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

In the Matter of	)	
	)	
FLETCHER PACIFIC CONSTRUCTION CO., LTD.,	)	PCH 98-2
	)	
Petitioner,	)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
	)	
vs.	)	
	)	
STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	

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

I. INTRODUCTION

On February 17, 1998 Fletcher Pacific Construction Co., Ltd. (Petitioner) filed a document entitled "Commencement of Proceeding and Request for Administrative Hearing" with the State of Hawaii, Department of Transportation (Respondent) contesting the bid process for "Modifications to [the] International Arrivals Building (IAB), Phase I Honolulu International Airport - State Project No. AC1037 - and Major Maintenance and Repairs to IAB, Phase II - State Project No. D01014-84, AIP Project No. 3-15-0005-35". Thereafter, on March 4, 1998[1] the Respondent transmitted the Petitioner's request to the Department of Commerce and Consumer Affairs, Office of Administrative Hearings for filing, docketing, and scheduling.

[1] Hawaii Administrative Rules § 3-126-42 requires that a Respondent transmit a Petitioner's request to the DCCA Office of Administrative Hearings *within three business days* from its receipt of the request.

A Notice of Hearing and Prehearing Conference was filed on March 10, 1998, setting a prehearing date of March 18, 1998, and a hearing date of March 25, 1998. In addition, on March 17, 1998 the Respondent filed a Response to Petitioner's Commencement of Proceeding and Request for Administrative Hearing. The March 18, 1998 prehearing conference which was attended by Diane T. Hastert, Esq. and Anna H. Oshiro, Esq. on behalf of the Petitioner and by Jefferry Kato, Esq. on behalf of the Respondent, was helpful in exchanging information, discussing issues, and clarifying matters of procedure. The primary foci of the Petitioner's request were allegations that the successful low bidder had failed to meet the Disadvantaged Business Enterprise (DBE) goals, had failed to list all of its subcontractors, and did not have the ability to perform certain work on the project. The relief sought by the Petitioner was a rejection of the existing award and the issuance of a new award to itself, or in the alternative, a rebidding of the project.

Thereafter, the hearing began on March 25, 1998, and continued on April 6, 7, 8, and 9, 1998. The Petitioner was again represented by Ms. Hastert and Ms. Oshiro, and the Respondent was represented by Mr. Kato and Dawn Y.J. Ching, Esq. At the close of the Petitioner's case in chief the Respondent made an oral motion for a directed verdict which was denied. At the end of the hearing the parties were requested to submit proposed findings of fact and conclusions of law by April 24, 1998, and both parties filed their submissions on that date.

The undersigned Hearings Officer, having considered the evidence and arguments presented during the course of the hearing - as well as the parties' post hearing pleadings - in light of the entire record in this matter, hereby renders the following findings of fact, conclusions on law, and decision. Findings of fact have been presented in a generally chronological format, while conclusions of law have been presented in a more topical sequence. The *contents*[2] of the parties' proposed findings and conclusions were adopted to the extent that they were consistent with 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

The Events Preceding Bid Opening

1. On April 11, 1997 the Respondent printed a massive Invitation for Bids entitled "SPECIAL PROVISIONS, SPECIFICATIONS AND PROPOSAL FOR MODIFICATIONS TO INTERNATIONAL ARRIVALS BUILDING, PHASE 1 AND MAJOR MAINTENANCE AND REPAIR TO INTERNATIONAL ARRIVALS BUILDING, PHASE II AT HONOLULU INTERNATIONAL AIRPORT[,] HONOLULU,

[2] The somewhat disjointed *form* of the proposals submitted by the parties tended to reflect selected fragments of testimony rather than synthesizing the entirety of the evidence.

OAHU, HAWAII." This document (together with the attachments incorporated by reference) was the subject of Addendum No. 1 on June 12, 1997, and Addendum No. 2 on June 19, 1997 and eventually totaled almost 1,200 pages.

2. The Invitation for Bids included a "Notice to Bidders" which provided general information including: the scope of the work to be performed; the availability of plans, specifications, and general provisions; the inclusion of federal funds and federal regulations, including the U.S. Department of Transportation Disadvantaged Business Enterprise (DBE) program; the requirement of a notice of intention to bid; the applicability of the mandatory pre-bid meeting; and an estimate of the construction cost as being in excess of $15 million. The notice also specifically stated that the DBE goal for subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals was 17.1% of the dollar value of the prime contract, and that if a bidder failed to meet that goal it would be required to provide documentation demonstrating that it had made a good faith effort in attempting to do so. A supplemental page regarding the DBE program requirements stated that: "A bid that fails to meet these requirements will be considered non-responsive and will be rejected."

3. The Invitation for Bids also included "Instructions To Bidders" which provided further general information and included the following paragraphs:

> 8. LISTING OF JOINT CONTRACTORS AND/OR SUBCONTRACTORS - The bidder's attention is directed to the Proposal where the names of all joint contractors and/or subcontractors to be engaged in the work and the nature of work involved must be indicated by completing the form provided in the proposal. Failure to comply may result in the rejection of the bid. If no joint contractor or subcontractor is to be engaged, the form must be completed by writing "NONE" on the form. If left blank, the Department will interpret the blank as no joint contractors and/or subcontractor will be used.
>
> ***
>
> 11. DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION REQUIREMENTS - The bidder's attention is directed to the Notice of Requirements for Participation by Disadvantaged Business Enterprises (49 CFR Part 23) incorporated hereinafter as part of the contract document for compliance.
>
> This contract will be awarded only to the lowest responsible bidder that meets the DBE goal or satisfies the Hawaii Department of Transportation (HDOT) that "good faith" efforts were taken in accordance with 49 CFR 23.45 and Appendix A to Part 23.45.
>
> Prospective prime bidders (sole bidders or joint venture

bidders) are advised that their prospective subcontractors and vendors must be certified by HDOT as DBEs (for those claiming DBE status) no later than the bid opening date. Prime bidders are advised to encourage their prospective subcontractors and vendors to submit their Schedule A for certification as eligible DBE as early as possible, well before bid opening. Schedule forms may be obtained from any office where plans and specifications for the project are made available as indicated in the Notice to Bidders.

Such schedule forms are to be completed, properly executed, and returned to the Business Management Office, Department of Transportation, 869 Punchbowl Street, Honolulu, Hawai: 96813.

4. The Invitation for Bids also included a separately identified "Notice of Requirements For Participation by Disadvantaged Business Enterprises (49 CFR 23)" which restated information/requirements previously set out in the "Notice to Bidders" as well as in the "Instructions To Bidders" - and provided further information/requirements on this subject - including the following language:

IV. DISADVANTAGED BUSINESS ENTERPRISE (DBE) INFORMATION

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Firms intending to participate in this project as DBEs must be certified by HDOT no later than the bid opening date. Prime bidder[s] must reasonably assure themselves that prospective subcontractors and vendors claiming DBE status are in fact certified as such on or before the bid opening date.

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V. AWARD OF CONTRACT - The Department reserves the right to reject all bids. The award of contract, if it be awarded, will be to the lowest responsible bidder who meets or exceeds the contract DBE goal, or makes good faith efforts to do so, as determined by the Department.

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C. If the lowest responsible bidder does not meet the total contract DBE goal and does not demonstrate good faith efforts to the satisfaction of the Department, such bidder will be rejected as nonresponsive....

5. The Invitation for Bids - under Special Provisions - stated that the General Provisions for the State of Hawaii, Department of Transportation, Harbor's Division or Airport's Division construction projects (contained in a pamphlet entitled "GENERAL PROVISIONS FOR CONSTRUCTION PROJECTS", dated 1977) were applicable and were included in the invitation for bids by reference. The General Provisions specified, *inter alia*, (under Article VIII - paragraph 8.1) that bidders were required to list all of their subcontractors as part of their bid package.

6. On May 19 and 21, 1997, the Respondent published the "Notice to Bidders" portion of the Invitation for Bids in the Honolulu Advertiser, announcing that sealed proposals [bids] for modifications to the international arrivals building, Phase 1 and major maintenance and repair to the international arrivals building, phase II at the Honolulu International Airport (State Project Nos. AO1037-95 and DO1014-84, AIP Project No. 3-15-0005-35) would be received until June 19, 1997. (The receipt date for bids was subsequently extended to June 30, 1997 by Addendum No. 1.)

7. On June 6, 1997 the Respondent conducted the mandatory pre-bid meeting for prospective bidders, and during the course of that meeting handed out certain printed materials reiterating the importance of the DBE requirements and pointing out that bids which failed to meet these requirements would be rejected as nonresponsive. This material restated, *inter alia*, that the DBE numerical goal was 17.1%, and that in calculating this figure only 60% of the DBE vendor's quoted price could be included if the vendor was a supplier (rather than a manufacturer/supplier whose quoted price could be counted at 100%). Where a bidder had not met the numerical percentage it would be necessary for that bidder to clearly demonstrate, with supporting documentation, good faith efforts to meet that goal by actively and aggressively seeking the participation of DBEs. In addition, the material stated that only DBEs that had been certified as of the bid opening date would be counted toward the 17.1% goal.

From Bid Opening To Protest

8. The Respondent received a total of five bids as of bid opening on June 30, 1997, with the low bid of $15,933,000 for the prime contract (exclusive of amounts for additive alternative bid items) having been submitted by G.W. Murphy Construction Co., Inc. (Murphy), a licensed general contractor in the State of Hawaii with A, B, and all included C licenses (i.e., C-3 asphalt paving and surfacing; C-5 cabinet, millwork, and carpentry remodeling and repairs; C-6 carpentry framing; C-9 cesspool; C-12 drywall; C-17 excavating, grading, and trenching; C-24 building moving and wrecking; C-25 institutional and commercial equipment; C-31a cement concrete; C-32 ornamental guardrail and fencing; C-35 pile driving, pile and casson drilling, and foundation; C-37a sewer and drain line; C-37b irrigation and lawn sprinkler systems; C-38 post tensioning; C-42a aluminum shingles; C-42b wood shingles and shakes; C-43 sewer, sewage disposal, drain, and pipe laying; C-49 swimming pool; C-56 welding; C-57a pumps installation; C-57b injection well; and C-61 solar energy systems). Nevertheless, the face of Murphy's bid showed only 16% for the amount of its DBE subcontractor participation.

9. The next lowest bid price of $17,444,000 for the prime contract (exclusive of amounts for additive alternative bid items) had been submitted by the Petitioner in this matter, Fletcher Pacific Construction Co., Ltd. (Fletcher). All of the bids that were submitted by general contractors reflected a calculation of their bid price on a base amount which did not include separately estimated prices for wheel chair lifts - which was identified in the Invitation for Bids as a separate "Additive Alternate Bid Item" (i.e. an elective item that the Respondent could pursue at a later time if it had sufficient funds available). The amount of additive alternate bid items is not a factor in calculating whether a bid is in compliance with either the 17.1% DBE goal or the DBE good faith efforts goal, but where an additive alternate bid item must be performed by a subcontractor the bidder must list that subcontractor in its bid.

10. Thereafter, by a memorandum dated July 1, 1997 from the Respondent's Project Manager (Shuzo Kimura), the bid documents for the two lowest bidders were forwarded to the Respondent's Contracts Officer (Mary Kitsu). Ms. Kitsu had been a management analyst with HDOT for about eight years, but had transferred to the contracts office only a few months earlier. The memorandum noted that Murphy had not met the DBE goal of 17.1% - as its bid documents reported only 16.0% - and asked that an evaluation be made as soon as possible to determine whether Murphy had made a good faith effort to meet the DBE percentage goal.

11. On the following day, July 2, 1997, the Respondent's Airport Operations Officer (Stanford Miyamoto) wrote a letter to Murphy's President (J. Patrick Henderson) stating that Murphy was the apparent low bidder but the Respondent was unable to determine whether it had met the DBE contract goal from the information provided in its bid documents. Accordingly, the letter requested clarification on whether two subcontractors - DHS Hawaii and SUN Industries - were suppliers or were manufacturer/suppliers of their offered commodities. This letter was written despite the fact that Murphy had stated in its bid documents that its DBE participation was 16.0%, and despite the fact that Mr. Kimura had already requested Ms. Kitsu to perform an evaluation of Murphy's good faith efforts in attempting to meet the 17.1% DBE contract goal.

12. Also on July 2, 1997, Fletcher's Estimating Manager (Richard Charleson) wrote a letter to the Respondent questioning whether Murphy had properly listed all of its subcontractors in its bid documents. In particular, Fletcher raised its concerns about an apparent lack of identification of subcontractors for the installation of wheel chair lifts, for soil (termite control) treatment, and for fire protection work. The letter also questioned whether Murphy had the actual capability to self-perform certain other portions of the project in lieu of subcontracting such work to others. Upon its receipt by the Respondent, this letter was forwarded to Ms. Kitsu for a review concurrent with her review of the DBE issue.

13. By a letter dated July 3, 1997, Mr. Henderson replied to Mr. Miyamoto's July 2, 1997 inquiry regarding the status of its subcontractors by stating that Murphy

understood DHS Hawaii was a commodities supplier and that SUN Industries was a commodities manufacturer/supplier.

14. On July 9, 1997 Ms. Kitsu sent a return memorandum to Mr. Kimura which did not address Murphy's good faith efforts, its alleged failure to identify all subcontractors, or its ability to self-perform certain portions of the project. It did note, however, that she had recalculated Murphy's DBE percentage based upon the information provided by Mr. Henderson to Mr. Miyamoto regarding the subcontractor status of DHS Hawaii and SUN Industries. At that time, Ms. Kitsu calculated that Murphy's DBE participation was 17.4%, but also noted that Murphy's bid documents had not included the full names of its proposed subcontractors and asked that Mr. Kimura verify their identity.

15. During July of 1997 Mr. Kimura discussed the issues of Murphy's compliance or noncompliance with the DBE goal requirements with the Respondent's Engineering Program Manager (Ernest Kurosawa) and with the Respondent's Design Section Head (Steven Wong), as well as with other employees of the Respondent. Mr. Kimura was also concerned about Murphy's failure to: 1) name a licensed elevator subcontractor for wheelchair installation (specifically set out in § 14225 of the invitation for bids), and to name a licensed pest control subcontractor to handle soil treatment for termite control (specifically set out in § 02281 of the invitation for bids). Furthermore, although he was of the opinion that fire protection work (not listed separately in Murphy's bid) could be performed by Murphy's plumbing and air conditioning subcontractor (Kasan Construction Corp.) within the scope of its license, he was concerned that it appeared to be a shell corporation lacking an actual workforce sufficient to accomplish the task.

16. The provisions of the Invitation for Bids state, *inter alia*, in Section 14225 - Wheel Chair Lift, Part 1 - General, 1.02 Description of Work, as follows:

> B. Installer shall be a Licensed Elevator Contractor possessing a current C-16 License issued by the Contractor's Licensing Board of the Department of Commerce and Consumer Affairs, State of Hawaii.

Murphy's bid did not list or otherwise specifically identify a subcontractor to perform this work, however, because Mr. Henderson refused to believe that a licensed contractor was required to do it and felt that it could be performed by Murphy as the general contractor. (Murphy's bid did list Montgomery Kone [sic], a Licensed Elevator Contractor possessing a current C-16 License, but only in a separate category for "Elevator Repair".)

17. The provisions of the Invitation for Bids state, *inter alia*, in Section 02281 - Soil Treatment For Termite Control, Part 1 - General, 1.03 General Requirements, that:

> A. Soil shall be treated against subterranean termites by a Pest Control Operator licensed by the Hawaii State Pest Control Board in Branch #3 and certified as a commercial applicator

under the Hawaii Pesticide Law by the Hawaii State Department of Agriculture in category 7b.

Furthermore, in Part 3 - Execution, 3.02 Application And Rates, it is set out that:

A. The solution shall be applied during non-school hours.

B. Whenever possible, the solution shall be applied not more than 24 hours before the pouring of concrete over the affected area.

C. Where a treated area that is not scheduled to be covered with a moisture barrier in the finished construction (e.g. lanai area) cannot be covered with a poured concrete slab the same day, the area shall be protected with a waterproof covering such as polyethylene sheeting.

D. The solution under slabs shall be applied after backfill has been completed and rough plumbing and other utility lines have been installed and just prior to the placement of the moisture barrier. The treatment shall be applied to dry material whenever possible, but in any case shall not be applied under conditions during which the soil does not readily absorb the solution.

E. The solution shall be applied uniformly and at the rates indicated on the label for the chemical being used. This shall include treatment to provide vertical barriers as stated on the product label.

Murphy's bid did not list or otherwise specifically identify a subcontractor to perform this work, however, because Mr. Henderson intended to bring in pre-treated soil rather than treating the existing soil at the project site. The estimated cost for this part of the project (Section 02281 - Soil Treatment For Termite Control) was about $10,000 to $13,000 which was substantially less than 1% of Murphy's total bid price.

18. Kasan Construction Corp. had been originally licensed as a general building contractor on December 6, 1996, with additional licenses in the following categories: C-4 boiler, hot-water heating & steam fitting, C-37 plumbing, C-40 refrigeration, and C-52 ventilating & air conditioning. The scope of its C-37 plumbing license (as set out in Hawaii Administrative Rules, Title 16, Chapter 77, Exhibit A) included "fire protection sprinkler systems when supervised by licensed mechanical engineers or licensed fire protection contractors[.]" Its licenses were current, valid, and in good standing when it submitted its subcontracting bids to Murphy, and although Mr. Henderson did not know how many persons it employed, he recognized that it could expand or contract its workforce depending on the volume of its work at any given time. The practice of

contractors in maintaining a flexible employee base is not uncommon within the construction trades.

19. By a letter dated July 11, 1997 Mr. Kurosawa wrote to Mr. Henderson stating that it appeared Murphy had not listed subcontractors for work on various portions of the project even though such work was not normally done under the license of a general contractor. Mr. Henderson's reply letter to Mr. Kurosawa dated July 15, 1997 referenced the general proposition that "a General Contractor is permitted to do or to superintend the whole or any part of a construction project within the scope of its prime contract if the contract contains more than two unrelated trades or crafts[,]" and stated that it was "ready, willing, and able to undertake all of the work for which no subcontractor has been named." More specifically, however, Mr. Henderson's letter set out Murphy's understanding that: 1) wheelchair lifts would be purchased as fully factory assembled and therefore a licensed subcontractor would be unnecessary for their installation; 2) pre-treated soils would be purchased and imported to the site for making subgrade in accordance with termite control requirements; and, 3) Kasan Construction Corp. which had been identified in its bid documents as its subcontractor for plumbing and air conditioning would be performing the fire protection work under the supervision of a licensed engineer.

20. By a letter dated August 1, 1997 the Respondent's Airports Administrator (Jerry Matsuda) replied to Mr. Charleson's July 2, 1997 inquiry by acknowledging that the installation of wheel chair lifts would require a licensed subcontractor. The letter stated that the law allowed a subcontractor to be added after bid opening (if it was in the best interests of the State and if the amount at issue did not exceed 1% of the total bid) and that the Respondent would direct Murphy to have this work done by a licensed subcontractor. As far as the topics of fire protection and soil treatment were concerned, the letter simply echoed the contents of Mr. Henderson's July 15, 1997 letter to Mr. Kurosawa. Finally, the letter stated that Murphy would be self-performing various other portions of the project which had been questioned by Fletcher.

21. In or about early August of 1997, Mr. Kimura received new information which caused him to question the status of SUN Industries as a manufacturer/supplier and thus to question Ms. Kitsu's calculation that Murphy had exceeded the 17.1% DBE goal. Accordingly, by a letter dated August 5, 1997 Mr. Kurosawa wrote directly to SUN Industries for verification of its role as a subcontractor for Murphy, noting that SUN Industries (which was listed in Murphy's bid twice as a non DBE subcontractor - for identifying devices and photomurals, and once as a DBE subcontractor - for signage) was identified in the HDOT DBE Directory as a supplier for highway signs, traffic warning devices, guardrail, and pavement striping. By a reply letter dated August 12, 1997, SUN Industries acknowledged that there had been some confusion on this subject, and stated that it would be a supplier of commodities (from another manufacturer) for Murphy's bid.

22. Meanwhile, by a letter dated August 15, 1997 Mr. Charleson wrote to the Respondent as a follow-up to Mr. Matsuda's August 1, 1997 letter, and offered additional comments on what it understood to be Murphy's subcontracting arrangements for the project.

First, it questioned whether a waiver on wheel chair lifts was really in the best interests of the State since it might set an unfavorable precedent with respect to other types of work; second, it renewed earlier objections to Murphy's lack of identifying specific subcontractors for fire protection and for soil treatment; third, it agreed that Murphy could self-perform other work but again questioned its technical competence to do so; and fourth, it noted that it had learned that Murphy may not have met the DBE goal of 17.1% for the project.

23. Then, by a letter dated August 22, 1997, to the Respondent Mr. Henderson stated that as a general contractor it was not in a position to make a distinction between a commodities supplier and a commodities manufacturer/supplier, and that it had relied on earlier information from SUN Industries that it should be classified as a manufacturer/supplier. The letter went on to say, however, that if the Respondent and SUN Industries had concluded otherwise, Murphy was not then in a position to challenge that decision, and that if a reclassification of SUN Industries had an effect on its ability to meet the 17.1% DBE goal it would provide documentation in support of its good faith efforts to do so. A subsequent recalculation of Murphy's DBE percentage (with SUN Industries as a supplier) resulted in a numerical value of 16.7%.

24. Accordingly, by a letter to Mr. Henderson dated August 25, 1997, Mr. Matsuda stated that - even though it was the apparent low bidder - Murphy had failed to meet the 17.1% DBE goal, and therefore it was being offered the opportunity to demonstrate good faith efforts toward meeting it. The letter requested that Murphy provide specific responses to questions in nine categories in order to help the Respondent evaluate Murphy's DBE good faith efforts. The categories were as follows:

> 1. Did you attend the pre-bid meeting that was held by the state Department of Transportation to inform BDEs of contracting and subcontracting opportunities in the subject project?
>
> 2. Did you advertise in general circulation, trade association or minority-focus media concerning the subcontracting opportunities?
>
> 3. Did you provide written notice to a reasonable number of specific DBEs that their interest in the contract is solicited, in sufficient time as to allow the DBEs to participate effectively?
>
> 4. Did you follow-up initial solicitation of interest by contacting DBEs to determine with certainty whether the DBEs were interested?
>
> 5. Did you select portions of the work to be performed by DBEs in order to increase the likelihood of meeting the DBE goal (including, where appropriate, breaking down contract work into economically feasible units to facilitate DBE participation?
>
> 6. Did you provide interested DBEs with adequate information about the plans, specifications and requirements of the contract?
>
> 7. Did you negotiate in good faith with interested DBEs,

not rejecting them as unqualified without sound reasons based on a thorough investigation of their capabilities?

8. Did you make efforts to assist interested DBEs and potential DBEs in obtaining bonding, certification, lines of credit or insurance required by the state Department of Transportation or you?

9. Did you effectively use the services of available minority community organization, minority contractors' groups, state and federal minority assistance offices, and other organizations that provide assistance in the recruitment and placement of DBEs?

25. By a letter dated September 2, 1997 Murphy's Administrative Manager (June Keaton) offered its reply to Mr. Matsuda's inquiry regarding Murphy's D.B.E good faith efforts. The letter answered all of the nine questions in the affirmative. It also included an attachment that was entitled "D.B.E. GOOD FAITH EFFORTS" and consisted of 418 pages of supporting documentation to substantiate the affirmative replies.

26. Upon receiving Ms. Keaton's letter the Respondent again asked Ms. Kitsu to conduct an evaluation of Murphy's DBE good faith efforts. At that time she had not received any formal training in conducting such evaluations, and had only limited on-the-job training and/or experience with other DBE matters. She did, however, receive some assistance from her predecessor, Edward Asato, who was then employed by HDOT in another capacity. During the course of her evaluation Ms. Kitsu reviewed Murphy's documentation, made phone calls to listed DBE subcontractors (including S&M Welding and V&C Drywall) to ask about their interactions with Murphy for bidding on the project, held meetings with Mr. Henderson, and discussed the extent of Murphy's good faith efforts with members of its staff.

27. On September 25, 1997, Ms. Kitsu sent a memorandum to Mr. Kurosawa summarizing her work. It commented that although Murphy had met seven out of the nine criteria (all but items 4 and 7), its efforts lacked "intensity, aggressiveness and thoroughness" in terms of follow-up work with DBEs. In addition, she questioned why Murphy had rejected a low bid from a particular DBE subcontractor (S&M Welding) in favor of performing the work itself. It concluded that Murphy had not demonstrated good faith efforts and recommended that its bid be rejected in favor of the next lowest responsive bidder.

28. Mr. Kurosawa replied to Ms. Kitsu by memorandum on October 2, 1997, by stating that in light of her determination that Murphy had failed to pass the DBE good faith efforts test, his recommendation was that the Respondent should proceed with a contract award to Fletcher as the lowest responsive bidder. On the following day, October 3, 1997 the HDOT Director (Kazu Hayashida) wrote a letter to Mr. Henderson notifying him that Murphy's bid had been determined to be non-responsive and that it was the Respondent's intention to award a contract for the project to the next lowest responsive bidder.

The Bid Protest and Beyond

29. By a letter dated October 8, 1997 Mr. Henderson filed a bid protest with the Respondent contesting its determination that Murphy had not met the DBE good faith requirement and asserting (for the first time) that if one of its subcontractors, R.H. Tom Interiors, were counted as a DBE subcontractor (even though it was identified as a non-DBE subcontractor in Murphy's bid documents, and even though it had not been certified as of the bid opening date) the DBE numerical goal of 17.1% would also be met by Murphy. In making this assertion Mr. Henderson relied, in part, on an outdated HDOT general information handout for the DBE program on airport and highway construction and procurement - which was *not* part of the Respondent's invitation to bid.

30. A general information handout on the HDOT DBE program had been prepared by the Respondent many years earlier for use at HDOT workshops, but it had subsequently been amended to conform with federal revisions to 49 CFR Part 23 reflecting changes in the federal DBE program. Paragraphs A and B found in Part III (Eligibility Determination) of the original handout stated that:

> A. Firms found eligible as a DBE will be identified, certified and listed in a directory compiled by the State DOT.
>
> Contractors are urged to have their subcontractors submit Schedule A [application for certification] at the earliest possible date but no later than 6 days prior to the bid opening date for eligibility determination for those firms not listed in the directory.
>
> B. For a firm to be determined as an eligible DBE, it must go through the certification process.

The same paragraphs of the amended handout stated that:

> A. Firms found eligible as a DBE will be certified and listed in the HDOT's DBE Directory, which is printed annually in December.
>
> Contractors are urged to encourage their potential DBE subcontractors to submit schedule A [application for certification] at the earliest possible date for certification prior to the bid opening date.
>
> B. For a firm to be certified as an eligible DBE, it must go through the certification process, which includes an on-site review of the firm.

31. Murphy had been instrumental in urging R.H. Tom Interiors to apply for certification as a DBE contractor, and R.H. Tom Interiors had submitted an application to HDOT on June 2, 1997. The application, however, was not accompanied by any explanatory information associating it with Murphy's bid, or by any request for expedited processing of either the paperwork or the site inspection. Accordingly, it was processed in the normal course of business with approval of the paperwork in or about mid June of 1977, and with approval of the site inspection on July 2, 1997. Since certification required approval of both the paperwork and the site inspection, HDOT did not grant certification to R.H. Tom Interiors as a DBE subcontractor until two days after the bid opening date of June 30, 1997.

32. In mid October of 1997 Mr. Kimura prepared a draft letter for Mr. Kurosawa's signature to Fletcher informing it that Murphy's bid had been determined to be non-responsive; that Murphy had been advised that an award would be made to Fletcher; that Murphy had thereafter filed a bid protest; and, that since an evaluation of the protest would take some time the Respondent would like Fletcher to extend the time for acceptance of its bid to December 11, 1997. Although the letter was neither signed nor formally sent out, Fletcher did receive an advance copy from Mr. Kimura, and by a letter dated October 21, 1997 Fletcher stated that it would extend its acceptance period to December 11, 1997. (In a series of subsequent letters written in early December of 1997, Fletcher agreed to further extensions of its acceptance period to April 30, 1998.)

33. By a letter dated October 20, 1997, Mr. Matsuda wrote to Mr. Henderson asking for additional information and documentation regarding the extent of its compliance with the two DBE good faith efforts criteria (items 4 and 7) for which the Respondent's earlier evaluation had given Murphy failing scores. The letter also asked for an explanation of why Murphy had decided to self perform certain work when a DBE certified subcontractor (S&M Welding) had been the low bidder for this work. Four days later, on October 24, 1997 Mr. Henderson replied by a letter reiterating its earlier affirmative answers to items 4 and 7; referring to attached exhibits as supporting its efforts to follow-up with potential DBE subcontractors (unless they definitely said that they did not intend to bid); and, stating that S&M Welding was not selected because their "low" bid was still substantially above Murphy's estimated cost of using its own personnel to perform this task.

34. Once again, following Murphy's bid protest, Ms. Kitsu had been asked to re-evaluate the extent of Murphy's DBE good faith efforts, and once again she did so by applying similar methodology. (By this time, however, her calls to DBE subcontractors were yielding questionable responses because many of them no longer had clear recollections of what efforts, if any, Murphy had made to follow-up with them and/or encourage their participation.) As part of the re-evaluation Ms. Kitsu, Mr. Asato, Mr. Kimura, and Mr. Wong met with Mr. Henderson on November 20, 1997. Since no new documentation was provided by Mr. Henderson at that time, however, the discussions focused on previously received information and documents. Although notes of the meeting stated that it ended amicably, the same notes indicate a rather defensive posture by Mr. Henderson which offered relatively limited new insights on Murphy's DBE good faith efforts. Mr. Henderson did, however, agree

to provide copies of Murphy's own estimates for work on portions of the project where bids accepted from subcontractors were lower than its own estimates.

35. By a letter dated November 25, 1997 Mr. Henderson wrote to Ms. Kitsu asking that the Respondent specify in writing exactly what copies of Murphy's own estimates were being requested; the reason why they were being requested; and a written acknowledgment that the Respondent would hold such documents as confidential. In reply, Mr. Miyamoto wrote a letter on November 28, 1997 to Mr. Henderson which reiterated Ms. Kitsu's oral identification of, and explanation for, the requested documents; represented that they would be protected as confidential; and stated that if they were not provided by the close of business on December 1, 1997 the Respondent would conclude its review without them.

36. On December 16, 1997 Ms. Kitsu chaired another meeting with Mr. Henderson to discuss the issue of Murphy's DBE good faith efforts. This meeting was also attended by Mr. Asato, Ms. Keaton, and Deputy Attorney General Jefferry Kato. During the course of the meeting Ms. Keaton acknowledged that Murphy had not met the 17.1% DBE goal but asserted that Murphy had shown good faith efforts to do so in their follow-up activities with DBE subcontractors. She pointed out its advertising, notices, letters to minority organizations, and phone contacts to encourage DBE contractors to bid. She also pointed out its attempts to break down larger tasks which were too big for DBE contractors, and particularly stressed its faxes and follow-up phone contacts with DBE contractors - unless they had made it clear that they simply would not bid on the project.

37. During the course of the December 16, 1997 meeting, Mr. Matsuda joined the group for a short time and questioned Mr. Henderson on Murphy's DBE good faith efforts *and* its calculation of the 17.1% DBE percentage goal. Mr. Henderson went over a number of the points previously made by Ms. Keaton regarding Murphy's good faith efforts and also touched on the matter of R.H. Tom Interiors' status in calculating DBE percentages. Mr. Henderson also added that DBE subcontractors bids were accepted if they were within 10% of Murphy's own estimates, but added that he was unsure of whether any of his subcontractor's bids were still valid - and thus he was uncertain whether Murphy could stay with the amount of its own bid. Subsequently, however, by a letter dated December 19, 1997 to the Respondent, Mr. Henderson stated that Murphy would extend its acceptance period through January 31, 1998.

38. In late December of 1997 Ms. Kitsu remained of the opinion that the additional re-evaluation did not warrant any change in the Respondent's two earlier determinations that Murphy had not met the good faith efforts goal. She verbally shared this opinion with Mr. Kimura and others within HDOT, but did not reflect this in another written recommendation. She was also of the belief, however, that Mr. Matsuda may have decided that Murphy had met one or both of the alternative DBE goals. Shortly thereafter, Ms. Kitsu did learn that Mr. Matsuda and/or Mr. Hayashida had overruled her staff recommendation by deciding that Murphy had met the 17.1% DBE goal based upon including R.H. Tom Interiors as a DBE subcontractor.

39. On December 24, 1997 Mr. Matsuda sent a memorandum to Ms. Kitsu stating that based upon a further review of Murphy's information and documentation it had been determined that Murphy "has in fact met the DBE goal[,]" and should be awarded the contract for the project. This determination was made even though Mr. Matsuda was an engineer by profession (with no formal training in conducting DBE good faith evaluations); had not actually conducted any previous DBE good faith evaluations; and had only limited exposure to the substantive content of Ms. Kitsu's earlier fact gathering processes.

40. By a letter dated January 12, 1998 Mr. Hayashida wrote to Murphy stating that it was awarded the contract for the project; advising Murphy that the letter did not constitute an official notice to proceed with the work; and, adding that the contract documents would be forwarded to Murphy for its signature. The letter read as follows:

> With the concurrence of the Federal Aviation Administration, you are awarded the contract on the subject project based on your proposal of $16,968,000.00 for Bid Items 1, 2 and the Additive Alternative Bid Item received by us on June 30, 1997.
>
> I want to advise you that this letter is not an official notice to proceed with the work. You will be contacted by our Airports Engineering Branch to arrange for an appropriate date for you to commence work.
>
> All necessary documents will be forwarded to you shortly for your execution.

41. By a letter dated February 5, 1998 to Fletcher's attorneys, Mr. Hayashida rejected Fletcher's bid protest as unfounded and informed them of the statutory provisions governing a request for reconsideration by HDOT and/or a request for an administrative hearing to contest the rejection.

42. During the course of preparing for her appearance as a witness in this proceeding (and after consultations with the Respondent's attorney), Ms. Kitsu reexamined her two earlier evaluations of Murphy's DBE good faith efforts. She also contacted the Federal Aviation Administration to inquire about their DBE evaluation procedures, and concluded that undue emphasis may have been placed on Murphy's policy of not following up with DBE contractors who stated that they definitely would not submit bids, or that undue emphasis may have been placed on what was thought to have been insufficient documentation of Murphy's follow-up efforts. She then concluded that her previous conclusions would have been different if less emphasis had been placed on those factors.

43. The Respondent did not make "a written determination that the award of the contract without delay is necessary to protect substantial interests of the State" under HRS § 103D-701(f), and accordingly, has neither executed a contract with Murphy nor issued any notice to proceed with work on the project.

III. CONCLUSIONS OF LAW

The Petitioner in this matter raised certain issues which, as previously noted in the Introduction, focused on allegations that Murphy had failed to meet the DBE goals, had failed to list all of its subcontractors, and had failed to demonstrate the ability to perform certain portions of the project. These topics have been evaluated in light of the requirement in HRS § 103D-709(c) that the Petitioner has the burden of proof to establish its allegations by a preponderance of the evidence, and with a view toward the overall purpose of the Hawaii Public Procurement Code. The legislative history of the code, 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.

The DBE Subcontractor Goals

In first examining Murphy's noncompliance with the 17.1% DBE goal, it is worth emphasizing how explicitly stated and how often repeated - in the published "Notice to Bidders", in the "Invitation For Bids", and at the "Mandatory Pre-Bid Meeting" - was the requirement that *qualifying DBE subcontractors must have been certified as such prior to the bid opening date.* Any purported reliance on an outdated HDOT handout, which did not waive the pre-certification requirement; which had been subsequently revised; and, which was not even part of the invitation for bids, was misplaced and erroneous. As a matter of fact, R.H. Tom Interiors was not so qualified, and was not claimed to be so qualified in the listing of subcontractors which accompanied Murphy's bid. Thus R.H. Tom Interiors' bid price as a subcontractor could not be used in calculating whether Murphy met the 17.1% requirement, and without it Murphy did not meet that goal. Accordingly, unless Murphy could show that it had met the DBE good faith efforts requirement, its bid would have to be rejected as non-responsive.

An examination of Murphy's DBE good faith efforts presents a somewhat more complex scenario. Initially, it is worth noting that Ms. Kitsu's evaluations found that

Murphy had met 7 of the 9 criteria used to measure good faith efforts; that the remaining two criteria lent themselves to rather subjective interpretations; and, that Mr. Henderson and Ms. Keaton had supplied a considerable amount of information and documentation in support of Murphy's endeavors in this regard. Furthermore, there was no evidence presented that a bidder had to obtain a "perfect" score of 9 out of 9 in order to meet the DBE good faith efforts goal.

Nevertheless, Ms. Kitsu's September 25, 1997 memorandum concluded that Murphy had not met the good faith efforts goal. Furthermore, since this conclusion was essentially reconfirmed by her subsequent reassessments, this memorandum remained as the only written document reflecting any determination on this topic. It is uncertain whether Mr. Matsuda intended to overrule Ms. Kitsu's recommendation on this topic, and there is no written documentation that he had actually made a contrary determination. It appears that after incorrectly determining that Murphy had met the 17.1% DBE goal, the Respondent considered that a further determination as to whether Murphy had met the DBE good faith efforts goal was unnecessary.[3] Accordingly, the failure of Murphy to actually meet the 17.1% DBE goal, combined with the failure of the Respondent to articulate a determination that Murphy had met the DBE good faith efforts goal, meant that Murphy's bid was non-responsive, and its selection by the Respondent was not in accordance with the terms and conditions of the invitation for bids (solicitation).

The Listing of Subcontractors

As a starting point, the requirement for bidders to list *all* of their subcontractors - like the requirement regarding DBE qualifications - was clearly and repetitiously set out in the Invitation for Bids and at the mandatory pre-bid meeting. Second, the bid specifications regarding wheel chair lifts (Section 14225) and soil treatment for termite control (Section 02281) specified that such work was to be performed by licensed contractors. Third, Murphy's license as a general contractor did not include specialty licenses for either electrical work or pesticide applications, and Murphy did not independently hold specialty classification licenses for such work.[4]

The identification of subcontractors is also a regulatory requirement that was adopted pursuant to HRS Chapter 103D in support of the statutory provisions of the Hawaii

[3] Although the evidence presented during the course of this hearing actually tended to support a conclusion that Murphy had met the DBE good faith efforts goal, the responsibility for making an initial determination on this issue rests with the contracting agency rather than with the reviewing authority.

[4] In early 1993 the Contractors License Board had considered the extent of work allowed under just this type of situation, and affirmed that while a general contractor could perform additional work that was incidental and supplemental to its license, "the electrical, plumbing and elevator work must be performed by the appropriately licensed specialty contractor because of the special permits required by the Counties." Minutes of the Contractors License Board, May 21, 1993 Meeting, page 8.

Public Procurement Code. It is contained in HAR § 3-122-21(a)(5) which reads, in relevant part, as follows:

> § 3-122-21 Preparing a competitive sealed bid. (a) The invitation for bids shall be used to initiate a competitive sealed bid procurement and shall include:
>
> ***
>
> (5) Invitation for bids for construction, shall require that the bidder include:
>
> (A) The name of each person or firm to be engaged by the bidder as a joint venture, partner or subcontractor in the performance of the contract; and
>
> (B) The nature and scope of the work to be performed by each.

Thus, in order to comply with the Invitation for Bids (and the above cited rule) bidders were required to identify (by listing) all of the subcontractors necessary to perform work which could not be self-performed by the bidder.

Murphy did not comply with this requirement in regard to either the wheel chair lifts or the soil treatment for termite control. Nevertheless, the Respondent partially remedied this defect by allowing Murphy to add a licensed contractor for the installation of wheel chair lifts after bid opening, in accordance with the provisions of § 3-122-21(a)(6). This rule states that:

> Construction bids that do not comply with the requirements in paragraph (5) may be accepted if acceptance is in the best interests of the State and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one percent of the total bid amount.

The evidence showed that the value of work for the wheel chair lifts was less than 1% of the total bid amount, and the Petitioner did not establish that the Respondent had erred in its determination that the post award addition of a licensed contractor to do this work was in the best interests of the State.

On the other hand, although the value of the work to be performed with respect to soil treatment for termite control was also less than 1% of the total bid amount, the Respondent did not make a similar determination that Murphy should be allowed to add a licensed contractor after bid opening as being in the best interests of the State. This omission could presumably be traced to the Respondent's incorrect assumption that Murphy could use pre-treated soil to comply with the soil treatment specifications set out in the invitation for

bids.[5] Accordingly, the failure of Murphy to have listed a licensed subcontractor to perform the soil treatment requirements, in combination with the Respondent's failure to have made and articulated a determination that allowing Murphy to add a licensed contractor after bid opening would be in the best interests of the State, meant that Murphy's bid was non-responsive, and its selection by the Respondent was not in accordance with the terms and conditions of the Invitation for Bids (solicitation), or the procurement regulations.

The Ability to Perform on the Project

Finally, the question of Murphy's ability (responsibility) to accomplish all of the work set out in the invitation for bids by either self-performance or performance through subcontractors such as Kasan Construction Corp. needs to be briefly addressed. In essence, the Petitioner's allegation was that although these contractors likely have had the licenses necessary for lawful performance, at the time of bid opening neither of them had the actual workforce needed to accomplish the project. While this is certainly a topic that may warrant close scrutiny and continued monitoring by the Respondent during the course of actual construction,[6] it does not reflect noncompliance by Murphy in terms of the requirements for submitting a bid. As pointed out on multiple occasions, the size and makeup of construction firms can fluctuate considerably depending upon the volume of their work at any given time, and as long as they are properly licensed they may expand their infrastructure to meet the needs of a given project.

The Selection of Available Remedies

The whole solicitation/contract award process for a major construction project - beginning with the preparation of an invitation for bids by a governmental entity, followed by the preparation and submittal of bids by contractors, and culminating in the selection of a bidder for the execution of a contract - is a *very* complicated and expensive process. In a time of economic downturn, marked by an increased level of competition for a decreased number of projects, it is also a process which has come under an increased scrutiny of its many technical requirements. It is also worth pointing out that while this matter does involve mistakes by the Respondent, this matter does not involve the type of egregious behavior by a respondent as noted in such matters as PRC Public Sector, Inc., vs. County of Hawaii, Dept. Hawaii of Finance, PCH 96-3 (May 31, 1996). Accordingly, it becomes particularly important to fashion a remedy which reflects an outcome consistent with the law and yet avoids unnecessary obstacles to the accomplishment of the underlying public project.

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[5] Once again, although the evidence presented during the course of this hearing tended to support a conclusion that allowing Murphy to add a licensed contractor after bid opening to fulfill the soil treatment requirements would have been in the best interests of the State, the responsibility for making such an initial determination rests with the contracting agency rather than with the reviewing authority.

[6] The authority to resolve *subsequent* contractual controversies, as opposed to those arising out of the solicitation or award process, is contained in HRS § 103D-703 and relates to the judicial forum.

Nevertheless, the legal and contractual remedies set out in Part VII of the Hawaii Public Procurement Code could be construed as severely restricting the application of just remedies, since they tend to poorly reflect certain realities inherent in the "contract award" *process* by treating it as a singular event. The relevant statutes applicable to remedies are contained in HRS § 103D-706, which reads as follows:

> Remedies prior to an award. If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:
>
> (1) Canceled; or
> (2) Revised to compl· with the law[,]

and HRS § 103D-707, 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;[7] 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,[8]

[7] 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).
[8] See footnote 6 above.

without prejudice to the State's rights to such damages as may be appropriate.

Generally - as in this matter - there are actually multiple events that make up the "contract award" process which, in its least complicated form, unfolds in the following stages.

1. An oral or written notification (the July 2, 1997 letter from Mr. Miyamoto to Murphy) to a person or firm shortly after bid opening that it is the lowest responsive bidder, with the presumption that it will be awarded the contract upon verification of the contents of its bid.

2. A written notification (the January 12, 1998 letter from Mr. Hayashida to Murphy) to the successful bidder announcing that it was awarded the contract for the project.

3. The complete written and signed contract document(s) for the project (referred to as being forthcoming in the January 12, 1998 letter from Mr. Hayashida to Murphy but not executed).

4. A notice to proceed with work under the contract (never issued by the Respondent to Murphy) allowing the successful bidder to actually commence with work on the project.

In the present matter, an award of the contract to Murphy occurred on January 12, 1998, as evidenced by the Respondent's letter of that date, *although no contract for the project has yet been executed and no work has been performed.* Accordingly, while a strict construction of the statutes governing remedies would appear to require the application of the post award options (contract ratification vs. contract termination/nullification) set out in HRS § 103D-707, there is no contract to ratify or terminate/nullify under the existing facts. On the other hand, if the award of a contract were to be construed as a process,[9] with the operative event intended to distinguish these two statutes being *the execution of a contract*, a more liberal construction could allow the application of the pre-award options (contract cancellation vs. contract revision) set out in HRS § 103D-706. In addition, such an approach would clearly allow for an order remanding the matter to the Respondent for reconsideration of the two areas in which Murphy's bid cannot currently be said to be responsive. In the matter of Arakaki v. State, 87 Haw. 147 (1998) at 151, it was emphasized that "the term 'revise' in the context of HRS § 103D-706 includes remand and reconsideration."

[9] There is considerable precedent for proceeding in such a well reasoned manner, as recently illustrated in the matter of Carl Corp. v. State Dept. of Educ., 85 Haw 431 (1997) in which the court elected to apply a broad definition to the term "solicitation" so as to incorporate the *process of soliciting bids* rather than restricting its definition to the actual *document* soliciting proposals.

In view of the findings and conclusions resulting from this hearing, it would appear that a fair, equitable, and expeditious resolution would be to remand the matter to the Respondent with instructions to: 1) withdraw its January 12, 1998 notification letter to Murphy stating that it was awarded the contract; 2) make a specific determination as to whether Murphy met the DBE good faith efforts goal, and if so; 3) make a specific determination as to whether allowing Murphy to add a licensed subcontractor to meet the soil treatment requirements after bid opening would be in the best interests of the State. In other words, to fully and correctly perform (and document) the bid evaluation process as it should have been done, but without rebidding the project. The Respondent could then proceed with an award - to either Murphy or such other responsive low bidder as might properly be selected from the remaining four bids.

Such a remedy would not reward the Respondent as it would not be able to fashion its own remedy for its own wrongdoing, and its conduct would remain potentially subject to future protest or hearing procedures. Furthermore, the advantages such a remedy would include: minimizing the impact of the Respondent's errors on Murphy, on Fletcher, and on the other bidders; eliminating the substantial costs inevitably associated with the issuance of a new invitation for bids; protecting current bidders from the potential misuse of their now disclosed bid costs by other competitors; reducing further loss of time on initiating the underlying project; and, enhancing public confidence in the procurement code by its application in a manner consistent with the elements of common sense and legislative intent.

IV. DECISION

It is hereby ordered that, in accordance with the above findings of fact and conclusions of law, this matter is remanded to the Respondent, Department of Transportation, State of Hawaii, with instructions to: 1) withdraw its January 12, 1998 notification letter to Murphy stating that it was awarded the contract; 2) make a specific determination as to whether Murphy met the DBE good faith efforts goal, and if so; 3) make a specific determination as to whether allowing Murphy to add a licensed subcontractor to meet the soil treatment requirements after bid opening would be in the best interests of the State. The Respondent may thereafter take such further action in regard to proceeding with an award as may then be warranted in accordance with the law.

DATED: Honolulu, Hawaii, MAY 19 1998.

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