what was anticipated to be prolonged administrative proceedings. The memorandum also stated that most of the projects involved reroofing projects at public schools, and that it was important to pursue an alternative approach to the projects because maintenance of the roofs was critical to the health and safety of the students and faculty. This memorandum (although inaccurate in other respects) was retained as a file document within the Respondent's records.

The Correction of Mistakes in Performance Ratings

As noted in the above discussion regarding Data Collection/Application, the facts presented during the hearing revealed that there were instances where errors had been committed by the Respondent in the collection and/or inputting of data for the contractor and manufacturer performance ratings. The Respondent's actions to correct such errors in past ratings, as well as the lack of impact they had in the ranking of contractors' proposals, have also been addressed above. Next, to the extent that the Petitioner is seeking a prospective order requiring the Respondent to correct past or possibly future errors that might impact on future RFPs, it does not appear that (while the Respondent should take all reasonable steps to minimize errors) such an order would be relevant to the past mistakes as asserted in this matter.

The PIPS Program within the Procurement Code

The Petitioner also alleged that the use of competitive sealed proposals, in lieu of competitive sealed bids, was not allowed under the Hawaii Public Procurement Code. The provisions contained in Part III of the Code (Source Selection and Contract Formation) make it clear that, as specified in HRS § 103D-301, "Unless otherwise authorized by law, all contracts shall be awarded by competitive sealed bidding pursuant to section 103D-302 ..." This requirement is restated in HRS § 103D-302 which specifies that competitive sealed bidding is the required method of awarding contracts - except as provided in HRS § 103D-301. The exceptions within HRS § 103D-301, do allow the use of competitive sealed proposals but only in a manner consistent with HRS § 103D-303[15] which specifies that:

[15] Other exceptions set out in HRS § 103D-301 (professional services procurement, small purchases procurement, sole source procurement, and emergency procurement) are inapplicable herein.

> (a) Competitive sealed proposals may be utilized to procure goods, services, or construction which are either not practicable or not advantageous to the State to procure by competitive sealed bidding. Competitive sealed proposals may also be utilized when the head of a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State.

On one hand, the evidence did not show that the use of competitive sealed bids was impractical or disadvantageous to the State. Establishing such a determination involves more than the presentation of after-the-fact, conflicting testimony offered at a subsequent administrative hearing. Similarly, there was no showing that a written determination had been made by the head of the purchasing agency that the use of competitive sealed bids was not practicable or not advantageous, as would be required for making an exception under HAR § 3-122-43(b) and/or HAR § 3-122-45(b).

On the other hand, however, HAR § 3-122-45(a) provides an additional exception for such determinations by stating, in relevant part, that:

> Pursuant to subsection 103D-303(a), HRS, the procurement policy board may approve a list of specified types of goods, services, or construction that may be procured by competitive sealed proposals without a determination by the head of the purchasing agency. This list, as provided in Exhibit A, entitled "Procurements Approved for Competitive Sealed Proposals" dated 06/21/99, attached at the end of this chapter shall be reviewed biennially.

As one of its four categories of exceptions, the listing provided in Exhibit A includes "design and build public works projects." Accordingly, since the type of the protested projects was included in the approved list of exceptions, the Respondent's use of RFPs for competitive sealed proposals was an acceptable practice within the scope of the procurement laws.[16]

Next, in examining the conduct of the Respondent *after receiving the protests*, the preponderance of the evidence established that 1) the Respondent knew or should have known about all ten of the protests, but 2) nevertheless engaged in significant and continuous activities on at least four of them over a period of many weeks after receiving the Petitioner's protests – and without any written determination by the chief procurement officer that it was necessary to do so to protect the State's substantial interests. It is noteworthy in this respect that subsection (f) of HRS § 103D-701 states that:

> In the event of a timely protest under subsection (a), no further action shall be taken on the solicitation or the award

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[16] Other purported violations that were raised in closing arguments were not directly applicable to resolving the allegations raised in the petition and, while presenting interesting peripheral observations, were not deemed sufficiently relevant to warrant additional discussion.

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.

The major instances in which the Respondent violated this section have been highlighted in the findings of fact and need not be repeated here. It is sufficient to say that – especially with regard to the completed Aiea, Kipapa, and Lincoln projects – the Respondent acted in complete disregard of HRS § 103D-701(f) and its conduct represented clear violations of both the RFP and the procurement law.

Whether the conduct of the Respondent in processing payment documents for the completed projects was also a violation of HRS § 103D-701(f) is less clear, since the statute appears directed toward imposing a stay on the performance of any work toward the construction/completion of a project rather than toward staying payments to a contractor for completed work not shown to have been done fraudulently or in bad faith.

The Question of Bad Faith by the Respondent

In viewing the entirety of the particulars surrounding the Respondent's handling of the RFPs *after receiving the Petitioner's protests*, the obvious focus is on its handling of the Nanakuli, Aiea, Kipapa, and Lincoln projects. Of these, its handling of the Nanakuli project is the least offensive – but probably only for the reason that construction work was not planned until the summer of 2002. As a result, although some additional planning took place in violation of HRS § 103D-701(f) it was minimal in comparison to the work done on the three other projects.

Even giving the Respondent the benefit of understandable confusion between the Petitioner's October 2, 2001 letter and its superficially similar October 22, 2001 letter, and even considering the Respondent's lack of attention to preparing a punctual response to the Petitioner's protests or its follow-up requests, one must conclude that the Respondent eventually became aware that it had been proceeding on projects that should have been stayed. Precisely when this occurred is unclear, but the preponderance of the evidence showed that there was never a time when the PIPS group did not know that the Aiea, Kipapa, and Lincoln projects were going forward. Thus, the focus of the query becomes when they actually knew (rather than when they should have known) that the projects had been protested.

It is indeed possible that Mr. Miwa carefully read the second page of the Petitioner's October 22, 2001 letter and thus actually knew the extended content of that protest shortly after that date. It is equally possible that in scanning the first page he mistakenly concluded that its content was the same as the October 2, 2001 letter and paid it no more heed. The probability is that even though Mr. Miwa - and all of PIPS - unquestionably had known that work activities had never ceased on these projects, his actual awareness that the projects had been protested may not have occurred until late December of 2001 or early January of 2002. And, since he was the conduit through which such information was passed on to other PIPS members (and, in turn, from them to other parts of DAGS and/or contractors) this information may have been unknown to them prior to that time.

Nevertheless, Mr. Miwa must have realized that work was in progress on the projects *despite the Petitioner's protests* by the time he began preparing his draft of the January 9, 2002, "cancellation" memorandum from the Respondent to the State Procurement Office. This chronology would be consistent with the absence of any

mention of the Nanakuli, Aiea, Kipapa, and Lincoln projects in the earlier December 2001 draft memorandum. It would also be consistent with Mr. Miwa's rather confusing statement to the PIPS members in the middle of January 2002 that he thought the projects had been stayed under PIPS standard operating procedures despite his having taken no personal action to stay them nor to coordinate a stay with Ms. Kinimaka or Ms. Nakatsuka.

Accordingly, from October 2, 2001 until early January of 2002, the most fitting characterization for the Respondent's conduct in this regard would likely include descriptive adjectives such as inattentive, incompetent, or indifferent. By comparison, however, many of the Respondent's subsequent activities – including factual misrepresentations in its January 9, 2002 memorandum to the State Procurement Officer, after-the-fact creation and issuance of award letters and contracts, and scheduling/conducting final inspections – strongly connoted that they were done by the Respondent intentionally, knowingly, and in bad faith.

The Selection of Available Remedies

In its Request for Hearing the Petitioner sought the following relief: 1) a stay of projects that had not been completed by DAGS; 2) a termination of any contracts issued for those projects; 3) a holding that any contracts for those projects were null and void; 4) an order that DAGS correct the performance rating of the Petitioner and other companies; 5) a finding that DAGS and certain employees acted in bad faith[17], and 6) an award of attorney's fees and costs.

A reasonable starting point in evaluating the Petitioner's requested relief would be to look at the legislative purpose behind the enactment of the Code. Its relevant history, as stated in Senate Standing Committee Report No. S8-93, 1993 Senate Journal, page 39, reveals that:

> The purpose of this bill is to revise, strengthen, and clarify Hawaii's laws governing procurement of goods and services and construction of public works.
>
> Specifically, the bill establishes a new comprehensive code that will:
>
> (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 public confidence in the integrity of the system.

Nevertheless, the legal and contractual remedies set out in Part VII of the Code appear to severely restrict the application of just remedies, since they tend to assume misconduct by contractors rather than by government agencies, and inaccurately

[17] This request for a finding (rather than a request for relief) has been addressed in the findings of fact.

reflect certain realities inherent in the procurement process. The provisions applicable to remedies after awards are contained in HRS § 103D-707[18], which reads as follows:

> **Remedies after an award**. If after an award it is determined that a solicitation or award of a contract is in violation of law, then:
>
> (1) If the person awarded the contract has not acted fraudulently or in bad faith:
>
> (A) The contract may be ratified and affirmed, provided that doing so is in the best interests of the State;[19] or
>
> (B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination;
>
> (2) If the person awarded the contract has acted fraudulently or in bad faith:
>
> (A) The contract may be declared null and void; or
> (B) The contract may be ratified and affirmed if the action is in the best interests of the State, without prejudice to the State's rights to such damages as may be appropriate.

In determining what relief would be appropriate for this particular matter it is worth noting that the Petitioner's main focus was the allegation that "its performance rating under the PIPS program was incorrect (i.e., determined based on subjective evidence and improperly inputed [sic] and calculated)..." Its underlying protests at the agency level were also based "on DAGS' failure to correct Protestor's performance ratings..."[20] This allegation was not established by the evidence, however, and neither was the Petitioner's broader allegation that the Respondent should not have used the PIPS program for the protested projects. Finally, the Petitioner did not establish that it should have been selected for the Lincoln project (the only one for which it submitted a proposal), and it is entirely speculative whether the Petitioner would/should have been selected for the Aiea and Kipapa projects if it had submitted proposals for them.

In view of the above factual findings and legal conclusions the most realistic relief compatible with the law would not appear to include a further stay of projects that

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[18] It would be theoretically possible to apply the "remedies prior to an award" set out in HRS § 103D-706 since no actual letters of award appear to have been issued, but the pre-award remedies provide no better offerings and are impractical in light of the Respondent leapfrogging the award stage for these projects.

[19] Determinations made by an administrative hearings officer as to "the best interests of the State" under either HRS § 103D-706 or 103D-707 are to be distinguished from determinations made by a chief procurement officer or the head of a purchasing agency as to "the best interests of the State" under HAR § 3-122-21(a)(6).

[20] Petitioner's Request for Hearing, filed January 30, 2002, Statement of Violations and Protests, page 3.

had not been worked on by the Respondent nor an order that the Respondent correct the performance rating of the Petitioner and others. Nevertheless, it would appear to include termination of any post-performance contracts issued for the Aiea, Kipapa, and Lincoln projects as having been entered in violation of the law, thereby making them null and void. The ratification or affirmation of contracts under such circumstances cannot reasonably be argued to be in the best interests of the State given the legislative purposes for the enactment of the Code. In reaching this position, consideration has also been given to the (regulatory) provisions of HAR § 3-126-38(a)(4) as well as the (statutory) provisions of HRS §§ 103D-705 to 103D-707 as reflected in *Carl, id.* at 448 et seq., despite their apparent design to address contractor, rather than government, misconduct.

> In making the determination whether ratification of the contract is in the best interests of the State, the following factors are among those considered:
>
> (A) The costs to the State in terminating and resoliciting;
> (B) The possibility of returning goods delivered under the contract and thus decreasing the costs of termination;
> (C) The progress made toward performing the whole contract; and
> (D) The possibility of obtaining a more advantageous contract by resoliciting.

*Carl, id.* at 448, citing HAR § 3-126-38(a)(4). These factors, however, are generally inapplicable in light of the nature of the work involved, the Respondent's overall conduct, and the currently completed status of the projects. In addition, while a narrow application of these factors could arguably lead to a ratification of the contracts, as being in the (technically favorable – yet unlawfully procured) best interest of the Respondent, a more meaningful interpretation/conclusion would be that termination is the preferred remedy. The Respondent's unlawful conduct should not be validated as to do so would neither be in keeping with the stated intention of the Legislature, nor truly be in the best interests of the *State*.

Nevertheless, since there was no finding that the contractors which were allowed to proceed with work on the projects had acted fraudulently or in bad faith, the provisions of HRS § 103D-707(1)(B) would entitle them to their actual expenses and a reasonable profit for their performances on the projects. This constitutes, of course, substantially the same result as a ratification or affirmation of the unlawful contracts – and illustrates the futility of applying the Code's limited remedies to instances where the violations are committed by a government agency.[21]

Finally, despite statutory language, which would appear to preclude it, the Petitioner's additional request for an award of attorney's fees and costs may present a legitimate issue for consideration in this forum. As originally adopted in 1993, the Code did not include a provision for such an order, but in addressing this issue in *Carl Corporation v. State Dept. of Educ.*, 85 Haw. 431 (1997) the Hawaii Supreme Court held that a

[21] The lack of realistic sanctions to punish governmental misconduct and/or compensate persons exposing such misconduct through the administrative process is another area where amendments to the Code appear to be sorely needed. The present set of remedies leaves little room to enhance or even enforce the Code's stated purpose of strengthening and clarifying Hawaii's laws governing procurements as well as enhancing public confidence in that system.

successful protestor at the administrative hearings level was, under circumstances showing it should have been awarded a project, entitled to recover its bid preparation costs - and under circumstances showing bad faith on the part of the government agency, entitled to recover its attorney's fees. The *Carl* decision differs from the present matter in that the Petitioner herein did not show that it should have been awarded the project (Lincoln Elementary School) for which it had submitted a proposal, but the *Carl* decision reflects substantially similar circumstances with respect to the bad faith conduct of the Respondent.

In essence, the court held that the Code did not specifically preclude an award of attorney's fees, and that under certain factual circumstances its purposes could be fatally undermined if a successful protestor were required to bear the fees it had incurred in pursuing relief.

> Although the Code does not expressly authorize the award of attorney's fees under the circumstances of the instant case, interpreting HRS § 103D-704 to preclude such an award renders the Code incapable of furthering the purposes and policies that required its enactment.

*Carl, id.* at 460. After discussing 1) the lack of legislative contemplation on a governmental agency's bad-faith violation of the code, 2) the very limited civil enforcement mechanisms in the code, and 3) the resulting disincentives for an agency to comply with the code's procedural requirements, the court concluded that:

> ...we hold that a protestor is entitled to recover its attorney's fees incurred in prosecuting its protest if: (1) the protestor has proven that the solicitation was in violation of the Code; (2) the contract was awarded in violation of HRS § 103D-701(9); and (3) the award of the contract was in bad faith.

*Carl, id.* at 460.

The 1999 Legislature subsequently passed an amendment to HRS § 103D-707[22] that added the words "other than attorney's fees" in describing the types of relief available to a person whose contract had been terminated despite no showing of fraud or bad faith on its part. While this is significant where it is factually applicable, it is limited to the provisions of that statute, and is of questionable relevance under the facts seen in both the *Carl* decision and the present matter. Furthermore, the Legislature did not amend any portion of HRS § 103D-704 which the court had relied on for its determination that such an award was not only appropriate, but almost mandated, under such circumstances.[23] Thus, an award of attorney's fees would appear to be allowed by the court in the resolution of petitions at the administrative hearings level.

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[22] The 1999 Legislature also passed an amendment slightly modifying the language in HRS § 103D-701(g), which arguably strengthened its language precluding an award of attorney's fees in the resolution of *protests at the agency review level* (prior to the commencement of an administrative proceeding).

[23] Not to be entirely overlooked, however, was a very well reasoned dissenting opinion in *Carl* written by Justices Ramil and Nakayama that reached a different conclusion.

## IV. DECISION

Accordingly, it is hereby ordered that, in accordance with the above findings of fact and conclusions of law, the contracts for the Aiea, Kipapa, and Lincoln projects are terminated (although the contractors are entitled to their actual expenses and a reasonable profit for their performances), and the Petitioner is awarded its reasonable attorney's fees incurred in pursuing this matter.

DATED: Honolulu, Hawaii, JUN 28 2002.

RICHARD A. MARSHALL
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

Hi-TEC Roofing Services, Inc.
PCH-2001-2