IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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OKADA TRUCKING CO., LTD.,
Petitioner-Appellee-Petitioner,

vs.

BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU,
Respondent-Appellee-Respondent,

and

INTER ISLAND ENVIRONMENTAL SERVICES, INC.,
Intervenor-Repondent-Appellant-Respondent.

NO. 22956

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(DOCKET NO. PCH-99-11)

JANUARY 28, 2002

MOON, C.J., LEVINSON, NAKAYAMA, RAMIL, AND ACOBA, JJ.

OPINION OF THE COURT BY LEVINSON, J.

We granted the application for a writ of certiorari filed by the petitioner-appellee-petitioner Okada Trucking Co., Ltd., [hereinafter, "Okada Trucking"], to review the published decision of the Intermediate Court of Appeals (ICA) in Okada Trucking Co, Inc. v. Board of Water Supply, No. 22956 (Haw. Ct. App. March 20, 2001) [hereinafter, the "ICA's opinion"].[1] In its

[1] The ICA's opinion was authored by the Honorable Corinne K.A. Watanabe and joined by Chief Judge James S. Burns and the Honorable Daniel R. (continued...)

opinion, the ICA held that the administrative hearings officer, who reviewed the decision of the respondent-appellee-respondent City and County of Honolulu Board of Water Supply [hereinafter, "the BWS"] to award a construction contract to the intervenor-respondent-appellant-respondent Inter Island Environmental Systems, Inc., [hereinafter, "Inter Island"], erroneously determined that Inter Island was not a "responsible" bidder and had submitted a "non-responsive" bid in connection with an invitation for bids that the BWS had issued, pursuant to the Hawai'i Public Procurement Code, HRS ch. 103D (1993 & Supp. 2000), in order to procure a contractor to construct a booster station.[2] ICA's opinion at 3-4. According to the ICA, the hearings officer erroneously found that the project for which the BWS had invited bids required the use of a plumbing subcontractor who held a "C-37" specialty contracting license. Id. at 4. Insofar as the project, in the ICA's view, did not entail work

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Foley.

[2] The Procurement Code applies "to all procurement contracts made by governmental bodies[.]" HRS § 103D-102(a) (Supp. 2000). HRS § 103D-104 (Supp. 2000) defines "governmental body" to include "the several counties of the State." HRS ch. 103D provides for review of the BWS's award of the construction contract by an administrative hearings officer and for judicial review of the hearings officer's decision. Pursuant to HRS § 103D-701 (Supp. 2000), "[a]ny actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation." HRS § 103D-709(a) (1993) provides in relevant part that a "hearings officer . . . shall have jurisdiction to review and determine de novo any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer[.]" Pursuant to HRS § 103D-709(b) (1993), the hearings officer "shall have the power to . . . find facts, make conclusions of law, and issue a written decision[,] which shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the supreme court under [HRS §] 103D-710 [(1993 & Supp. 2000)]." HRS § 103D-710(a) (Supp. 2000) provides that "[o]nly parties to proceedings under [HRS §] 103D-709 who are aggrieved by a final decision of a hearings officer under that section may apply for judicial review of that decision. The proceedings for review shall be instituted in the supreme court." Pursuant to HRS § 602-5(8) (1993) and Hawai'i Rules of Appellate Procedure (HRAP) Rule 31(a) (2000), we assigned the matter to the ICA.

that would require the particular skills of a plumbing subcontractor who held a C-37 specialty license, the ICA held that Inter Island -- which had neither named a C-37 licensed plumbing subcontractor in its bid nor described the nature and scope of the work that such a subcontractor would perform -- had submitted the lowest responsive and responsible bid. Id. at 4. Consequently, the ICA further held that the hearings officer had erroneously determined that the BWS should not have awarded the contract for the project to Inter Island. Id. On the basis of its analysis, the ICA "vacated" the hearing officer's findings of fact, conclusions of law, and order, but denied Inter Island the relief it had sought -- i.e., reinstatement of the BWS's award of the project contract to it -- because the ICA believed that to do so would be in neither the BWS's nor the public's best interests. Id. at 54-55.

For the reasons set forth below, we vacate the ICA's opinion and remand this matter to the ICA for consideration of the points of error raised by Inter Island in its appeal from the hearings officer's decision.

I. BACKGROUND

A. Factual Background

In May 1999, the BWS issued an invitation for bids, with accompanying documents [hereinafter, collectively, "the IFB"], in which it sought sealed bids for a project involving the construction of a booster station. The IFB expressly required that all prospective bidders hold "a current A - General Engineering Contractor license." The IFB further required that,

> [t]o be eligible to bid, the prospective bidder must give separate written notice of his/her intention to bid together with certifications that he/she is licensed to undertake this project pursuant to Chapter 444, HRS, relating to the licensing of contractors, to the Director of Budget and

Fiscal Services, City and County of Honolulu.

In essence, the BWS sought to procure a general contractor, holding an "A" general engineering contractor's license, who would "furnish[] and pay[] for all labor, tools, equipment and materials necessary for the installation" of the booster station; specifically, the task called for a qualified general engineering contractor to

> install, in place complete, in accordance with plans and specifications, three pumping units and appurtenances; a pump/control building and appurtenances, including all mechanical and electrical work; site work; approximately 700 linear feet of 16-inch class 52 water main and appurtenances; an access road and appurtenances; and all incidental work.

During the administrative proceedings, no party disputed, and the hearings officer expressly found, that the project involved some work that would have to be performed by a plumbing subcontractor who held a C-37 specialty contracting license.[3]

As to those subcontractors whom the bidding contractor intended to engage in order to complete the project, the IFB expressly provided, in language similar to that contained in HRS § 103D-302(b) (Supp. 2000)[4] and Hawai'i Administrative Rules (HAR)

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[3] The IFB specified, as "Item No. 2," that the general engineering contractor awarded the contract would need to

> [p]rovide and install booster pumping units within [the] booster station, inclusive of pumps, motors, piping, fittings, valves, flow tube, transmitters, recorders, switches, gages, emergency pumping piping and connection, interior piping . . . , and appurtenances, in place complete, all in accordance with the plans and specifications, ready for use.

The hearings officer expressly found that "[a]t least a portion of the work described under Item No. 2 required the services of a duly licensed plumber with a C-37 specialty classification license for completion."

[4] HRS § 103D-302(b) provides:

> An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction, it shall specify that all bids
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> (continued...)

§ 3-122-21(a)(8) (1997),[5] that the contractor was required to disclose the name of, as well as the nature and scope of work to be undertaken by, the subcontractor:

> each bid for public works construction contracts shall include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the public works construction contract. The bid shall also indicate the nature and scope of work to be performed by such joint contractors or subcontractors. All bids which do not comply with this requirement may be rejected.

Nevertheless, the IFB -- again reflecting the provisions of the Procurement Code and the administrative rules implementing its provisions, see supra notes 4 and 5 -- further provided that "where 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 listing of the joint contractor or subcontractor may be waived if it is in the best interest of BWS."

To assist the bidding contractor, the IFB included a form for the bidding contractor to complete as relevant, which

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[4](...continued)
include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. Construction bids that do not comply with this requirement may be accepted if acceptance is in the best interest 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 per cent of the total bid amount.

[5] HAR § 3-122-21(a)(8) provides:

For construction projects the bidder shall provide:
(A) The name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract; and
(B) The nature and scope of the work to be performed by each.

Construction bids that do not comply with the above requirements may be accepted if acceptance is in the best interest 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.

enumerated each type of specialized work with respect to which a subcontractor could hold a classification "C" specialty contractor's license. Other than providing that the bidding contractor must hold a classification "A" general engineering contractor's license and that the project involved specialty work in the areas of pavement restoration (which would have had to be performed by an asphalt and paving contractor holding a C-3 specialty contractor's license) and water chlorination (which would have had to be performed by a water chlorination contractor holding a C-37d specialty contractor's license), the IFB did not expressly identify what other specialty work the project involved.

After the BWS opened the sealed bids and determined that Inter Island had submitted the lowest bid, it contacted Inter Island in connection with its failure to disclose the name of and the nature and scope of work to be performed by a C-37 licensed plumbing subcontractor, as well as several other speciality subcontractors that the project would require.[6] In response, Inter Island asserted that it "did not list subcontractors for the plumbing and installation of the pumps as their quotes were considerably below 1% or $13,500.[00]" of its bid. Inter Island believed that the disclosure requirement did "not require[it] to list subcontractors [whose estimates of the cost of the work they would perform on the project were] under 1%." To verify its assertion that the work to be performed by each of the undisclosed subcontractors amounted to less than one

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[6] Specifically, the other subcontractors that Inter Island neglected to list in its bid were a C-42 licensed roofing subcontractor and a C-47 licensed reinforcing steel subcontractor. The only subcontractors that Inter Island listed in its bid were a C-3 licensed asphalt and paving subcontractor, a C-33 licensed painting and decorating subcontractor, and a C-37d licensed water chlorination subcontractor.

percent of its bid, Inter Island transmitted to the BWS several estimates that it had received from the undisclosed subcontractors, each of which in fact fell below one percent of the bid that Inter Island had submitted to the BWS. However, the estimate that Inter Island obtained from a plumbing subcontractor to "[i]nstall [b]uilding [p]ump [p]iping in accordance with plans & specifications," bore the a date of June 22, 1999, which was twelve days after the "bid-opening" date of June 10, 1999.[7] Thereafter, on July 28, 1999, the BWS awarded the project contract to Inter Island.

Pursuant to HRS § 103D-701, see supra note 2, on August 4, 1999, Okada Trucking, which had submitted the second lowest bid on the project, filed a protest of the BWS's award of the project contract to Inter Island with the BWS's chief procurement officer. Okada Trucking asserted that the contract "should not have been awarded to [Inter Island] because it [had] not demonstrated that it is qualified and/or capable of completing the contract." More specifically, Okada Trucking contended that: (1) "approximately" fifteen percent of the work required by the project involved "certain specialty work, such as plumbing," which could only be performed by a C-37 licensed subcontractor; however, (2) in contravention of HRS § 103D-302(b) (1993), see supra note 4, Inter Island had not disclosed the name of or the nature and scope of work to be performed by the C-37 licensed subcontractor it intended to use; and, thus, (3) the project contract should not have been awarded to Inter Island. Moreover,

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[7] The plumbing subcontractor's estimate was $8,300.00, conditioned upon Inter Island "supply[ing] all materials, and pipefitters to assist [the plumbing subcontractor's] plumbers while on jobsite." Inter Island received an estimate from a C-42 speciality roofing subcontractor on June 10, 1999, in the amount of 12,500.00. Similarly, Inter Island received an estimate from a C-47 speciality contractor to do reinforcing steel work on June 9, 1999, in the amount of $8,675.00.

Okada Trucking contended that, in any event, even if the plumbing work required by the project amounted to less than one percent of Inter Island's bid, it was not in the BWS's best interest to waive the requirement that Inter Island disclose the subcontractors it intended to use to complete the project. The BWS denied Okada Trucking's protest, inter alia, because it was within the BWS's discretion to waive the disclosure requirement in the event, as Inter Island had verified, the work to be performed by a subcontractor was less than one percent of Inter Island's bid.[8]

B. Administrative Review

Subsequently, pursuant to HRS § 103D-709, see supra note 2, Okada Trucking requested administrative review of the BWS's denial of its protest. By stipulation, Inter Island was allowed to intervene in the administrative proceedings. Okada Trucking contended, inter alia, that Inter Island's bid was "non-responsive" because it failed to disclose the name of and the nature and scope of work to be performed by a duly licensed plumbing subcontractor.[9]

The hearings officer noted that the parties were not "disput[ing] the need for the performance of work by subcontractors with [a] speciality classification license[] in plumbing (C-37)[.]" The hearings officer further noted, pursuant to HRS § 103D-302(b) and HAR § 3-122-21(a)(8), see supra notes 4 and 5, that Inter Island's failure to disclose a duly licensed

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[8] The BWS also denied Okada Trucking's protest on the basis that it was untimely.

[9] Okada Trucking also contended that it had timely filed its protest with the BWS. The hearings officer determined that Okada Trucking had timely filed its protest. On judicial appellate review of the hearings officer's decision, Inter Island has not challenged that aspect of the hearings officer's decision.

plumbing subcontractor rendered its bid "non-responsive," which, in fact, the parties did "not dispute[]." Rather, the essence of the dispute between the parties was whether the non-responsive aspect of Inter Island's bid was fatal or waivable by the BWS. According to Inter Island, it was not required to identify a subcontractor at all, if the amount of work that the subcontractor would perform amounted to less than one percent of Inter Island's total bid and the BWS subsequently determined that it was in its own best interest to waive the disclosure requirement. On the other hand, Okada Trucking maintained (1) that Inter Island was required to disclose each subcontractor it intended to engage in order to complete the project, which, a fortiori, necessitated that Inter Island obtain estimates for such speciality work prior to "bid-opening,"[10] and, in any event, (2) that it was not in the BWS's best interest to waive the disclosure requirement.

The hearings officer determined that Inter Island was obligated to identify all subcontractors it would engage in order to complete the project and, as a consequence, that Inter Island had submitted a "non-responsive bid." Pursuant to HAR § 3-122-97(a)(2) (1997),[11] the hearings officer concluded that the BWS

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[10] Okada Trucking appears to have argued that Inter Island's bid was both "non-responsive" for failing to disclose the requisite plumbing subcontractor, insofar as the bid did not conform to the IFB's requirements, and "non-responsible," insofar as it did not reflect that Inter Island could lawfully complete the project (having failed to list a subcontractor who could perform the necessary plumbing work).

[11] HAR § 3-122-97(a) provides in relevant part:

> Bids shall be rejected for reasons including but not limited to:
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> (1) The bidder that submitted the bid is nonresponsible as determined by subchapter 13; [or]
>
> (2) The bid is not responsive, that is, it does not conform in all material respects to the

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had no choice but to reject the bid unless, pursuant to HRS § 103D-302(b) and HAR § 3-122-21(a)(8), see supra notes 4 and 5, "it waived the non-responsive aspect of [Inter Island's] bid" on the basis that "acceptance [of the bid] would be in [its] best interest[.]" However, addressing Okada Trucking's contention that the BWS had abused its discretion in determining that its best interests would be served by accepting Inter Island's bid, the hearings officer ruled that the IFB's requirement that each prospective bidder "must be capable of performing the work for which the bids [were] being" invited "subsume[d a requirement that] the bidder, at the time of bid submission and no later than bid opening date, was ready and able to perform the work required on the construction project if awarded the contract." Accordingly, the hearings officer concluded that not only was Inter Island's bid "non-responsive," but also that, in failing to have a duly licensed plumbing subcontractor "lined up," Inter Island "was not a responsible bidder." The hearings officer noted that bidder responsibility, if lacking at "bid-opening," could thereafter be remedied, but that bid responsiveness could not. As such, the hearings officer believed that the BWS had violated "provisions of the Procurement Code" by allowing Inter Island "to rectify its failure by obtaining a plumbing subcontractor after bid opening." (Emphasis in original.) The hearings officer therefore concluded that it was not in the BWS's or the public's best interests to have waived the disclosure requirement. Accordingly, the hearings officer terminated the

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[11](...continued)

invitation for bids under the provisions of subchapter 13.

"Subchapter 13," HAR §§ 3-122-108 through 3-122-110 (1997), generally pertains to bidder responsibility.

contract between the BWS and Inter Island and awarded Inter Island compensation for any actual expenses it had reasonably incurred under the contract, as well as a reasonable profit based upon any performance it had already undertaken on the contract.

C. Application For Judicial Review

Pursuant to HRS § 103D-710, see supra note 2, Inter Island applied to this court for judicial review of the hearings officer's decision. In its present appeal, Inter Island has not, expressly or impliedly, challenged the hearings officer's finding that the project required some work that would have to be performed by a duly licensed plumbing subcontractor. Rather, Inter Island challenges the hearings officer's determinations that it had submitted a non-responsive bid, that it was not a responsible bidder, and that it was not in the BWS's best interest to waive the disclosure requirement with regard to Inter Island's failure to identify a duly licensed plumbing subcontractor.[12] Inter Island asserts, in essence, that "[t]he

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[12] Specifically, Inter Island challenges the hearings officers conclusions regarding: (1) the responsiveness of its bid, arguing that they were

> in error because HRS § 103D-302(b) does not require a procuring agency to reject a general contractor's bid for failure to list a subcontractor with whom the general contractor is not contractually bound when that subcontractor would perform work valued at less than [one percent] of the total bid amount and the procuring agency determined that it would be in its best interest to waive the subcontractor listing requirement[;]

(2) Inter Island's responsibility as a bidder, arguing that they were "in error because such conclusions . . . defeat[ed] the purpose of, and eliminate[d] a procuring agency's use of the de minimis listing exception provided for in HRS § 103D-302(b) and responsibility may be determined after bid opening and prior to award [of the contract;]" and (3) the BWS's best interest, arguing that they were

> in error because the Procurement Code does not mandate that a bidder be contractually bound to all of its subcontractors at bid opening and there was no evidence introduced at the hearing to suggest that the anti-bid shopping policy behind the listing requirement was violated by the BWS's exercise

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principal issue [before the ICA was] whether the [h]earings [o]fficer incorrectly found that it was unlawful under the Procurement Code for the BWS to determine that it was in its best interest to waive the subcontractor listing requirement and allow Inter Island to obtain a written commitment from a plumbing subcontractor after bid opening." Inter Island correctly observes that the issue is one of statutory interpretation -- i.e., whether, under the relevant provisions of the Procurement Code and ancillary administrative rules and regulations, a failure to list a subcontractor whose work would amount to less than one percent of a submitted bid renders (1) the bid materially non-responsive, such that it cannot be cured after bid-opening or waived by the procuring agency and (2) the bidder non-responsible, subject to cure after bid-opening or waiver by the procuring agency if it is in the public's best interests to do so.

Inter Island maintains that the applicable statutes and administrative rules are unambiguous. Quoting HRS § 103D-104 (1998), Inter Island notes that "a '[r]esponsive bidder' [means] 'a person who has submitted a bid which conforms in all material respects to the invitation for bids.'" (Emphasis added.) Thus, according to Inter Island, "[o]nly if the deficiency in the bid is material, is the bid non-responsive." (Emphasis in original.) As support for its position, Inter Island, cites, inter alia, Southern Foods Group, L.P. v. State of Hawai'i Dept. of Educ., 89 Haw. 443, 456, 974 P.2d 1033, 1046 (1999), for the proposition that "deviations from bid specifications may be waived by the contracting officer[,] provided that the[deviation] do[es] not

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[12](...continued)
of its statutory right to waive this subcontractor listing requirement.

go to the substance of the bid or work an injustice on other bidders." Inter Island urges that a "substantial deviation" is one that "affects either the price, quantity, or quality of the articles [or services] offered." In Inter Island's view, the waiver provision set forth in HRS § 103D-302(b), see supra note 4, simply codifies the foregoing principle, essentially providing that the procuring agency may waive immaterial or "de minimis" defects that, a fortiori, do not substantially affect a submitted bid or the articles and services offered by the bidder. Thus, Inter Island urges that it submitted a responsive bid because, to the extent that the bid deviated from the IFB, it did so only in immaterial and insubstantial respects that did not affect the price or quality of its performance under the project contract.

D. The ICA's Opinion

The ICA's opinion did not address Inter Island's points of error on appeal. Rather, after generally discussing bid responsiveness and bidder responsibility, see ICA's opinion at 25-31, the ICA noted that the "correctness" of the hearings officer's determinations that Inter Island's bid was nonresponsive and that it was not a responsible bidder "depends . . . on whether Inter Island was required by the IFB and applicable statutes or rules to use and list subcontractors in the three speciality classifications to perform work under the contract," id. at 31. The ICA then discussed the legislative history of the subcontractor disclosure requirement codified in HRS § 103D-302(b), see id. at 31-35, reviewed the hearings officer's reasoning with respect to its conclusion that Inter Island's bid was non-responsive, see id. at 35-39, and agreed with the hearings officer that the subcontractor disclosure requirement reflected the legislature's intent to prevent a

general contractor's "bid shopping" or "bid peddling" in connection with procuring subcontractors to perform a given public works contract, see id. at 39. Nevertheless, the ICA "conclude[d] that the hearings officer was wrong in holding that Inter Island was required to list in its bid subcontractors with a 'C-37' plumbing, [a] 'C-41' reinforcing steel, and [a] 'C-42' roofing specialty license." Id. at 39. According to the ICA, HRS § 103D-302(b), see supra note 4, as well as HAR § 3-122-21(a)(8), see supra note 5, which the IFB incorporated by reference, only required that prospective bidders disclose "those subcontractors who are 'to be engaged by the bidder'" to complete the project. Id. at 39 (emphasis in original). Thus, the ICA believed that "if a contractor does not plan to use a subcontractor in the performance of the contract, and the contractor is not required by statute, rule, or the IFB to use a joint contractor or subcontractor to perform portions of the contract,[] the contractor is not required to list any joint subcontractor." Id. at 40 (footnote -- noting that the IFB expressly required only the use of duly licensed asphalt and paving and water chlorination subcontractors -- omitted).

The ICA held sua sponte, however, that the hearings officer "was wrong" in determining that the nature of the project required Inter Island to subcontract any plumbing, roofing, and reinforcing steel specialty work that the project would necessitate. See id. at 40-41. In the ICA's view, by virtue of holding an "A" general engineering contractor's license and a "B" general building contractor's license, both of which automatically qualified the holder to engage in specific class "C" specialty work (but not the specialty work at issue in the present matter), Inter Island was vested with "broad contracting

authority." See id. at 41. After parsing the statutes and administrative rules regarding licensing, the ICA remarked that

> an "A" contractor is authorized to generally undertake all contracts to construct fixed works requiring specialized engineering knowledge and skill in a wide range of subject areas, including water power, water supply, and pipelines. A "B" contractor is authorized to undertake contracts to construct structures requiring "the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof." An "A" and "B" contractor is prohibited, however, from undertaking work solely in a specialty contracting area, unless the contractor holds a specialty license in that area.

Id. at 43. Thus, the ICA held that Inter Island "was authorized to undertake the [p]roject with its own staff,[] provided, of course, that where certain work required performance by individuals with particular licenses, Inter Island utilized employees who were appropriately licensed to perform such work." Id. at 41-44. In reaching its holding, the ICA necessarily held sub silentio, as a matter of plain error, that the hearings officer had clearly erred in finding that the project involved work that was required to be performed by a C-37 licensed subcontractor, as well as by duly licensed roofing and reinforcing steel subcontractors. Id.

Because the ICA believed that Inter Island was not required to engage such specialty subcontractors to perform the contract, it did not address Inter Island's contention that the hearings officer erred in determining that the BWS had violated the Procurement Code in waiving Inter Island's failure to list specialty plumbing, roofing, and reinforcing steel subcontractors. Id. at 44-46. Finally, even though Inter Island prevailed on the merits, the ICA, relying on In re CARL Corp., 85 Hawai'i 431, 946 P.2d 1 (1997), further held that Inter Island was not entitled to the relief it sought -- i.e., reinstatement of the terminated contract -- because, as the parties represented at oral argument, the contract had been awarded to Okada

Trucking, which had, at that time, been performing on the contract for "several months." Id. at 53-54. As such, the ICA believed that it would not be in either the BWS's or the public's best interests to terminate Okada Trucking's contract with the BWS and to reinstate the original contract between Inter Island and the BWS. Id. at 54. The ICA therefore "vacate[d]" the hearing officer's decision, but "den[ied] Inter Island's request that [it] reinstate BWS's contract award to Inter Island and terminate BWS's contract award to Okada [Trucking]." Id. at 54-55.

E. Application For Certiorari

Okada Trucking applied to this court for a writ of certiorari to review the ICA's opinion. In its application, Okada Trucking contended that the ICA "erred in concluding" (1) that the project did not involve some specialty work requiring the use of a duly licensed plumbing subcontractor and (2) that Inter Island was not required to list such a subcontractor in its bid. Accordingly, Okada Trucking urges that the ICA's opinion (1) contains a grave error of law, insofar as the ICA concluded that Inter Island was vested with "broad contracting authority" by virtue of holding a classification "A" general engineering contractor's license and a classification "B" general building contractor's license and, thus, was not obligated to engage specialty contractors to perform specialty work, such as plumbing, with respect to the project contract and (2) contains a grave error of fact, insofar as the ICA found that the project did not involve specialty work that would require Inter Island, inter alia, to engage a duly licensed plumbing subcontractor.

II. STANDARDS OF REVIEW

A. Review Of The ICA's Decision

Pursuant to HRS § 602-59(b) (1993), our review of a decision of the ICA is limited, inter alia, to "grave errors of law or fact," which are of such a "magnitude" as to "dictat[e] the need for further appeal." See, e.g., In re Jane Doe, Born On June 20, 1995, 95 Hawai'i 183, 189, 20 P.3d 616, 622 (2001).

B. Statutory Interpretation

"The interpretation of a statute is a question of law reviewable de novo." Id. at 190, 20 P.3d at 623 (citations, internal quotation signals, ellipsis points, and brackets omitted).

III. DISCUSSION

At no point in its opinion did the ICA acknowledge, expressly or impliedly, that it was reviewing, sua sponte and as a matter of plain error, the hearing officer's uncontested factual finding that the project entailed some work that had to be performed by a duly licensed plumbing subcontractor. Findings of fact, however, that are not challenged on appeal are binding on the appellate court. See, e.g., Taylor-Rice v. State, 91 Hawai'i 60, 65, 979 P.2d 1086, 1091 (1999) (noting that, in failing to challenge any of the trial court's findings of fact, the State had waived any challenge to those findings and, thus, that they were binding on appeal and citing Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 252, 948 P.2d 1055, 1093 (1997), for the proposition that "[i]f a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of law is valid"); cf. Burgess v. Arita, 5 Haw. App. 581, 704 P.2d 930 (1985) ("[u]nchallenged findings of fact are binding upon the appellant"). Moreover,

insofar as an administrative hearings officer possesses expertise and experience in his or her particular field, the appellate court "should not substitute its own judgment for that of the agency" either with respect to questions of fact or mixed questions of fact and law. Southern Foods Group, L.P., 89 Hawai'i at 452, 974 P.2d at 1042 (quoting Dole Hawaii Division-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990)). Rather, even those factual findings, as well as conclusions of law that involve mixed questions of fact and law, which are challenged on appeal from the decision of an administrative hearings officer based on the Hawai'i Public Procurement Code, are entitled to deference and, as such, will not be reversed unless they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Id. (quoting Arakaki v. State, Dep't of Accounting and Gen. Serv., 87 Hawai'i 147, 149-50, 952 P.2d 1210, 1212-13 (1998)); see also HRS § 103D-710(e)(5) (1993).

In connection with addressing plain error, we have often remarked that the "[t]he plain error doctrine represents a departure from the normal rules of waiver that govern appellate review," see, e.g., Montalvo v. Lapez, 77 Hawai'i 282, 291, 884 P.2d 345, 354 (1994), and, as such, that an appellate court should invoke the plain error doctrine in civil cases "only . . . when justice so requires," id. at 290, 884 P.2d at 354 (quoting State v. Fox, 70 Haw. 46, 56 n.2, 760 P.2d 670, 676 n.2 (1988) (some citations omitted) (internal quotation signals omitted)). As such, the appellate court's discretion to address plain error is always to be exercised sparingly. See, e.g., State v. Aplaca, 96 Hawai'i 17, 22, 25 P.3d 792, 797 (2001). And, indeed, in civil cases,

> [w]e have taken three factors into account in deciding whether our discretionary power to notice plain error ought to be exercised[:] (1) whether consideration of the issue not raised at trial requires additional facts; (2) whether its resolution will affect the integrity of the trial court's findings of fact; and (3) whether the issue is of great public import.

Montalvo, 77 Hawai'i at 290, 884 P.2d at 353 (citations omitted).

Our reluctance to reach plain error in civil cases is especially heightened in an appeal from an administrative proceeding with respect to questions of fact or mixed questions of fact and law that neither party has challenged at any point in the proceedings. As we have noted, unchallenged factual findings are deemed to be binding on appeal, which is to say no more than that an appellate court cannot, under the auspices of plain error, sua sponte revisit a finding of fact that neither party has challenged on appeal.

In light of the foregoing, the ICA erred in holding sua sponte that the hearings officer "was wrong" in determining that the nature of the project required Inter Island to subcontract with a duly licensed plumbing subcontractor, thereby holding, sub silentio, that the hearings officer had plainly and clearly erred in finding that it did. The question then becomes whether the ICA further erred in holding that, pursuant to the applicable statutes and administrative rules, Inter Island, which did not possess the requisite speciality contracting license in plumbing, could, by virtue of the general contracting licenses it did hold, lawfully perform the specialty work that the project required without engaging a duly licensed specialty plumbing contractor.

HRS ch. 444 (1993 & Supp. 2000) creates a contractors license board [hereinafter, "the board"], see HRS § 444-3 (1993), which is vested with broad authority over contractor licensing; the general purpose of HRS ch. 444 "is the protection of the

general public." HRS § 444-4(2) (Supp. 2000). By statute, the board is directed to adopt such rules as it deems proper fully to implement its authority and to enforce the provisions of HRS ch. 444 and the rules adopted pursuant thereto. See HRS §§ 444-4(2), (3), and (4). The board also grants, suspends, and revokes contractors' licenses and oversees the examination of applicants to ensure that contractors are qualified to undertake the work for which they are licensed. See HRS § 444-4(1), (5), (7), and (8).

HRS § 444-7(a) (1993) provides that, "[f]or the purposes of classification, the contracting business includes any or all of the following branches: (1) [g]eneral engineering contracting; (2) [g]eneral building contracting; [and] (3) [s]pecialty contracting." As such, pursuant to its rules, the board has classified the types of licenses it issues as (1) general engineering contractor (classification "A"), (2) general building contractor (classification "B"), and (3) specialty contractor (classification "C"). See HAR §§ 16-77-28(a) (1988) and 16-77-32 through 16-77-35 (1988). Classification "C" includes numerous specific licenses, each of which pertains to the particular trade or craft in which the applicant has the requisite expertise. See HAR, title 16, chapter 77, exhibit A (1988). For example, a "C-6" license pertains to "carpentry framing," a "C-13" license pertains to "electrical" work, and so on. Id.

HRS § 444-7 generally describes the principal business activity of each of the three contracting "branches." "A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works requiring specialized engineering knowledge and skill[.]" HRS § 444-7(b).

The legislature has determined that a general engineering contractor's knowledge and skill includes

> the following divisions or subjects: irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, docks and wharves, shipyards and ports, dams and hydroelectric projects, levees, river control and reclamation works, railroads, highways, streets and roads, tunnels, airports and airways, sewers and sewage disposal plants and systems, waste reduction plants, bridges, overpasses, underpasses and other similar works, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, parks, playgrounds and other recreational works, refineries, chemical plants and similar industrial plants requiring specialized engineering knowledge and skill, powerhouses, power plants and other utility plants and installations, mines and metallurgical plants, land levelling and earth-moving projects, excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above mentioned fixed works.

Id. Elaborating upon the foregoing determination, the board has determined, by virtue of the "A" classification, that a duly licensed general engineering contractor "automatically hold[s]" sixteen classification "C" specialty licenses. HAR § 16-77-32(a). However, a global C-37 specialty license is not among those that a general engineering contractor automatically holds. Id.[13]

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[13] The enumerated specialties in which a general engineering contractor is automatically qualified to undertake work, "without further examination or paying additional fees," are: (1) C-3, asphalt paving and surfacing; (2) C-9, cesspool; (3) C-17, excavating, grading, and trenching; (4) C-24, building moving and wrecking; (5) C-31a, cement concrete; (6) C-32, ornamental guardrail and fencing; (7) C-35, pile driving, pile and caisson drilling, and foundation; (8) C-37a, sewer and drain line; (9) C-37b, irrigation and lawn sprinkler systems; (10) C-38, post tensioning; (11) C-43, sewer, sewage disposal, drain, and pipe laying; (12) C-49, swimming pool; (13) C-56, welding; (14) C-57a, pumps installation; (15) C-57b, injection wall; and (16) C-61, solar energy systems. HAR § 16-77-32(a). The board has further determined that a general engineering contractor

> may also install poles in all new pole lines and replace poles, provided that installation of the ground wire, insulators, and conductors are performed by a contractor holding the C-62 pole and line classification. The "A" general engineering contractor may also install duct lines, provided that installation of conductors is performed by a contractor holding the C-13 [electrical] classification.

HAR § 16-77-32(b).

A general building contractor

> is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

HRS § 444-7(c). Like a general engineering contractor, a general building contractor, duly holding a classification "B" license, "automatically holds" a number of classification "C" specialty licenses, but a C-37 specialty plumbing license is not among them.[14] HAR § 16-77-32(c).

Finally, a specialty contractor "is a contractor whose operations as such are the performance of construction work requiring special skill such as, but not limited to, electrical, . . . plumbing, or roofing work, and others whose principal contracting business involves the use of specialized building trades or crafts." HRS § 444-7(d). Insofar as the board has, with regard to classification "C" specialty licensing, subclassified particular trades or crafts (such as C-37 plumbing, which includes five subdivisions), it has further determined that "[l]icensees who hold a specialty contractors license shall automatically hold the subclassifications of the licensee's particular specialty without examination or paying additional fees." HAR § 16-77-32(d).

However, pursuant to HRS § 444-9 (1993), "[n]o person within the purview of [HRS ch. 444] shall act, or assume to act, or advertise, as [a] general engineering contractor, [a] general

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[14] Specifically, a general building contractor, by virtue of its classification "B" license, automatically holds, "without further examination or paying additional fees," seven "C" specialty licenses: (1) C-5, cabinet, millwork, and carpentry remodelling and repairs; (2) C-6, carpentry framing; (3) C-12, drywall; (4) C-24, building moving and wrecking; (5) C-25 institutional and commercial equipment; (6) C-42a, aluminum shingles; and (7) C-42b, wood shingles and shakes. HAR § 16-77-32(c).

building contractor, or [a] specialty contractor without a license previously obtained under and in compliance with [HRS ch. 444] and the rules and regulations of the contractors license board." See also HAR § 16-77-4(a) (1988) (same). Thus, absent, for example, a global C-37 specialty plumbing license, neither a general engineering contractor (despite the fact that it automatically holds specialty licenses in two subclassifications of plumbing, see supra note 13) nor a general building contractor can act as a C-37 specialty plumbing contractor. In other words, a general engineering contractor cannot perform specialized work for which it is not, automatically or otherwise, duly licensed and which it lacks the requisite specialized skill to undertake. Accordingly, although a general engineering contractor possesses a broad range of knowledge and experience that renders it competent to undertake particular specialty work that is subsumed within its classification "A" general engineering contractor's license, that range does not extend, in the view of the board, to the "special skill" requisite to undertake global C-37 specialty plumbing work. Indeed, a contrary result would eviscerate the board's express enumeration of the particular specialty licenses that a general engineering contractor "automatically holds," due to its experience, knowledge, and skill. Thus, if a particular project for which a general engineering contractor has obtained a contract requires work in a specialty classification in which it is not licensed to operate ("automatically" or otherwise), the general engineering contractor cannot, pursuant to HRS § 444-9, undertake to perform that specialty work itself.[15] Rather, only

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[15] We do not reach the question whether, if an employee of the general engineering contractor holds a specialty license, the general engineering contractor can, without subcontracting with that employee, simply utilize that employee to perform any requisite specialty work in that

(continued...)

a duly licensed specialty contractor can undertake to complete the requisite specialty work.[16]

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[15](...continued)
employee's area of expertise, as the ICA appears to have held. See ICA's opinion at 44. The record is devoid of any evidence that reflects whether any of Inter Island's employees held specialty licenses at all, and we will not speculate on the matter. Similarly, we note that whether Inter Island holds a "B" classification license in general building contracting is similarly irrelevant; a classification "B" general building contractor does not, as noted above, hold the requisite C-37 specialty plumbing license at issue in the present matter. As such, our reasoning with respect to a general engineering contractor's competence to perform C-37 specialty plumbing work applies with equal force to a general building contractor.

[16] That HRS § 444-8(c) (1993) provides, in essence, that a specialty contractor may engage in work that requires utilization of a craft or trade other than that in which it is licensed if the utilization of that other craft or trade is "incidental and supplemental" to the specialty contractor's work in the field in which it is licensed does not affect our holding. In full, HRS § 444-8 provides as follows:

> (a) The contractors license board may adopt rules and regulations necessary to effect the classifications of contractors in a manner consistent with established usage and procedure as found in the construction business, and may limit the field and scope of the operations of a licensed contractor to those in which the contractor is classified and qualified to engage, as defined in [HRS §] 444-7.
>
> (b) A licensee may make application for classification and be classified in more than one classification if the licensee meets the qualifications prescribed by the board for such additional classification or classifications. For qualifying or classifying in additional classifications, the licensee shall pay the appropriate application fee but shall not be required to pay any additional license fee.
>
> (c) This section shall not prohibit a specialty contractor from taking and executing a contract involving the use of two or more crafts or trades, if the performance of the work in the crafts or trades, other than in which the specialty contractor is licensed, is incidental and supplemental to the performance of work in the craft for which the specialty contractor is licensed.

Consistent with HRS §§ 444-8 and 444-9, the board has limited the scope of work in which a classification "A" or "B" licensee may engage as follows: "[a] licensee classified as an 'A' general engineering contractor or as a 'B' general building contractor shall not act, assume to act, or advertise as a specialty contractor except in the specialty classifications which the licensee holds." HAR § 16-77-33(a). A general building contractor is even further limited in the scope of work it may undertake, insofar as a classification "B" license

> does not entitle the holder to undertake a contract unless it requires more than two unrelated building trades or crafts or unless the general building contractor holds the specialty license to undertake the contract. Work performed

(continued...)

It is therefore apparent that the ICA erred in holding that the applicable statutes and administrative rules merely prohibit a general engineering or building contractor from "undertaking work solely in a specialty contracting area, unless the contractor holds a specialty license in that area." ICA's opinion at 43 (emphasis added). Rather, as discussed above, pursuant to HRS § 444-9, a general engineering or building contractor is prohibited from undertaking any work, solely or as part of a larger project, that would require it to act as a specialty contractor in an area in which the general contractor was not licensed to operate. Thus, to the extent that the project required plumbing work classified as C-37 specialty work, Inter Island, which does not hold a C-37 specialty license, could not undertake to act in that area. It therefore follows that Inter Island would need to obtain a subcontractor duly licensed

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[16](...continued)
which is incidental and supplemental to one contractor classification shall not be considered as unrelated trades or crafts.

HAR § 16-77-33(b). The board has defined "incidental and supplemental" to mean "work in other trades directly related to and necessary for the completion of the project undertaken by a licensee pursuant to the scope of the licensee's license." HAR § 16-77-34. Nevertheless, "[a]ny licensee who acts, assumes to act, or advertises in any classification other than [that] for which the licensee is duly licensed . . . shall be construed to be engaged in unlicensed activity." HAR § 16-77-33(d).

The foregoing provisions, to the extent that they permit a specialty contractor to engage in "incidental and supplemental" work in trades or crafts in which it is not licensed do not similarly expand the scope of work in which a general engineering contractor may engage. Rather, as to general engineering contractors, HRS §§ 444-8 and 444-9, as well as HAR §§ 16-77-32 through 16-77-34, expressly constrain them from engaging in any operations for which they are not duly licensed.

More importantly, however, in the present matter, no party has ever contended that Inter Island could undertake the plumbing work required by the project because that work was "incidental and supplemental" to work that Inter Island was duly licensed to undertake. Inasmuch as we are not fact-finders and given that the hearings officer expressly found that the project required work in the C-37 plumbing classification, the ICA erred in construing the foregoing provisions to support its holding that the project in the present matter did not require specialized plumbing work that Inter Island was not duly licensed to undertake. See ICA's opinion at 41-44.

in the C-37 plumbing classification to undertake such work in order to complete the project. Consequently, we hold that the ICA erred, in both law and fact, in reversing[17] the hearing officer's decision on the ground that the project did not require work in the C-37 plumbing classification and that Inter Island did not, consequently, need to engage a specialty contractor holding a C-37 specialty license in order to complete the project.

IV. CONCLUSION

In light of the foregoing, we vacate the ICA's opinion and remand this matter to the ICA for it to consider the points of error that Inter Island raises on appeal from the hearing officer's decision.[18]

James E. T. Koshiba and Neal K. Aoki (of Koshiba Agena & Kubota) for the petitioner-appellee-petitioner Okada Trucking Co., Ltd., on the application for a writ of certiorari

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[17] Although the ICA purported to "vacate" the hearings officer's decision, it actually "reversed" it, at least insofar as it overturned the hearings officer's disposition of the present matter and did not remand the matter for further proceedings.

[18] Bearing in mind that our statutory review of the ICA's decision is limited to the alleged "grave" error contained therein, remand to the ICA is appropriate in this case. Ordinarily, the error alleged in a decision of the ICA lies in the ICA's analysis of the points of error raised on appeal. In such cases, we necessarily reach the merits of the ICA's substantive analysis of those points of error. In the present matter, however, the ICA's alleged error includes its failure to address the points of error that Inter Island advanced on appeal. Accordingly, our holding that the ICA erred in its sua sponte disposition of this case on a factual and legal basis that was not presented to it on appeal does not address the merits of Inter Island's points of error either. It is the prerogative of the ICA to do so in the first instance.

IN THE INTERMEDIATE COURT OF APPEAL

OF THE STATE OF HAWAI'I

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OKADA TRUCKING CO., LTD., Petitioner-Appellee, v. BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU, Respondent-Appellee, and INTER ISLAND ENVIRONMENTAL SERVICES, INC., Intervenor-Respondent-Appellant

NO. 22956

APPEAL FROM THE OFFICE OF ADMINISTRATIVE HEARINGS, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
(Dkt. No. PCH-99-11)

March 20, 2001

BURNS, C.J., WATANABE, AND FOLEY, JJ.

OPINION OF THE COURT BY WATANABE, J.

This case stems from a protest by Petitioner-Appellee Okada Trucking Co., Ltd. (Okada), challenging the award of a contract for the construction and installation of the Kaluanui Booster Station, Phase II (the Project) by Respondent-Appellee Board of Water Supply, City and County of Honolulu (BWS) to Intervenor-Respondent-Appellant Inter Island Environmental Services, Inc.[1/] (Inter Island). The grounds of Okada's protest

[1/] It is not clear what the legal name for Intervenor-Respondent-Appellant is. Throughout the record on appeal, its name is spelled sometimes as "Inter Island Environmental Services, Inc." and (continued...)

were that Inter Island, in violation of statutes, rules, and bid documents, failed to identify in its bid the names of joint contractors or subcontractors (collectively, "subcontractors") who possessed the specialty licenses allegedly required for performance of the plumbing, reinforcing steel, and roofing work under the contract.

On November 10, 1999, following a de novo administrative review requested by Okada, a hearings officer with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawai'i (DCCA) issued Findings of Fact, Conclusions of Law and Decision (Decision), concluding that: (1) Inter Island was not a responsible bidder because it did not have, at the time of bid opening, a properly licensed plumbing subcontractor "lined up" to perform the portions of the work for the Project that allegedly required a plumbing contractor's license; (2) Inter Island's bid was non-responsive because, in violation of the subcontractor listing requirement imposed by Hawai'i Revised Statutes (HRS) § 103D-302(b) (Supp. 2000) and Hawai'i Administrative Rules (HAR) § 3-122-21(a)(8), Inter Island failed to list the names of the subcontractors who would be performing work under the contract in three areas

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[1/](...continued)
sometimes as "Inter-Island Environmental Services, Inc." Since the official caption for this case refers to the corporation as "Inter Island Environmental Services, Inc. (without a hyphen), we will refer to the corporation in this opinion as "Inter Island."

(plumbing, reinforcing steel, and roofing) that allegedly required specialty contractor licenses; and (3) although BWS was authorized to waive Inter Island's failure to list a reinforcing steel and roofing subcontractor, BWS violated the Hawai'i Public Procurement Code (the Procurement Code) set forth in HRS chapter 103D, as well as the administrative rules promulgated to implement the Procurement Code, HAR Title 3, subtitle 11, chapter 120, when it waived Inter Island's failure to list a plumbing subcontractor[2/] and awarded the contract to Inter Island.

Accordingly, the hearings officer ordered that BWS's contract award to Inter Island be terminated and that Inter Island be compensated for actual expenses reasonably incurred under the contract, plus a reasonable profit based upon its performance of the contract up to the time of termination. Inter Island thereafter sought appellate judicial review.

We conclude that the hearings officer's Decision that Inter Island was neither a responsible nor responsive bidder was premised on an erroneous determination that Inter Island was

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[2/] Petitioner-Appellee Okada Trucking Co., Ltd. (Okada) did not seek judicial review of the hearings officer's determination that Respondent-Appellee Board of Water Supply, City and County of Honolulu (BWS) was authorized to waive the failure of Intervenor-Respondent-Appellant Inter Island Environmental Services, Inc. (Inter Island) to list the joint contractors or subcontractors (collectively, "subcontractors") that Inter Island intended to use for the reinforcing steel and roofing work, if it were awarded the contract. Therefore, the only issues before us for judicial review relate to Inter Island's failure to list a subcontractor with a specialty plumbing contractor's license.

required to engage properly licensed plumbing, reinforcing steel, and roofing subcontractors in order to perform the contract in question. Therefore, the hearings officer should not have ordered BWS to terminate its contract award to Inter Island. However, since Inter Island, in its application for judicial review, failed to challenge that determination, we decline to grant Inter Island's request that we reinstate BWS's award of the contract to Inter Island.

BACKGROUND

A. *The Invitation for Bids*

On or about May 6, 1999, BWS issued an Invitation for Bids (IFB), seeking sealed bids for the Project. As required by HRS § 103D-302 (Supp. 2000),[3/] the IFB instructed prospective bidders that they were required to list, on a form included in the IFB, each subcontractor to be engaged by the prospective bidder in the performance of the contract for the Project.

[3/] Hawai'i Revised Statutes (HRS) § 103D-302(b) (Supp. 2000), which has not changed in language since the Invitation for Bids (IFB) was issued by BWS, states as follows:

> An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction, it shall specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. Construction bids that do not comply with this requirement may be accepted if acceptance is in the best interest 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 per cent of the total bid amount.

Prospective bidders were also notified that they had to be licensed to undertake the Project, pursuant to HRS chapter 444, relating to the licensing of contractors and were required to hold a current "A" General Engineering Contractor license[4/] from

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4/ HRS § 444-7 (1993) defines the classifications of contractors as follows:

> **Classification.** (a) For the purpose of classification, the contracting business includes any or all of the following branches:
>
> (1) General engineering contracting;
>
> (2) General building contracting;
>
> (3) Specialty contracting.
>
> (b) A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works requiring specialized engineering knowledge and skill, including the following divisions or subjects: irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, docks and wharves, shipyards and ports, dams and hydroelectric projects, levees, river control and reclamation works, railroads, highways, streets and roads, tunnels, airports and airways, sewers and sewage disposal plants and systems, waste reduction plants, bridges, overpasses, underpasses and other similar works, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, parks, playgrounds and other recreational works, refineries, chemical plants and similar industrial plants requiring specialized engineering knowledge and skill, powerhouses, power plants and other utility plants and installations, mines and metallurgical plants, land levelling and earth-moving projects, excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above mentioned fixed works.
>
> (c) A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

(continued...)

[4/](...continued)

(d) A specialty contractor is a contractor whose operations as such are the performance of construction work requiring special skill such as, but not limited to, electrical, drywall, painting and decorating, landscaping, flooring, carpet laying by any installation method, plumbing, or roofing work, and others whose principal contracting business involves the use of specialized building trades or crafts.

Hawai'i Administrative Rules (HAR) § 16-77-32 further explains the scope of the classifications:

> General engineering, general building, and specialty contractors. (a) Licensees who hold the "A" general engineering contractor classification shall automatically hold the following specialty classifications without further examination or paying additional fees:
>
> (1) C-3 asphalt paving and surfacing;
>
> (2) C-9 cesspool;
>
> (3) C-17 excavating, grading, and trenching;
>
> (4) C-24 building moving and wrecking;
>
> (5) C-31a cement concrete;
>
> (6) C-32 ornamental guardrail and fencing;
>
> (7) C-35 pile driving, pile and caisson drilling, and foundation;
>
> (8) C-37a sewer and drain line;
>
> (9) C-37b irrigation and lawn sprinkler systems;
>
> (10) C-38 post tensioning;
>
> (11) C-43 sewer, sewage disposal, drain, and pipe laying;
>
> (12) C-49 swimming pool;
>
> (13) C-56 welding;
>
> (14) C-57a pumps installation;
>
> (15) C-57b injection well;
>
> (16) C-61 solar energy systems.
>
> (b) The "A" general engineering contractor may also

(continued...)

the State of Hawai'i.

B. *The Bid Opening*

On June 10, 1999, BWS opened the nine sealed bids that had been submitted for the Project. Inter Island was determined to be the lowest bidder, with a bid of $1,349,160. Okada was the second lowest bidder, with a bid of $1,375,000.

It is undisputed that Inter Island is a licensed "A" general engineering contractor, as required by the IFB. Inter Island also holds a "B" general building contractor license and "C" contractor licenses in the following specialty

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[4/](...continued)
install poles in all new pole lines and replace poles, provided that installation of the ground wire, insulators, and conductors are performed by a contractor holding the C-62 pole and line classification. The "A" general engineering contractor may also install duct lines, provided that installation of conductors is performed by a contractor holding the C-13 classification.

(c) Licensees who hold the "B" general building contractor classification shall automatically hold the following specialty classifications without further examination or paying additional fees:

(1) C-5 cabinet, millwork, and carpentry remodelling and repairs;

(2) C-6 carpentry framing;

(3) C-12 drywall;

(4) C-24 building moving and wrecking;

(5) C-25 institutional and commercial equipment;

(6) C-42a aluminum shingles;

(7) C-42b wood shingles and shakes.

(d) Licensees who hold a specialty contractors license shall automatically hold the subclassifications of the licensee's particular specialty without examination or paying additional fees.

classifications: C-13 (electrical contractor) and C-27 (landscape contractor). Pursuant to HAR § 16-77-32(d),[5/] Inter Island, by virtue of its C-13 and C-27 licenses, automatically held licenses in all subclassifications of the C-13 and C-27 specialty classifications. Additionally, pursuant to HAR § 16-77-32(a) and (c),[6/] Inter Island, by virtue of its "A" and "B" licenses, automatically held "C" licenses in a number of specialty classifications.

The Special Provisions of the IFB specifically required that all "[r]estoration of pavements" work under the contract "shall be done by a contractor holding a current C-3 - ASPHALT PAVING AND SURFACING CONTRACTOR specialty license for the State of Hawaii [Hawai'i.]" Additionally, the Special Provisions included the following requirement:

> All construction contract bids involving any chlorination work shall have a name listed for the C-37d Water Chlorination Subcontractor. Any bid not listing this subcontractor shall be rejected and disqualified. However, where the value of the work to be performed by the subcontractor is equal to or less than one percent of the total bid amount, the listing of the subcontractor may be waived if it is in the best interest of [BWS].

In its bid, Inter Island, as required by the Special Provisions, listed subcontractors who possessed specialty contractor licenses in the "C-3" (asphalt paving and surfacing) and "C-37d" (water chlorination) classifications and

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[5/] See footnote 4 for text of this rule.

[6/] See footnote 4 for text of these rules.

subclassifications. Inter Island also designated a "C-33" (painting and decorating) subcontractor. However, Inter Island did not list any subcontractors who possessed a "C-37" license in plumbing,[7/] a "C-41" license in reinforcing steel,[8/] and a "C-42" license in roofing.[9/] Our review of the record indicates that

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7/ Title 16, Chapter 77 of the HAR are rules adopted by the Hawai'i Contractors License Board to regulate general and specialty construction contractors. Exhibit A to Chapter 77, lists the different subclassifications of specialty contractors and defines the scope of work that can be performed by each specialty contractor subclassification. It defines the scope of work for classification C-37 as follows:

> **Plumbing contractor.** To install, repair, or alter complete plumbing systems which shall include supply water piping systems, waste water piping systems, fuel gas piping systems, and other fluid piping systems; the equipment, instrumentation, non-electric controls, and the fixture for these systems and the venting for waste water piping systems and fuel gas piping systems; for any purpose in connection with the use and occupancy of buildings, structures, works, and premises where people or animals live, work, and assemble; including piping for vacuum, air, and medical gas systems, spas and swimming pools, lawn sprinkler systems, irrigation systems, sewer lines and related sewage disposal work performed within property lines, fire protection sprinkler systems when supervised by licensed mechanical engineers or licensed fire protection contractors, and solar hot water heating systems, and the trenching, backfilling, patching, and surface restoration in connection therewith[.]

Exhibit A at A-10. The C-37 specialty contractor classification includes a number of subclassifications. Specifically, C-37a is the subclassification for "sewer and drain line contractor"; C-37b is for "irrigation and lawn sprinkler systems contractor"; C-37c is for "vacuum and air systems contractor"; C-37d is for "water chlorination contractor"; C-37e is for "treatment and pumping facilities contractor"; and C-37f is for "fuel dispensing contractor"[.] HAR § 16-77, Exhibit A at A-2.

8/ The HAR defines a C-41 classification as follows: "**Reinforcing steel contractor.** To fabricate, place and tie steel reinforcing bars (rods), of any profile, perimeter, or cross-section, that are or may be used to reinforce concrete buildings and structures[.]" HAR § 16-77, Exhibit A at A-12.

9/ The C-42 classification is defined in HAR § 16-77, Exhibit A, as follows:

> **Roofing contractor.** To install a watertight covering to

(continued...)

the other eight bidders did list subcontractors with "C-41" and "C-42" licenses. However, of the nine bidders, only three listed a "C-37" plumbing subcontractor. Moreover, even Okada did not name a "C-37" plumbing contractor.[10/]

C. *The Bid Protests*

Following the bid opening, an agent of The Pacific Resources Partnership (PRP), an unregistered partnership doing business in Hawai'i whose stated mission is "to secure a level

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(...continued)

> roof surface by use of, but not limited to, cedar, cement, asbestos, metal, and composition shingles, wood shakes, cement and clay tile, built-up roofing, single ply, fluid type roofing systems, and other acceptable roofing materials including spray urethane foam, asphalt, and application of protective or reflective roof, or both, and deck coatings[.]

[10/] At oral argument, Okada's attorney, when asked about his own client's failure to list a "C-37" licensed plumbing subcontractor, stated that Okada did list a subcontractor with a "C-37d" water chlorination subclassification specialty. Okada's attorney further represented that the rules governing contractors provided that a subcontractor who held a license to perform work that was a subclassification of a "C-37" specialty license was automatically authorized to perform all aspects of a "C-37" license. Therefore, according to the attorney, Okada, by listing a "C-37d" subcontractor, had listed a subcontractor to perform "C-37" work.

Our review of the rules governing contractors that were promulgated by the Contractors License Board, which is administratively part of the Department of Commerce and Consumer Affairs, State of Hawai'i (DCCA), indicates, however, that the converse of what Okada's attorney represented is true. HAR § 16-77-32(d) states that "[l]icensees who hold a specialty contractors license shall automatically hold the subclassifications of the licensee's particular specialty without examination or paying additional fees." Therefore, a "C-37" plumbing contractor would automatically hold licenses in the "C-37a," "C-37b," "C-37c," "C-37d," "C-37e," and "C-37f" plumbing subclassifications. However, a "C-37d" license would not entitle the holder to practice in the broader "C-37" category. Therefore, Okada's listing of a "C-37d" subcontractor would not satisfy a requirement that it list a "C-37" subcontractor.

Moreover, the record indicates that Inter Island also listed a "C-37d" water chlorination subcontractor in its bid. If the statement of Okada's attorney were true, then Inter Island was in exactly the same situation as Okada.

playing field for all public works contracts," contacted BWS to inquire about the status of the bid award for the Project. The PRP agent also communicated to BWS PRP's concern regarding Inter Island's failure to list all the specialty subcontractors that PRP believed were necessary to perform the construction for the Project.[11/] Okada was then, and is now, a member of PRP.

Thereafter, PRP, through its attorney, submitted a letter of formal protest to BWS, requesting that BWS reject as nonresponsive any bids for the Project that did not include all of the specialty "C" licenses required to complete the work described in the bid documents. In the letter, PRP explained, in relevant part:

> We submit that any bid proposal which does not include all of the specialty licenses (to be held by either the bidder and/or its joint contractor/subcontractor) required to complete the work described in the bid documents should be deemed non-responsive and, therefore, disqualified or rejected. For example, the bid proposal of [Inter Island] for [the Project] indicates that neither [Inter Island] nor any of its joint contractors or subcontractors holds the "C-37" (Plumbing), "C-41" (Reinforcing Steel) and "C-42" (Roofing) contractor's licenses, all of which are required for significant portions of the contract work.
>
> Pursuant to the Contractors Law, [HRS] Chapter 444, and its related administrative rules, any licensee who acts, assumes to act, or advertises in any classification other than for which the licensee is duly licensed shall be construed to have engaged in unlicensed activity. Although a licensee who holds the "A" general engineering contractor classification is automatically allowed to work in certain other specialty classifications without further examination or licensing fees, the C-37, C-41 and C-42 classifications do not fall within this exemption. The technical nature of Plumbing, Reinforcing Steel and Roofing work mandates that

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[11/] Although the communication is not included in the record, the Pacific Resources Partnership presumably asserted then, as it did in its June 21, 1999 letter, that Inter Island did not list subcontractors possessing the C-37, C-41 and C-42 classifications.

> only a licensee who holds these particular specialty licenses be permitted to complete this work. The safety of the public and the integrity of this special work requires the strict application of this licensing law. . . .
>
> Moreover, any proposition that --
>
> (1) an "A" general engineering contractor can engage in any contract which provides for more than two unrelated building trades, even if the general engineering contractor does not possess the specialty licenses for such trades, or
>
> (2) the Plumbing, Reinforcing Steel and Roofing work required under the subject contract is merely incidental and supplemental to the work needed to complete the contract,
>
> is illogical, contrary to the consumer protection purpose of the Contractors Law, and will certainly be rejected by the Courts.
>
> Finally, note that any misapplication of the licensing requirements (such as by allowing an "A" general engineering contractor to complete Plumbing, Reinforcing Steel and/or Roofing work without the related specialty licenses), even if inadvertent, will result in the misclassification of specialty work. This practice will skew the "prevailing wages" standards established under [HRS] Chapter 104 for public works contracts, and otherwise cause major unrest in the Construction Industry.

After receiving PRP's protest, a BWS employee telephoned the president of Inter Island to inquire about Inter Island's failure to list in its bid any licensed plumbing, reinforcing steel, and roofing subcontractors, and to request confirmation that Inter Island had received proposals from appropriately licensed subcontractors in the three specialty areas. By a letter dated June 21, 1999 and time-stamped as received by BWS on July 1, 1999, Inter Island offered the following explanation for its failure to list the three specialty subcontractors:

> Quite simply, we did not list subcontractors for the plumbing and installation of the pumps as their quotes were

> considerably below 1% or $13,500. of our quotation. Under the "[HAR], TITLE 3" we are not required to list subcontractors under 1%.
>
> Please find enclosed quotations from our plumbing and pump supplier that were used for bidding purposes. The quotation for pump installation was quoted at $750./day. We anticipated 2 days maximum for this portion of the work. As such, the price we used for the installation of the pumps was $1,500. Our plumbing quote was estimated to be $3,000. Both these prices were considerably below the 1% or $13,500.
>
> Should the [BWS] require us to use plumbers for the pipe fitting associated with the pumps which is normally performed under our "A" license, our subcontract to a plumbing contractor would still be less than 1%. [Inter Island] would supply the material and the assistance of our pipefitters to a plumbing contractor such as J's Plumbing who we normally use for our plumbing requirements. Their quotation has been attached for your review.

Attached to Inter Island's letter were proposals from three specialty subcontractors: (1) a June 22, 1999 proposal from J's Plumbing, which had a "C-37" (plumbing) license, offering to "Install Building Pump Piping in accordance with plans & specifications" for $8,300; (2) a June 9, 1999 proposal from Associated Steel Workers, Ltd., which had a "C-41" (reinforcing steel) specialty license, offering to furnish the labor for the "[i]nstallation of reinforcing steel complete in place according to plans and specifications" for the amount of $8,675; and (3) a June 10, 1999 proposal from ALCAL Hawaii, which had a "C-42" (roofing) license, offering to provide the labor to complete "Section 4.6 Built-Up Roofing" of the plans and specifications for the amount of $12,560. The quotations by all three specialty subcontractors covered only the price to furnish the licensed labor, with Inter Island providing the necessary materials and supplies. Additionally, the proposal of J's Plumbing expressly

noted that Inter Island was to furnish "pipefitters to assist our plumbers while on jobsite."

On July 28, 1999, BWS dismissed PRP's protest and awarded the contract for the Project to Inter Island. In a letter to PRP dated July 28, 1999, BWS gave the following reasons for the dismissal:

> 1. Pursuant to [HAR] Sections 3-126-1[12/] and 3-126-3, PRP does not have standing to file a valid protest of this solicitation;
>
> 2. PRP's protest letter was not received within five working days of the bid opening date as required by HAR Section 3-126-3(a)[13/]; and
>
> 3. The value of [Inter Island's] plumbing, reinforcing steel and roofing subcontractors were each less than one percent of the total project bid amount. Therefore, pursuant to [HRS] Section 103D-302(b), BWS has determined it is in its best interest to forego the listing requirement as to these three subcontractors.

(Footnotes added.)

On August 4, 1999, the attorney for PRP sent BWS another letter, this time on behalf of Okada, protesting the award of the contract to Inter Island for essentially the same

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12/ HAR § 3-126-1 defines "protestor" as "any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files a protest."

13/ HAR § 3-126-3 states:

> Filing of protest. (a) Protests shall be made in writing to the chief procurement officer or the head of a purchasing agency, and shall be filed in duplicate within five working days after the protestor knows or should have known of the facts leading to the filing of a protest. A protest is considered filed when received by the chief procurement officer or the head of a purchasing agency. Protests filed after the five-day period shall not be considered.

(Emphasis added.)

reasons that had been raised by PRP in its protest. By a letter dated August 30, 1999, BWS denied Okada's protest as well, explaining that: (1) the protest was not filed within five working days of the bid opening date, when Okada knew or should have known of the facts which led to the filing of the protest[14/]; and (2) BWS had the discretionary authority to waive Inter Island's failure to list the names of each specialty subcontractor whose work would cost less than one percent of the total bid amount.

D. *The Administrative Hearing*

By a letter hand-delivered to the DCCA Hearings Office on September 10, 1999, Okada requested an administrative hearing to review BWS's denial of its protest, as allowed by HRS

14/ BWS explained:

> Okada's protest does not allege any grievances arising from the July 28, 1999 award of the contract. Instead, Okada's protest is based solely on allegations that [Inter Island] failed to identify properly licensed subcontractors in its bid proposal. Such information was available to Okada on June 10, 1999 when the bids were opened. [HAR] requires:
>
> > Protests shall be made in writing to the chief procurement officer or the head of a purchasing agency, and shall be filed in duplicate **within five working days** after the protestor **knows or should have known of the facts leading to the filing of the protest.**
>
> Thus, Okada's protest of any irregularity in their competitor's listing of subcontractors should have been filed within five working days of the bid opening - June 17, 1999.

(Emphasis in original, citations omitted.)

§ 103D-709 (1993 & Supp. 2000).[15] Okada and BWS

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[15] Prior to July 1, 1999, when bids for the construction and installation of the Kaluanui Booster Station, Phase II were opened, HRS § 103D-709 (1993 & Supp. 1998), provided, in relevant part, as follows:

> **Administrative proceedings for review.** (a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under sections 103D-310, 103D-701, or 103D-702.
>
> (b) Hearings to review and determine any request made pursuant to subsection (a) shall commence within twenty-one calendar days of receipt of the request. The hearings officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision which shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the supreme court under section 103D-710.
>
> (c) The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. All parties to the proceeding shall be afforded an opportunity to present oral or documentary evidence, conduct cross-examination as may be required, and argument on all issues involved. The rules of evidence shall be strictly adhered to.
>
> . . . .
>
> (f) Hearings officers shall decide whether the determinations of the chief procurement officer or the head of the purchasing agency, or their respective designees were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract.

Effective July 1, 1999, subsections (c) and (f) of HRS § 103D-709 were amended to read:

> (c) <u>Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and 103D-702(f) may initiate a proceeding under this section.</u> The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. All parties to the proceeding shall be afforded an opportunity to present

(continued...)

stipulated to permit Inter Island to intervene as a respondent, and in a pre-hearing brief, Okada stated that it was seeking administrative review on two primary issues:

> 1. Whether or not [Inter Island's] protest filed with [BWS] on August 4, 1999 was timely?
>
> 2. Whether or not Inter Island's bid proposal was non-responsive because it did not list any joint contractor or subcontractor that is duly licensed as a Plumber?

A hearing before a DCCA hearings officer was held on September 29, 1999. At the conclusion of the hearing, the hearings officer requested that the parties submit proposed findings of fact (FsOF) and conclusions of law (CsOL) by October 14, 1999. Prior to this deadline, Okada filed a motion to reopen the hearing to allow it to submit "newly discovered evidence" that the June 9, 1999 proposal to Inter Island from Associated Steel Workers, Ltd. (the "C-41" reinforcing steel subcontractor) and the June 10, 1999 proposal to Inter Island

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[15/](...continued)

> oral or documentary evidence, conduct cross-examination as may be required, and argument on all issues involved. The rules of evidence shall [be strictly adhered to.] apply.
>
> . . . .
>
> (f) [Hearings officers] The hearings officer shall decide whether the determinations of the chief procurement officer or the [head of the purchasing agency, or their respective designees] chief procurement officer's designee were in accordance with the Constitution, statutes, [regulations,] rules, and the terms and conditions of the solicitation or contract[.], and shall order such relief as may be appropriate in accordance with this chapter.

1999 Haw. Sess. L. Act 162, § 7 at 536-37 (new language underscored; deleted language in brackets; quotation marks omitted). The changes, which became effective on July 1, 1999 and were thus in place at the time Okada filed its bid protest, are reflected in HRS § 103D-709 (1993 & Supp. 2000).

from ALCAL Hawaii (the "C-42" roofing subcontractor) were actually solicited by Inter Island after the June 10, 1999 bid opening date, but backdated by the two subcontractors at Inter Island's request. The hearings officer denied Okada's motion, and Okada has not appealed the denial. Accordingly, for purposes of judicial review, it is not disputed that although reinforcing steel and roofing subcontractors were not identified by Inter Island in its bid, Inter Island had received written proposals from such subcontractors by the bid opening date.

Subsequently, in its proposed FsOF and CsOL, Okada expanded its bases for seeking administrative review. Okada argued that: (1) Inter Island was not a responsible bidder since it did not have a plumbing subcontractor who was contractually bound to provide any plumbing work to Inter Island at or prior to the bid opening date and it was undisputed that a licensed plumbing subcontractor was required to perform some of the work for the Project; (2) Inter Island's bid was nonresponsive because it failed to list the licensed subcontractors who would be performing the plumbing, reinforcing steel, and roofing work for the Project; and (3) BWS's waiver of Inter Island's failure to list the required plumbing, reinforcing steel, and roofing subcontractors was unlawful because (a) there was no justification, such as an inadvertent or unintentional mistake, for Inter Island's failure to list the required subcontractors;

(b) the plumbing subcontractor's proposal was obtained by Inter Island after the bid opening; and (c) the plumbing subcontractor's proposal was for labor only and not for labor and materials as a package bid, which would have resulted in a proposal that would have been for an amount that was more than one percent of the total bid amount.

On November 10, 1999, the hearings officer issued his Decision. As a preliminary matter, the hearings officer concluded that Okada's protest of the contract award for the Project to Inter Island was timely.[16/] The hearings officer then addressed Okada's remaining contentions and concluded, in summary, as follows:

(1) It is undisputed that Inter Island failed to identify in its bid the subcontractors with specialty classification licenses in plumbing (C-37), reinforcing steel (C-41), and roofing (C-42) to be engaged for the Project; therefore, Inter Island's bid did not comply with the subcontractor listing requirements imposed by HRS § 103D-302(b) and HAR § 3-122-21(a)(8) and was nonresponsive;

(2) Inter Island's bid was also nonresponsive because at the time of bid submission and bid opening, Inter Island did not have a plumbing subcontractor "lined up" and

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[16/] In seeking judicial review of the November 10, 1999 Findings of Fact, Conclusions of Law and Decision issued by a hearings officer with DCCA, Inter Island raised no argument regarding this timeliness determination.

"contractually-bound to perform" the plumbing work under the contract for the Project;

(3) Inter Island was not a "responsible bidder," as defined in HRS § 103D-104 (1993) and HAR § 3-120-2, since it did not have a plumbing subcontractor bound to perform on the contract at the time of bid submission and bid opening and therefore did not have "the capability in all respects to perform fully" the contract requirements;

(4) HRS § 103D-302(b) and HAR § 122-21(a)(8) authorized BWS to accept construction bids that did not comply with the subcontractor listing requirement if (a) acceptance was in the best interest of BWS, and (b) the value of the work to be performed by an unlisted subcontractor was equal to or less than one percent of the total bid amount (one percent threshold);

(5) It was not unlawful or improper for Inter Island to have "the subcontractors who were to do the plumbing and reinforcing steel work submit proposals for labor only," and the value of each proposal submitted by the plumbing, reinforcing steel, and roofing subcontractors amounted to less than one percent of Inter Island's total bid amount, thereby satisfying the one percent threshold for waiver of the subcontractor listing requirement;

(6) Okada "established by a preponderance of the evidence that [BWS's] determination waiving the non-responsive

aspects of [Inter Island's] bid as being in the best interest of [BWS] and awarding the Project contract to [Inter Island] was contrary to the provisions of the Procurement Code and the rules."

The hearings officer ordered that the contract between BWS and Inter Island be terminated and that Inter Island be "compensated for actual expenses, if any, that were reasonably incurred under the contract and reasonable profit based upon any performance on the contract up to the time of termination." At oral argument before this court, the parties represented that following the entry of the hearing officer's Decision, BWS terminated the contract award to Inter Island and awarded the contract for the Project to Okada, which had commenced work under the contract.

E. *The Application for Judicial Review*

On November 18, 1999, pursuant to HRS § 103D-710(a) (Supp. 1999),[17/] Inter Island timely filed an application with the Hawai'i Supreme Court for judicial review of the hearings

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[17/] HRS § 103D-710(a) (Supp. 2000) provides, as it did at the time of the proceedings below, as follows:

> **Judicial review.** (a) Only parties to proceedings under section 103D-709 who are aggrieved by a final decision of a hearings officer under that section may apply for judicial review of that decision. The proceedings for review shall be instituted in the supreme court.

HRS § 103D-709 (1993 & Supp. 2000) sets forth the procedural requirements for administrative de novo review of protests and questions related to bid situations by the "several hearings officers appointed by the director of the department of commerce and consumer affairs[.]"

officer's Decision. The supreme court subsequently entered an order, dated April 6, 2000, assigning the case to this court for disposition.

Inter Island argues that the hearing officer erred in concluding that: (1) its bid was "nonresponsive"; (2) it was not a "responsible bidder"; and (3) BWS violated the Procurement Code, HRS chapter 103D, by waiving the subcontractor listing requirement imposed by HRS § 103D-302(b) and HAR § 3-122-21(a)(8).

STANDARDS OF REVIEW

A. *Review of Hearings Officer Decisions*

The Hawai'i Supreme Court has explained that the standard by which appellate courts review the decisions of a DCCA hearings officer in a procurement case is governed by HRS § 103D-710(e) (1993). Arakaki v. State Dep't of Accounting and Gen. Servs., 87 Hawai'i 147, 149, 952 P.2d 1210, 1212 (1998). HRS § 103D-710(e) provides:

> Upon review of the record the court may affirm the decision of the hearings officer issued pursuant to [HRS] section 103D-709 or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if substantial rights may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the chief procurement officer or head of the purchasing agency;
>
> (3) Made upon unlawful procedure;

(4) Affected by other error of law;

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

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

The supreme court elaborated in Arakaki that

> conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and the [h]earings [o]fficer's exercise of discretion under subsection (6). Accordingly, a reviewing court will reverse a [h]earings [o]fficer's finding of fact if it concludes that such . . . finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. On the other hand, the [h]earings [o]fficer's conclusions of law are freely reviewable.

Arakaki, 87 Hawai'i at 149, 952 P.2d at 1212 (quoting In re CARL Corp. v. State Dep't of Educ., 85 Hawai'i 431, 446-47, 946 P.2d 1, 16-17 (1997)). Additionally, the supreme court has stated that a conclusion of law

> that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case. When mixed questions of law and fact are presented, an appellate court must give deference to the agency's expertise and experience in the particular field.

Southern Foods Group, L.P. v. State Dep't of Educ., 89 Hawai'i 443, 452, 974 P.2d 1033, 1042 (1999) (citation and quotation marks omitted). When considering an agency's discretion, appellate courts must consider that

> discretion denotes the absence of a hard and fast rule. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Id. (brackets omitted). "A hearings officer abuses his or her discretion when he or she clearly exceeds bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party." Id. (quotation marks omitted). "Indeed, in order to reverse or modify an agency decision, the appellate court must conclude that an appellant's substantial rights were prejudiced by the agency." Id. at 453, 974 P.2d at 1043.

> In order to preserve the function of administrative agencies in discharging their delegated duties and the function of this court in reviewing agency determinations, a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.

Id. (emphasis in original).

B. *Statutory Construction*

The supreme court has stated that "[t]he interpretation of a statute is a question of law reviewable *de novo*." Gray v. Administrative Director of the Court, 84 Hawai'i 138, 144, 931 P.2d 580, 586 (1997). Moreover, in construing a statute, an appellate court's

> foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
>
> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.
>
> In construing an ambiguous statute, "the meaning of the ambiguous words may be sought by examining the context,

> with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) (1993). Moreover, the courts may resort to extrinsic aids in determining the legislative intent. One avenue is the use of legislative history as an interpretive tool.

Id. at 148, 931 P.2d at 590 (quoting State v. Toyomura, 80 Hawai'i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets, ellipses, and footnote omitted). An appellate court may also consider

> "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2) (1993). "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1-16 (1993).

Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 230, 953 P.2d 1315, 1328 (1998) (quoting State v. Cullen, 86 Hawai'i 1, 8-9, 946 P.2d 955, 963-64 (1997)) (brackets in original).

DISCUSSION

A. *The Requirement that Contracts be Awarded to the Lowest Responsible and Responsive Bidder*

1.

HRS § 103D-302(h) (Supp. 2000)[18/] provides, in pertinent part, that contracts awarded pursuant to the competitive sealed bidding process "shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder

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[18/] The language of HRS § 103D-302 (Supp. 2000) is the same as it was when the administrative proceedings underlying this application for appellate judicial review occurred.

whose bid meets the requirements and criteria set forth in the invitation for bids." (Emphases added.)

HRS § 103D-104 (Supp. 2000) defines a "responsible bidder" as "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." Additionally, HRS § 103D-310 (Supp. 2000), entitled "Responsibility of offerors," states, in relevant part:

> (b) . . . [T]he procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the [procurement] policy board. Whenever it appears from answers to the questionnaire or otherwise, that the prospective offeror is not fully qualified and able to perform the intended work, a written determination of nonresponsibility of an offeror shall be made by the head of the purchasing agency, in accordance with rules adopted by the policy board. . . .

(Emphasis added.) Among the rules adopted by the procurement policy board is HAR § 3-122-110, which states, partly, as follows:

> Determination of nonresponsibility. (a) The procurement officer shall determine, on the basis of available information, the responsibility or nonresponsibility of a prospective offeror.
>
> (b) If the procurement officer requires additional information, the prospective offeror shall promptly supply the information. Failure to supply the requested information at least forty-eight hours prior to the time advertised for the opening shall be considered unreasonable and may be grounds for a determination of nonresponsibility.
>
> (c) Notwithstanding the provision of paragraph (b), the head of the purchasing agency shall not be precluded from requesting additional information.

The term "responsive bidder" is defined in HRS § 103D-104 as "a person who has submitted a bid which conforms in all material respects to the invitation for bids."

The Hawai'i Supreme Court has explained that

> [t]he requirement that a bid be responsive is designed to avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all of the specifications and conditions in the invitation for bids, and who could have made a better proposal if they imposed conditions upon or variances from the contractual terms the government had specified. The rule also avoids placing the contracting officer in the difficult position of having to balance the more favorable offer of the deviating bidder against the disadvantages to the government from the qualifications and conditions the bidder has added. In short, the requirement of responsiveness is designed to avoid a method of awarding government contracts that would be similar to negotiating agreements but which would lack the safeguards present in either that system or in true competitive bidding.

Southern Foods Group, 89 Hawai'i at 456, 974 P.2d at 1046 (quoting Toyo Menka Kaisha, Ltd., 597 F.2d 1371, 1377 (Cl. Ct. 1979)).

A bid need not strictly comply with the requirements of an IFB to be deemed accepted. The definition of "responsive bidder" contained in HRS § 103D-104, to the extent that it refers to a responsive bid as one "which conforms in all material respects to the [IFB]," does provide some flexibility to overlook minor deviations from the IFB. In discussing what constitutes a "material deviation" from an IFB, the supreme court held in Southern Foods Group that

> deviations from advertised specifications may be waived by the contracting officer provided they do not go to the substance of the bid or work an injustice to other bidders. *A substantial deviation is defined as one which affects*

either the price, quantity, or quality of the article offered.

Id. at 456, 974 P.2d at 1046 (1999) (quoting Toyo Menka Kaisha, Ltd., 597 F.2d at 1376) (brackets omitted; emphasis in original).

2.

Case law also recognizes a material difference between a "responsible bidder" and a "responsive bidder." In Bean Dredging Corp. v. United States, 22 Cl. Ct. 519 (1991), the award of a dredging contract to the lowest bidder was challenged as being nonresponsive because the bid failed to include a schedule listing the plant and equipment to be used for the contract project. The claims court explained:

> Responsiveness addresses whether a bidder has promised to perform in the precise manner requested by the government. To be considered for an award a bid must comply in all material respects with the invitation for bids. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. If there is material nonconformity in a bid, it must be rejected. Material nonconformity goes to the substance of the bid which affects the price, quality, quantity, or delivery of the article or service offered.
>
> Responsibility addresses the issue of the performance capability of a bidder, which can include inquiries into financial resources, experience, management, past performance, place of performance, and integrity. In contrast to responsiveness, a bidder may present evidence of responsibility after bid opening up until the time of award.
>
> In terms of identifying whether a particular requirement is related to responsiveness or responsibility, the distinction is whether the bidder will conform to the IFB, as opposed to how the bidder will accomplish conformance. Stated another way, the concept of responsibility specifically concerns the question of a bidder's performance capability, as opposed to its promise to perform the contract, which is a matter of responsiveness.

Id. at 522-23 (citations and quotation marks omitted).

In Blount, Inc. v. United States, 22 Cl. Ct. 221 (1990), the claims court was asked to enjoin the Bureau of Prison's rejection, on nonresponsiveness grounds, of the lowest bid for a prison construction contract, submitted by Blount, Inc. (Blount). Blount had indicated, on a business management questionnaire submitted with its bid, that its firm would be self-performing "approximately 10%" or "approximately $6,000,000" of the work under the contract, for which Blount had bid a price of $63,287,000. Id. at 224. The IFB for the contract, however, included the following "Performance of Work" clause:

> The contractor shall perform on the site, and with its own organization, work equivalent to at least *20 percent* of the total amount of work to be performed under the contract. This percentage may be reduced by a supplemental agreement to this contract if, during performing the work, the Contractor requests a reduction and the Contracting Officer determines that the reduction would be to the advantage of the Government.

Id. at 223 (emphasis in original). The claims court initially stated:

> The court must determine at the outset whether the "Performance of Work" clause contained in the IFB and the Business Management Questionnaire submitted with Blount's bid relate to bidder responsiveness or responsibility. Responsiveness refers to the question of whether a bidder has promised to perform in the precise manner requested by the government. Responsibility, by contrast, involves an inquiry into the bidder's ability and will to perform the subject contract as promised. Matters of bid responsiveness must be discerned solely by reference to the materials submitted with the bid and facts available to the government at the time of bid opening. However, responsibility determinations are made at the time of award. A bidder may present evidence subsequent to bid opening but prior to award to demonstrate the bidder's responsibility.
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> . . . .
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> . . . . [A] bid which contains a material nonconformity must be rejected as nonresponsive. Material

> terms and conditions of a solicitation involve price, quality, quantity, and delivery. The rule is designed to prevent bidders from taking exception to material provisions of the contract in order to gain an unfair advantage over competitors and to assure that the government evaluates all bids on an equal basis. In other words, a bidder cannot receive award by offering a less expensive method of performance than that required by the solicitation.
>
> Responsibility concerns how a bidder will accomplish conformance with the material provisions of the contract. Responsibility addresses the performance capability of a bidder, and normally involves an inquiry into the potential contractor's financial resources, experience, management, past performance, place of performance, and integrity.

Id. at 226-27 (citations omitted). The claims court refused to issue the injunction order requested by Blount, explaining as follows:

> The "Performance of Work" clause was . . . designed to ensure that critical construction contracts are awarded to firms which possess the requisite experience, management, and supervisory capabilities to complete the contract in a timely and satisfactory manner. The clause represents the foregone conclusion that a contractor with the ability to perform a certain percentage of the contract with its own resources is likely to possess such qualities. In so doing, the "Performance of Work" clause examines the method by which a bidder will meet the obligations of the contract rather than the bidder's promise to perform the contract. . . . The court finds that the "Performance of Work" clause and question 3 of the Business Management Questionnaire examine the performance capability of bidders and were primarily included in the solicitation to ensure that the successful bidder on the prison facilities project was a responsible contractor.
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> Although the 20 percent self-performance requirement was designed to test bidder responsibility, the court's analysis cannot end here. The court has previously stated that information intended to reflect on bidder responsibility can render a bid nonresponsive if the information indicates that the bidder does not intend to comply with the material requirements of the IFB. The "Performance of Work" clause was clearly a term or condition of the IFB. In requiring the contractor to self-perform 20 percent of the work under the contract, the clause directly impacted bid price. The self-performance requirement limited the amount of work which could be subcontracted under the contract. A contractor can generally achieve considerable savings by subcontracting work to firms with lower cost structures who are capable of performing the project with less expense. As such, a contractor may gain a sizeable bid pricing advantage by

> subcontracting more work than its competitors. Since compliance with the "Performance of Work" clause invariably affected bid price, the "Performance of Work" clause constitutes a material term of the IFB. Although the clause was designed to help ensure that award was made to a qualified bidder, the 20 percent self-performance requirement was nevertheless part of the IFB and, therefore, the contractor was expected to comply with this requirement like any other material provision of the contract.
>
> . . . . By promising to self-perform only 10 percent of the contract work in the face of the 20 percent requirement imposed by the "Performance of Work" clause, Blount took affirmative exception to a material provision of the IFB. Blount's response to question 3 of the business questionnaire therefore constituted a material deviation from the IFB which rendered its bid nonresponsive at bid opening. Blount could not, thereafter, correct its response to the questionnaire or attempt to explain why its bid was in fact responsive to the IFB.

Id. at 227-29 (citations and footnotes omitted).

3.

In this case, the hearings officer determined that Inter Island's bid was nonresponsive because it did not list a properly licensed plumbing, reinforcing steel, and roofing subcontractor. The hearings officer also determined that Inter Island was not a responsible bidder because it did not have a contractually bound plumbing subcontractor available to perform the contract for the Project on bid opening date and therefore was incapable of performing the contract.

The correctness of the foregoing determinations depends, therefore, on whether Inter Island was required by the IFB and applicable statutes or rules to use and list subcontractors in the three specialty classifications to perform work under the contract.

B. *The Subcontractor Listing Requirement*

In 1993, the Hawai'i State Legislature met in special session to enact a comprehensive new Procurement Code, which was subsequently codified as HRS chapter 103D. 1993 Haw. Sp. Sess. L. Act 8, § 1 at 37-38. One of the statutory provisions included in the new Procurement Code was HRS § 103D-302(b), which originally read:

> An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction, it shall specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. Construction bids which do not comply with [this] requirement may be accepted if the chief procurement officer or rules of the policy office conclude that acceptance is in the best interest of the public.

HRS § 103D-302(b) (1993) (emphases added). HRS § 103D-302(b) was subsequently amended by Act 186, 1994 Haw. Sess. L. Act 186, § 9 at 422, to, among other changes, limit the discretion of the chief procurement officer to waive a bidder's failure to comply with the subcontractor listing requirement:

> An invitation for bids shall be issued[,] and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction, it shall specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. Construction bids [which] that do not comply with this requirement may be accepted if the chief procurement officer or rules of the policy office conclude that acceptance is in the best interest of the public[.] and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one per cent of the total bid amount.

1994 Haw. Sess. L. Act 186, § 9 at 422 (deleted statutory material bracketed; new statutory material underscored). According to the legislative history of Act 186, the amendment

> [e]xempt[s] a construction bid from the requirement that all joint contractors and subcontractors be named and their work described in the bid, if the value of the work to be performed by each of the joint contractors or subcontractors is equal to or less than one per cent of the total bid amount, in addition to being deemed by the [procurement] policy office to be in the best interest of the public[.]

Sen. Stand. Comm. Rep. No. 2959, in 1994 Senate Journal, at 1177 (emphasis added). Thus the intent of the legislature was to add a one percent or less threshold to qualify for a waiver of a violation of the subcontractor listing requirement.[19/]

The Procurement Code was based in large part on the American Bar Association's Model Procurement Code for State and Local Government (the Model Code). Sen. Stand. Comm. Rep. No. S8-93, in 1993 Senate Journal (Sp.), at 39. Although the Model Code did not include a subcontractor listing requirement similar to HRS § 103D-302(b), such a requirement already existed

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19/ In construing an exemption from a subcontractor listing statute, the Delaware Supreme Court explained the purpose of such a provision as follows:

> [I]n situations where certain specialty work is de minimis as compared to the overall project a means should be established whereby it can be removed from the realm constituting a bid condition . . . so as to avoid a situation . . . where the State, and thus the taxpayer, are deprived of the benefit of an otherwise advantageous low bid because of a technical defect or oversight in a bid proposal as to specialty work which forms only a fractional part of the entire contract.

George & Lynch, Inc. v. Division of Parks and Recreation, 465 A.2d 345, 349 (Del. 1983).

under the Hawai'i procurement laws in effect prior to the adoption of the Procurement Code.

Specifically, HRS § 103-29 (1985), which was repealed when the Procurement Code went into effect, stated:

> **Bids to include certain information.** In addition to meeting other requirements of bidders for public works construction contracts each such bid shall include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the public works construction contract. The bid shall also indicate the nature and scope of the work to be performed by such joint contractor or subcontractors. All bids which do not comply with this requirement shall be rejected.

(Emphases added.) HRS § 103-29 was enacted simultaneously with the now-repealed HRS § 103-33 as part of 1963 Haw. Sess. L. Act 185 at 228. HRS § 103-33 (1985) provided as follows:

> **Termination of contract by contracting agency.** The contracting officer for any contract executed in accordance with this chapter may terminate the contract at any time when, in the opinion of the contracting officer, the contractor has made unjustifiable and substantive changes from the condition set forth in the contractor's original itemized bid; provided that the changes which are directly due to the failure, refusal, or inability of a subcontractor named in the contractor's original itemized bid in accordance with section 103-29 to enter into the subcontract or because of the subcontractor's insolvency, inability to furnish a reasonable performance bond, suspension or revocation of the subcontractor's license, or failure or inability to comply with other requirements of the law applicable to contractors, subcontractors, and public works projects shall not be deemed to be unjustifiable and substantive changes warranting termination of the contract by the contracting officer. Upon termination, the contracting officer shall limit payment to the contractor to that part of the contract satisfactorily completed at the time of termination.

The purpose clause of Act 185 stated:

> The purpose of this Act is to require bidders on public works contracts to include in their bids the names of all other persons or firms to be engaged on the project as joint contractors or subcontractors and to indicate the nature of the work such joint contractor or subcontractor will perform; and to provide for the termination of the contract by the contracting agency in cases where the

> contractor makes substantive changes from his [or her] original itemized bid.

1963 Haw. Sess. L. Act 185, § 1 at 228. When the subcontractor listing and the termination provisions enacted by Act 185 are construed together, therefore, it is evident that the listing requirement was intended to protect subcontractors named by a contractor in its bid from being substituted after bid award, except where the named subcontractors were unable, for specific reasons set forth in HRS § 103-33, to perform their subcontract with the contractor. In the event unauthorized substitution of a subcontractor was made by a contractor, the contracting agency was required to terminate the contract.

Under the Procurement Code in existence now, a termination requirement similar to the former HRS § 103-33 is provided in HRS § 103D-302(g) (Supp. 2000), which states, in relevant part:

> After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the public or to fair competition shall be permitted. Except as otherwise provided by rule, all decisions to permit the correction or withdrawal of bids, to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the chief procurement officer or head of a purchasing agency.

1.

The hearings officer determined, in Finding of Fact No. 7 of his Decision, that "[a]t least a portion of the work described under Item No. 2 [of the IFB Proposal form] required the services of a duly licensed plumber with a C-37 specialty

classification license for completion." In another section of the Decision, the hearings officer stated that there was no "dispute concerning the need for the performance of work by subcontractors with specialty classification licenses in plumbing (C-37), reinforcing steel (C-41) and roofing (C-42) for the completion of the Project nor that [Inter Island] did not hold the necessary specialty classification licenses to do that."

In concluding that Inter Island's bid was nonresponsive and that Inter Island was not a responsible bidder, the hearings officer relied in part on a decision by another DCCA hearings officer in the case of In re Hawaiian Dredging, PCH-99-6 (HOFO August 9, 1999). In that case, the issue presented was whether after bid opening, the contractor submitting the lowest bid could substitute a subcontractor listed in the bid, who was determined not to have the necessary experience required by the IFB, with a subcontractor who had the requisite experience. In answering the question in the negative, the hearings officer in the Hawaiian Dredging case commented that the subcontractor listing requirement was primarily instituted to prevent bid shopping and bid peddling.

The hearings officer in Hawaiian Dredging noted that

> [b]id shopping is the use of the low bid already received by the general contractor to pressure other subcontractors into submitting even lower bids. Bid peddling, conversely, is an attempt by a subcontractor to undercut known bids already

submitted to the general contractor in order to procure the job.[20/]

20/ Bid shopping has been similarly defined elsewhere. A comment within the UCLA Law Review explained that "[b]id shopping is the use by the general [contractor] of one subcontractor's low bid as a tool in negotiating lower bids from other subcontractors. Bid peddling, conversely, is the practice whereby subcontractors attempt to undercut known bid prices of other subcontractors in order to get a job." Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry*, 18 UCLA L. Rev. 389, 394 (1970) (authored by Thomas P. Lambert). The Comment further explained the dangers of bid shopping and peddling:

> First, as bid shopping becomes common within a particular trade, the subcontractors will pad their initial bids in order to make further reductions during post-award negotiations. This artificial inflation of subcontractor's offers makes the bidding process less effective. Second, subcontractors who are forced into post-award negotiations with the general often must reduce their sub-bids in order to avoid losing the award. Thus, they will be faced with a Hobson's choice between doing the job at a loss or doing a less than adequate job. Third, bid shopping and peddling tend to increase the risk of loss of the time and money used in preparing a bid. This occurs because generals and subcontractors who engage in these practices use, without expense, the bid estimates prepared by others. Fourth, it is often impossible for a general to obtain bids far enough in advance to have sufficient time to properly prepare his [or her] own bid because of the practice, common among many subcontractors, of holding sub-bids until the last possible moment in order to avoid pre-award bid shopping by the general. Fifth, many subcontractors refuse to submit bids for jobs on which they expect bid shopping. As a result, competition is reduced, and, consequently, construction prices are increased. Sixth, any price reductions gained through the use of post-award bid shopping by the general will be of no benefit to the awarding authority, to whom these price reductions would normally accrue as a result of open competition before the award of the prime contract. Free competition in an open market is therefore perverted because of the use of post-award bid shopping.
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> . . . .
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> In the case of *post-award* shopping, . . . the detrimental effects are more pervasive. Here the negotiations take place in a market completely controlled by the general who has been awarded the prime contract; post-award bid shopping is therefore much less like free competition. Moreover, any reduction in the sub-bid will be to the detriment of both the subcontractor and the awarding authority. The price on the overall contract having already been set, the general's purpose here is simply to drive down his [or her] own cost, increasing his [or her] profit at the expense of the subcontractor.

(continued...)

Id. at 11 (footnote added). The hearings officer then quoted with approval a portion of the Hawaiian Dredging decision and expanded the principles expressed therein to the facts in this case:

> Thus, the listing requirement of HRS § 103D-302(b) was, in part, based upon the recognition that a low bidder who is allowed to replace a subcontractor after bid opening would generally have a greater leverage in its bargaining with other, potential subcontractors. By forcing the contractor to commit, when it submits its bid, to utilize a specified subcontractor, the Code seeks to guard against bid shopping and bid peddling. Thus, with one narrow exception, the failure to list a subcontractor in a bid for construction work renders a bid non-responsive under HRS § 103D-302(b). It therefore stands to reason that HRS § 103D-302(b) also precludes the substitution of a listed subcontractor after bid opening, at least in cases where the antibid shopping purpose of the listing requirement may be undermined. Any other conclusions would nullify the underlying intent of the listing requirement.
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> In the Matter of Hawaiian Dredging Construction Company, supra at 4. Citations and footnotes omitted.
>
> The principle expressed in that matter is equally applicable here although the specific facts may not be the same. The situation presented in this matter in fact presents a more egregious situation for [Inter Island] had not only failed to provide the name of a plumbing subcontractor needed to perform construction on the Project, but, did not have a contractually bound plumbing subcontractor whose name it could provide at the time it submitted its bid or at the time of bid opening. The fact that [Inter Island] had obtained and identified J's Plumbing as its plumbing subcontractor after bid opening did not rectify the non-responsive aspect of its bid relating to [Inter Island's] failure to have a contractually bound subcontractor at the time [Inter Island] submitted its bid. To allow such a procedure would be to allow bid shopping. Accordingly, the [h]earings [o]fficer concludes that [Inter Island's] failure to have a plumbing subcontractor bound and ready to perform on the contract at the time of bid submission, let alone at the time of bid opening, resulted in a non-responsive bid which should have been rejected. The attempt to allow [Inter Island] to rectify its failure by obtaining a plumbing subcontractor after bid opening, violated the provisions of the Procurement Code which were designed to treat all bidders fairly and

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[20/](...continued)
Id. at 395-97 (emphasis in original; footnotes omitted).

> equitably in their dealings with the government procurement system and to increase public confidence in the integrity of the government procurement system.

(Emphasis in original; block quotation format and footnote omitted.)

2.

We agree with the hearings officer that the subcontractor listing requirement of HRS § 103D-302(b) is intended to guard against bid shopping by a contractor or bid peddling by subcontractors who were not listed in the contractor's bid.

However, we conclude that the hearings officer was wrong in holding that Inter Island was required to list in its bid subcontractors with a "C-37" plumbing, "C-41" reinforcing steel, and "C-42" roofing specialty license.

Construed literally, HRS § 103D-302(b) does not mandate that a public works construction contractor use specialty subcontractors in performing portions of the construction work. The only requirement is that a contractor list those subcontractors who are "to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each." HRS § 103D-302(b) (emphasis added). Similarly, HAR § 3-122-21(a)(8), which was expressly made a part of the IFB by the "REVISED GENERAL PROVISIONS OF CONSTRUCTION CONTRACTS" section of the IFB, provides:

For construction projects the bidder shall provide:

(A) The name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract; and

(B) The nature and scope of the work to be performed by each.

(Emphasis added.) Therefore, if a contractor does not plan to use a subcontractor in the performance of the contract, and the contractor is not required by statute, rule, or the IFB to use a joint contractor or subcontractor to perform portions of the contract,[21/] the contractor is not required to list any joint subcontractor.

Of course, once a bidder names a subcontractor, that subcontractor cannot be substituted, unless substitution is permitted pursuant to HRS § 103D-302(g). Conversely, if a bidder does not name a subcontractor for specialty work and the bidder subsequently wishes to use a subcontractor to perform such work, the bidder will similarly not be allowed to do so unless authorized to do so pursuant to HRS § 103D-302(g).

3.

The conclusions of the hearings officer that:

(1) Inter Island was not a responsible bidder because it had not

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[21/] In this case, for example, the IFB issued by BWS specifically required that "[r]estoration of pavements shall be done by a contractor holding a current C-3 - ASPHALT PAVING AND SURFACING CONTRACTOR specialty license for the State of Hawaii [Hawai'i.]" (Emphasis in original.) Additionally, the IFB required that "[a]ll construction contract bids involving any chlorination work shall have a name listed for the C-37d Water Chlorination Subcontractor." Consequently, all bidders were required to list a joint contractor or subcontractor with the appropriate C-3 and C-37d specialty contractor licenses in order to be responsive to the IFB.

"lined up" a plumbing subcontractor to do the plumbing work required under the contract; and (2) Inter Island's bid was nonresponsive because it did not list the required plumbing, reinforcing steel, and roofing joint contractors or subcontractors necessary for completion of the Project, were premised in large part on the hearings officer's determination that Inter Island was required to use the three types of specialty contractors on the job.

Based on our review of HRS chapter 444, the statute governing contractors, and HAR Title 16, chapter 77, the rules promulgated by the Contractors License Board to implement HRS chapter 444, we conclude that the hearings officer's determination was wrong.

It is undisputed in this case that Inter Island held both an "A" general engineering contracting license and a "B" general building contracting license. Under the classification scheme set forth in HRS chapter 444 and HAR Title 16, chapter 77, holders of an "A" and "B" license have quite broad contracting authority. HRS § 444-7(b) and (c) (1993) states:

> (b) A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works requiring specialized engineering knowledge and skill, including the following divisions or subjects: irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, docks and wharves, shipyards and ports, dams and hydroelectric projects, levees, river control and reclamation works, railroads, highways, streets and roads, tunnels, airports and airways, sewers and sewage disposal plants and systems, waste reduction plants, bridges, overpasses, underpasses and other similar works, pipelines and other systems for the

transmission of petroleum and other liquid or gaseous substances, parks, playgrounds and other recreational works, refineries, chemical plants and similar industrial plants requiring specialized engineering knowledge and skill, powerhouses, power plants and other utility plants and installations, mines and metallurgical plants, land levelling and earth-moving projects, excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above mentioned fixed works.

(c) A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

Pursuant to HAR § 16-77-32, contractors who hold "A" or "B" licenses automatically hold licenses in certain specialty classifications.[22/] HAR § 16-77-33 also contains the following limitation on the authority of "A" and "B" licensees:

(a) A licensee classified as an "A" general engineering contractor or as a "B" general building contractor shall not act, assume to act, or advertise as a specialty contractor except in the specialty classifications which the licensee holds.

(b) A general building contractor license does not entitle the holder to undertake a contract unless it requires more than two unrelated building trades or crafts or unless the general building contractor holds the specialty license to undertake the contract. Work performed which is incidental and supplemental[23/] to one contractor classification shall not be considered as unrelated trades or crafts.

(Footnote added.) Furthermore, HAR § 16-77-32 provides that an "A" general engineering contractor "may install duct lines, provided that installation of conductors is performed by a

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22/ See footnote 4 for text of rule.

23/ HAR § 16-77-34 defines "[i]ncidental and supplemental" as "work in other trades directly related to and necessary for the completion of the project undertaken by a licensee pursuant to the scope of the licensee's license."

contractor holding the C-13 classification." Thus, an "A" contractor is required to engage the services of a C-13 subcontractor to perform specialty conductor-installation work.

The foregoing statutory provisions and rules regarding the scope of an "A" and "B" license indicate that an "A" contractor is authorized to generally undertake all contracts to construct fixed works requiring specialized engineering knowledge and skill in a wide range of subject areas, including water power, water supply, and pipelines. A "B" contractor is authorized to undertake contracts to construct structures requiring "the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof." An "A" and "B" contractor is prohibited, however, from undertaking work solely in a specialty contracting area, unless the contractor holds a specialty license in that area.

The Project in this case included work involving specialized engineering skill and knowledge in water power, water supply, pipelines, and other utility plants and installations, and the IFB specifically required that all bidders possess an "A" license. Additionally, work for the Project clearly involved more than two unrelated building trades or crafts.[24/] Therefore, Inter Island, pursuant to its "A" and "B" licenses, was

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[24/] The IFB Special Provisions specifically required the services of a C-3 (asphalt paving and surfacing) and C-37d (water chlorination) subcontractor. Additionally, the bid specifications required work in a number of other trades, e.g., plumbing, electrical, and landscaping.

authorized to undertake the Project with its own staff[25]; provided, of course, that where certain work required performance by individuals with particular licenses, Inter Island utilized employees who were appropriately licensed to perform such work.

C. *The Waiver Provision*

In its prehearing statement to the hearings officer, BWS justified its award of the contract to Inter Island by noting that "[t]he best interests of BWS would be protected if competition for public contracts was encouraged and the contracts were awarded to the lowest responsible bid. Therefore, BWS is obligated to determine if the apparent low bid is eligible for the exception provided by statute." BWS stated that upon

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[25] We note that HRS § 444-2(7) (Supp. 2000) provides an exemption from the contractor licensing requirements for

> [o]wners or lessees of property who build or improve residential, farm, industrial, or commercial buildings or structures on property for their own use, or for use by their grandparents, parents, siblings, or children and who do not offer the buildings or structures for sale or lease; provided that this exemption shall not apply to electrical or plumbing work that must be performed only by persons or entities licensed under this chapter, or to the owner or lessee of the property if the owner or lessee is licensed under chapter 448E.

Additionally, HRS § 444-9.1(c) (Supp. 2000) provides that to qualify for the exemption under HRS § 444-2(7), the owner of a building or structure who applies for a building permit must sign a disclosure statement that states in part:

> It is your responsibility to make sure that subcontractors hired by you have licenses required by state law and by county licensing ordinances. Electrical or plumbing work must be performed by contractors licensed under chapters 448E and 444, [HRS]. Any person working on your building who is not licensed must be your employee which means that you must deduct F.I.C.A. and withholding taxes and provide workers' compensation for that employee, all as prescribed by law.

consideration of Inter Island's bid, it concluded that "[s]ince the value of the work performed by each of the three subcontractors were each less than one percent of the total contract, and it is in the best interest of BWS to encourage competition, BWS exercised its discretion to accept [Inter Island's] bid."

The hearings officer disagreed with BWS. He explained that the issue presented was

> whether the waiver of [Inter Island's] non-responsive bid which not only failed to provide the name of its subcontractors as required by the statutes, rules and IFB, but, also, failed to have, at the time of the bid submission and bid opening, a contractually bound subcontractor to perform the required plumbing work on the Project was in the best interest of [BWS].

Contrary to the findings of BWS, the hearings officer concluded that the contract award was not in the best interest of BWS.[26/] After discussing the legislative intent behind the enactment of

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26/ HRS § 103D-709(a) (1993) provides:

> The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo any request from any bidder, offeror, contractor or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under sections 103D-310, 103D-701, or 103D-702.

(Emphasis added.) HRS § 103D-709(f) (Supp. 2000) provides that "[t]he hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract and shall order such relief as may be appropriate in accordance with this chapter." Given the limitations of HRS § 103D-709(f) on a hearings officer's decision-making authority, we are not certain whether a hearings officer, following a de novo evidentiary hearing, is allowed to second-guess a purchasing agency's discretionary decision and substitute his or her own judgment for that of the purchasing agency's.

the Procurement Code, the hearings officer concluded that "acceptance of [Inter Island's] bid and award of the Project contract to [Inter Island] was not in the best interest of [BWS] as it was contrary to the expressed purposes and principles of the Procurement Code and the implementing rules." Specifically, the hearings officer explained that

> [a]lthough acceptance of [Inter Island's] low bid would maximize the purchasing value of public funds, such award to [Inter Island], conversely: (1) fails to ensure the fair and equitable treatment of all persons dealing with procurement systems, (2) fails to promote the maintenance of a procurement system of quality and integrity, and (3) fails to increase the public confidence in the public procurement procedures being followed.

Inter Island contends that the hearings officer "incorrectly found that it was unlawful under the Procurement Code for BWS to determine that it was in its best interest to waive the subcontractor listing requirement and allow Inter Island to obtain a written commitment from a plumbing subcontractor after bid opening." Because we have concluded that the hearings officer incorrectly determined that Inter Island was required to list a plumbing subcontractor in its bid, we need not address this contention.

D. *The Appropriate Remedy*

In applying for judicial review, Inter Island requested that this court: (1) vacate or reverse the hearings officer's November 10, 1999 Decision and reinstate the award by BWS to Inter Island of the contract for the Project; and (2) terminate

the subsequent award by BWS to Okada of the contract for the Project.

Although we conclude that the hearings officer erroneously determined that Inter Island was required to use licensed "C-37," "C-41," and "C-42" specialty contractors to perform portions of the work for the Project, and also that the hearings officer erred in concluding that Inter Island was required to list such subcontractors in its bid, we decline to award Inter Island the relief it requests.

The supreme court has explained in In re CARL Corp. that our authority to order remedial relief in procurement protest cases is limited:

> Unlike the American Bar Association's Model Procurement Code for State and Local Governments (ABA Model Code), after which it was modeled, *see* Stand. Comm. Rep. No. S8-93, in 1993 Senate Journal at 39, or, apparently, any other jurisdiction's procurement code, the State Procurement Code provides that
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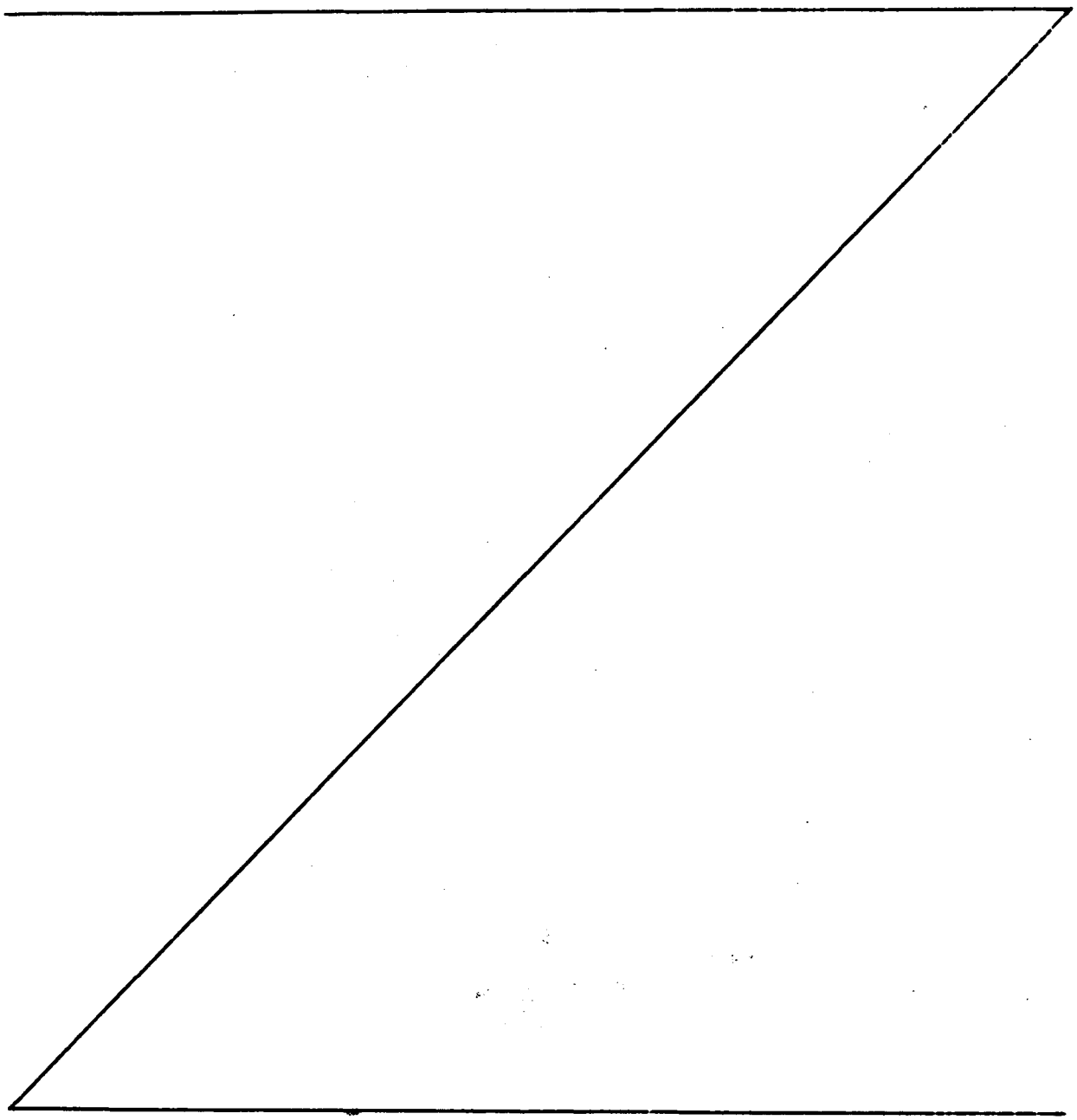
> > [t]he procedures and remedies provided for in this part, and the rules adopted by the policy office, shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract, . . . to resolve their claims or differences. The contested case proceedings set out in chapter 91[27/] shall not apply to protested solicitations and awards[.]
>
> HRS § 103D-704 [(1993)].
>
> The "remedies" available to a person aggrieved in connection with the solicitation or award of a contract are described in HRS §§ 103D-705 to 103D-707. HRS § 103D-705 provides that "[t]he provisions of section 103D-706 and section 103D-707 apply where it is determined administratively under sections 103D-701, . . . and 103D-709, or upon judicial review or action under section[]

27/ HRS chapter 91 is commonly referred to as the "Hawaii Administrative Procedure Act."

103D-710 . . ., that a solicitation or award of a contract is in violation of the law." Sections 103D-706 and 103D-707 provide:

> [§ 103D-706] **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) Cancelled; or
>
> (2) Revised to comply with the law.



[§ 103D-707] **Remedies after an award.** [28/] If

28/ HAR § 3-126-38 similarly provides for "remedies after an award." It provides, in pertinent part:

> (a) When there is no fraud or bad faith by a contractor:
>
> (1) Upon finding after award that a state or county employee has made an unauthorized award of a contract or that a solicitation or contract award is otherwise in violation of law where there is no finding of fraud or bad faith, the chief procurement officer or the head of a purchasing agency may ratify or affirm the contract or terminate it in accordance with this section after consultation with the respective attorney general or corporation counsel, as applicable.
>
> (2) If the violation can be waived without prejudice to the State or other bidders or offerors, the preferred action is to ratify and affirm the contract.
>
> (3) If the violation cannot be waived without prejudice to the State or other bidders or offerors, if performance has not begun, and if there is time for resoliciting bids or offers, the contract shall be terminated. If there is no time for resoliciting bids or offers, the contract may be amended appropriately, ratified, and affirmed.
>
> (4) If the violation cannot be waived without prejudice to the State or other bidders or offerors and if performance has begun, the chief procurement officer or the head of the purchasing agency shall determine in writing whether it is in the best interest of the State to terminate or to amend, ratify, and affirm the contract. Termination is the preferred remedy.
>
> The following factors are among those pertinent in determining the State's best interest:
>
> (A) The cost 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

(continued...)

[28/](...continued)

(D) The possibility of obtaining a more advantageous contract by resoliciting.

(5) Contracts based on awards or solicitations that were in violation of law shall be terminated at no cost to the State, if possible, unless the determination required under paragraphs (2) through (4) is made. If the contract is terminated, the State shall, where possible and by agreement with the supplier, return the goods delivered for a refund at no cost to the State or at a minimum restocking charge. If a termination claim is made, settlement shall be made in accordance with the contract. If there are no applicable termination provisions in the contract, settlement shall be made on the basis of actual costs directly or indirectly allocable to the contract through the time of termination. Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance was completed. Anticipated profits are not allowed.

(b) When there is fraud or bad faith by the contractor:

(1) Upon finding after award that a solicitation or award is in violation of law and the recipient of the contract acted fraudulently or in bad faith, the chief procurement officer or the head of a purchasing agency may, after consulting with the respective attorney general or corporation counsel, declare the contract void or ratify and affirm it in accordance with this section.

(2) The contract shall be declared void unless ratification and affirmation is found to be in the State's best interest under paragraph (3).

(3) The contract shall not be modified, ratified, and affirmed unless it is determined in writing that there is a continuing need for the goods, services, or construction under the contract and:

(A) There is no time to re-award the contract; or

(B) The contract is being performed for less

(continued...)

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 it is determined that doing so is in the best interests of the State; or

(B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses 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

---

[28/](...continued)

than it could be otherwise performed.

(4) In all cases where a contract is voided, the State shall endeavor to return those goods delivered under the contract that have not been used or distributed. No further payments shall be made under the contract and the State is entitled to recover the greater of:

(A) The difference between payments made under the contract and the contractor's actual costs up until the contract was voided; or

(B) The difference between payments under the contract and the value to the State of the goods, services, or construction the State obtained under the contract.

(C) The State may in addition claim damages under any applicable legal theory.

(5) The State shall be entitled to any damages it can prove under any theory including, but not limited to, contract and tort regardless of its ratification and affirmation of the contract.

(6) If a state or county employee knowingly and willfully lets a contract contrary to law, that employee may be personally liable for his or her actions.

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

In re CARL Corp., 85 Hawai'i at 448-49, 946 P.2d at 18-19 (footnotes added; footnote omitted). The supreme court also noted that in determining whether ratification of an awarded contract is in the best interest of the State, the following factors, enumerated in HAR § 3-126-38(a)(4), should be 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.

Id. at 449, 946 P.2d at 19. The supreme court explained:

> Thus, the award of the contract before it has been determined whether the solicitation or proposed award is in violation of law effectively limits the relief available to the person aggrieved by the solicitation or award. Where the contract has not yet been awarded, it is still possible to cancel the solicitation and proposed award, or to correct the violation. Once the contract has been awarded, whether or not it is in violation of law, and notwithstanding the prejudice to the aggrieved person or the public, the contract may still be ratified, provided it is "in the best interests of the State." Moreover, the further performance on the contract has proceeded, the more likely it is, given the applicable factors, that ratification of the contract is "in the best interests of the State," effectively eliminating any remedy, either to the public or the protestor, from an illegally entered contract.

Id. at 449, 946 P.2d at 19 (emphasis added).[29/]

[29/] The Hawai'i Supreme Court explained that in some instances the award of attorney's fees to the prevailing protestor is justified:

> The [Procurement] Code itself . . . contains an

(continued...)

In the instant case, the parties represented to this

[29/](...continued)
inherent incentive for an agency to award the contract immediately upon receipt of a protest: it can avoid the delay and expense that would be incurred in the cancellation and resolicitation should the protestor prevail. In addition, there is a built-in disincentive for an aggrieved participant to pursue a protest past the agency stage once the contract has been awarded: regardless of whether it is successful in proving a violation of the code, and no matter how egregious the violation, the only potential relief available to the protestor is recovery of its bid preparation costs. Requiring such a protestor to bear its own attorney's fees strengthens the financial disincentive to pursue a protest once the contract has been awarded, and essentially nullifies the most effective enforcement mechanism in the Code.

In the long term, this can only decrease competition among vendors. Moreover, if the procedural provisions of the Code are unenforceable except at the discretion of the prosecutor, the Code cannot "[i]ncrease public confidence in the integrity of the system" or, as it demonstrably failed to do in the instant case, "[p]rovide for fair and equitable treatment of all persons dealing with the government procurement system." 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.

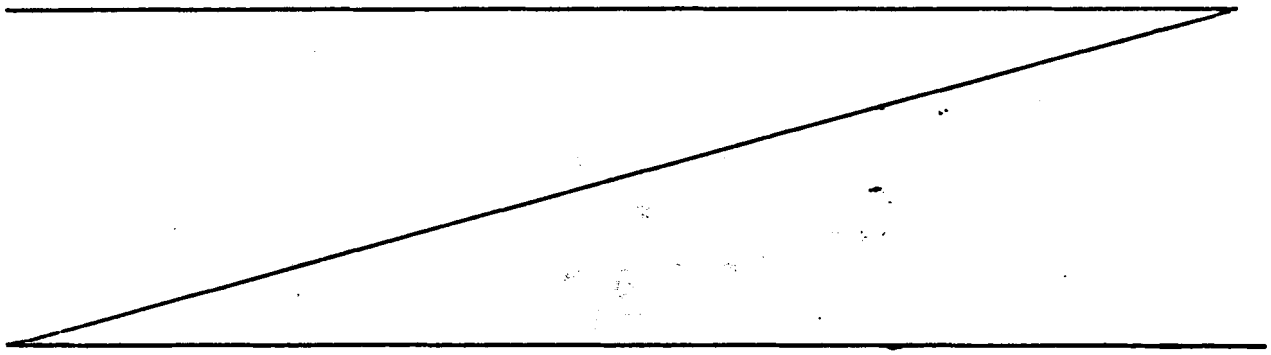
We do not believe that the legislature intended this result. The remedy provisions of the procurement code were intended to encourage the settlement of disputes "through administrative processes to save time and expense for both parties *while preserving all rights and maintaining fairness.*" Sen. Stand. Comm. Rep. No. S8-93, in 1993 Senate Journal, at 39 (emphasis added). Fairness is not maintained, however, by shifting the economic burden of enforcing the Code to a protestor, who, because of bad-faith actions of the contracting official, has been deprived of any means of being made whole following fruitless participation in an unlawfully conducted procurement process.

In re CARL Corp. v. State Dep't of Educ., 85 Hawai'i 431, 460, 946 P.2d 1, 30 (1997) (*CARL I*). However, we find the supreme court's ruling inapposite to the instant case, where the contracting official did not act in bad faith. Instead, BWS properly awarded the Project contract to Inter Island, only to have the award reversed by the hearings officer. We conclude that in such an instance, it is unfair to penalize BWS and award attorney's fees to Inter Island. The supreme court subsequently classified the attorney's fees awarded in *Carl I* as an "exceptional rule." In re CARL Corp. v. State Dep't of Educ., 93 Hawai'i 155, 170, 997 P.2d 567, 582 (2000) (*CARL II*). We decline to award such an "exceptional" remedy in the instant case.

court during oral argument that the contract for the Project has been awarded to Okada, which commenced performance under the contract several months ago. To order cancellation of BWS's contract with Okada and order BWS to award a new contract to Inter Island to complete the remaining work for the Project would not, in our view, be in the best interests of BWS and the public. Not only would the Project be delayed while Okada closed and Inter Island mobilized operations at the Project site, but the Project would be completed on a piecemeal basis, leading to accountability questions in the event problems ensued after the Project was completed. Moreover, Inter Island has already been awarded compensation "for actual expenses, if any, that were reasonably incurred under the contract and reasonable profit based upon any performance on the contract up to the time of termination."

CONCLUSION

In light of the foregoing discussion, we vacate the hearings officer's November 10, 1999 Decision. However, we deny



Inter Island's request that we reinstate BWS's contract award to Inter Island and terminate BWS's contract award to Okada.

Darryl H. W. Johnston,
David F. E. Banks, and
Marc E. Rousseau (Cades
Schutte Fleming & Wright) for
intervenor-respondent-appellant.

James E. T. Koshiba and
Neal K. Aoki (Koshiba
Agena & Kubota) for
petitioner-appellee.

James A. Burns

Connie K.A. Watanabe

Daniel R. Foley

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

In the Matter of	)	PCH-99-11
	)	
OKADA TRUCKING CO., LTD.,	)	HEARINGS OFFICER'S FINDINGS
	)	OF FACT, CONCLUSIONS OF
Petitioner,	)	LAW AND DECISION
	)	
vs.	)	
	)	
BOARD OF WATER SUPPLY,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
INTER ISLAND ENVIROMENTAL SERVICES, INC.,	)	
	)	
Intervenor-Respondent.	)	
	)	

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

I. INTRODUCTION

By letter dated and filed on September 10, 1997 with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii Neal K. Aoki, Esq.. on behalf of Okada Trucking Co., Ltd. ("Petitioner"). requested a review of the denial of the protest filed by Petitioner with the Board of Water Supply, City and County of Honolulu, State of Hawaii ("Respondent") which protested the award of the contract for the construction of the Kaluanui Booster Station, Phase II, Kaluanui, Oahu, Job Number 99-131 ("Project") to Inter Island Environmental Services, Inc. The request was

filed pursuant to the provisions of the Hawaii Revised Statutes ("HRS") Chapter 103D and Section 103D-712 thereunder. The matter was set for a pre-hearing conference on September 22, 1999 and a hearing on September 29, 1999, and notice thereof was duly served upon the parties. By stipulation of the parties, approved by the Hearings Officer, Inter Island Environmental Services, Inc. ("Intervenor") was permitted to intervene as a respondent and participate in the proceedings on this matter.

On September 22, 1999, Respondent and Intervenor filed their respective pre-hearing briefs and the pre-hearing conference was held as scheduled with Mr. Aoki representing Petitioner, Mark K. Morita, Esq. representing Respondent and David F.E. Banks, Esq. and Marc E. Rousseau, Esq. representing Intervenor. Matters of procedure and the issues to be addressed at the hearing were discussed. The parties agreed to the filing of a single set of exhibits to avoid duplication. Petitioner who had not filed a prehearing statement earlier filed its prehearing statement on September 24, 1999.

The matter came on for hearing on September 29, 1999 with Petitioner represented by Mr. Aoki, Respondent represented by Mr. Morita and Intervenor represented by Mr. Banks and Mr. Rousseau.

Intervenor orally moved to dismiss Petitioner's request for review at the conclusion of Petitioner's presentation. Upon a review of the evidence presented by Petitioner and consideration of the arguments by the parties Intervenor's motion was denied.

At the conclusion of the presentations by the parties, the Hearings Officer requested that the parties submit proposed findings of fact and conclusions of law pursuant to the provisions of Hawaii Administrative Rules ("HAR") § 3-126-72, and to submit written closing arguments. These were to be filed by the parties by October 14, 1999.

On October 13, 1999, Petitioner filed a Motion to Reopen Hearing To Take Further Evidence and a hearing thereon was set for October 20, 1999. A memorandum on the motion was filed by Respondent on October 18, 1999 and a memorandum in opposition to the motion. was filed by Intervenor on October 19, 1999.

On October 19, 1999, Petitioner filed a supplemental declaration in support of its motion. Intervenor on the same day filed a motion to strike such supplemental declaration.

On October 20, 1999, the hearing on Petitioner's motion to reopen hearing was held with Petitioner represented by Mr. Aoki, Respondent represented by Mr. Morita and Intervenor represented by Mr. Rousseau. The Hearings Officer upon review of the respective memorandum filed by the parties and consideration of the arguments of the parties denied Petitioner's motion to reopen the hearing to take additional evidence. The parties were thereupon ordered to file both their written final arguments and their proposed findings of fact and conclusions of law by October 22, 1999. These were timely filed by all the parties.

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

II. FINDINGS OF FACT

1. On or about May 6, 1999, Respondent issued an Invitation for Bids ("IFB") seeking sealed bids for the construction and installation of the Kaluanui Booster Station, Phase II, Kaluanui, Oahu, Job Number 99-131.

2. The IFB called for the installation of approximately three pumping units and appurtenances, a pump/control building and appurtenances, including all mechanical and electrical work; site work; approximately 700 linear feet of 16-inch Class 52 water main and appurtenances; an access road; and, other related incidental work.

3. The IFB in that portion denoted "NOTICE TO CONTRACTORS, ADVERTISEMENT FOR BIDS" stated the following requirement:

> To be eligible to bid, the prospective bidder must give separate written notice of his/her intention to bid together with certifications that he/she is licensed to undertake this project pursuant to Chapter 444, HRS, relating to the licensing of contractors, to the Director of Budget and Fiscal Services, City and County of Honolulu.

4. The IFB in Section SP-1 INSTRUCTIONS TO BIDDERS stated in paragraph 5. RESPONSIBILITY AND QUALIFICATION OF BIDDERS:

> Prospective bidders or offerors must be capable of performing the work for which the bids are being called. The procurement officer shall determine whether the prospective bidder has the ability to perform the work intended.

5. Formatted bid proposal forms which the bidders used to submit their bids were provided by Respondent. The following provision was included in the forms:

> LIST OF JOINT CONTRACTOR AND SUBCONTRACTOR
> Section 3-122-21, HAR, provides that each bid for public works construction contracts shall include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the public works construction contract. The bid shall indicate the value and scope of work to be performed by such joint contractors or subcontractors. All bids which do not comply with this requirement may be rejected. However, where 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 listing of the joint contractor or subcontractor may be waived if it is in the best interest of the BWS [Board of Water Supply]. (See SECTION SP-1, INSTRUCTIONS TO BIDDERS)

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

. . .

> 9. That the Contractor is licensed to undertake this project pursuant to Chapter 444, HRS, relating to licensing of Contractors.

6. Intervenor used the formatted form provided by Respondent and submitted its lump sum for bid Item No. 2 of the bid items which stated:

> Provide and install booster pumping units within booster station, inclusive of pumps, motors, piping, fittings, valves, flow tube, transmitters, recorders, switches, gages, emergency pumping piping and connection , interior piping (as listed in Drawing C-4), and appurtenances, in place complete, all in accordance with the plans and specifications, ready for use.

7. At least a portion of the work described under Item No. 2 required the services of a duly licensed plumber with a C-37 specialty classification license for completion.

8. On June 10, 1999, the designated bid submission and bid opening date for the Project, Respondent opened the sealed bids, tabulated them and determined that the lowest bid was submitted by Intervenor in the sum of $1,349.160.00. One percent of that amount is $13, 491.60.

9. Petitioner was the second lowest bidder with its bid of $1,375.000.00. The difference between the two bids is $25,840.00.

10. Intervenor is licensed as an "A" general engineering contractor. The bid submitted by Intervenor did not list any joint contractor or subcontractor who possessed a C-37 specialty classification license for plumbing, a C-41 specialty classification license for reinforcing steel, or a C-42 specialty classification license for roofing.

11. Petitioner knew or should have known, after the bid opening on June 10, 1999, that Intervenor had not listed any joint contractor or subcontractor possessing a specialty license for plumbing, reinforcing steel and/or roofing.

12. The normal practice and procedure followed by Respondent was to award competitive bid contracts within one or two weeks after the bid opening day.

13. On June 10, 1999, following the bid opening or shortly thereafter, The Pacific Resources Partnership ("PRP")[1] through Bill Naone ("Naone"), who was employed thereat as a compliance analyst, contacted Gayson Ching ("Ching"), Respondent's employee, to inquire into the status of the contract award and to communicate PRP's concern regarding the failure of Intervenor to list all the specialty subcontractors that were necessary to perform the Project construction.

14. About two days after the June 10, 1999 bid opening date, Naone talked to Gavin Hubbard ("Hubbard"), employed by Petitioner as its estimator, and discussed Intervenor's failure to list subcontractors with plumbing and other specialty licenses whose work was required to complete the Project.

[1] PRP is an unregistered partnership doing business in Hawaii. Part of PRP's activities include assisting its signatory contractors in their efforts to bid on a "level playing field" for public works contracts and to ensure compliance with applicable law.

15. Petitioner was at that time and continues to be a member of PRP.

16. Petitioner, through Hubbard, also contacted Respondent's employee Ching to inquire into Intervenor's failure to list subcontractors with the specialty licenses necessary to complete the Project.

17. On or about June 18, 1999, Ching contacted Intervenor's president Peter B. Richards ("Richards") to inquire into Intervenor's failure to list in their bid any subcontractor licensed to do work in the plumbing, reinforcing steel and roofing specialties.

18. Sometime between June 10 and June 22, 1999, Naone of PRP was informed by Mike Fuke, Respondent's Engineering Division Chief, that Respondent intended to award the Project contract to Intervenor.

19. Petitioner was not informed by Naone of his conversation with Mr. Fuke concerning Respondent's intention to award the Project contract to Intervenor.

20. Hubbard for Petitioner, was reluctant to pursue any protest against Respondent because he believed that such action might interfere with the good relationship Petitioner had with Respondent, and because he wanted to give Petitioner an opportunity to "figure out" what it would do. Hubbard expected Ching to notify him before any award was made.

21. A letter dated June 21, 1999 sent to Respondent on behalf of PRP by its attorney Neal K. Aoki, Esq., of Koshiba, Agena & Kubota, stated:

> We submit that any bid proposal which does not include all of the specialty licenses (to be held by either the bidder and/or its joint contractor/subcontractor) required to complete the work described in the bid documents should be deemed non-responsive and, therefore, disqualified or rejected. For example, the bid proposal of Inter-Island Environmental Services, Inc. ("Inter-Island") for the Kaluanui Booster Station project, indicates that neither Inter-Island nor any of its joint contractors or subcontractors hold the "C-37" (Plumbing), "C-41" (Reinforcing Steel) and "C-42" (Roofing) contractor's licenses, all of which are required for significant portions of the contract work.
>
> . . .
>
> Based on the foregoing, we hereby request that all bid proposals which do not include all of the specialty licenses

required to complete the work described in the bid documents be disqualified and rejected.

22. On or about June 18, 1999, Respondent requested Intervenor to provide it with the bids submitted by its subcontractors with specialty classification licenses for C-37 (plumbing), C-41 (reinforcing steel), and C-42 (roofing).

23. By letter which was dated June 21, 1999 but date stamped as received by Respondent's engineering division on July 1, 1999, Intervenor responded to Respondent's inquiry of June 18, 1999 concerning the listing of its subcontractors for the Project. Intervenor enclosed copies of the quotations submitted by subcontractors in the three specialty classifications under review, plumbing (C-37), reinforcing steel (C-41) and roofing (C-42). Intervenor stated:

> Quite simply, we did not list subcontractors for the plumbing and installation of pumps because their quotes were considerably below 1% or $13,500 of our quotation. Under the "HAWAII ADMINISTRATIVE RULES, TITLE 3" we are not required to list subcontractors under 1%.

24. In its letter dated June 21, 1999 to Respondent, Intervenor further stated:

> Should the Board of Water Supply require us to use plumbers for the pipe fitting associated with the pumps which is normally performed under our "A" license, our subcontract to a plumbing contractor would still be less than 1%. Inter-Island Environmental Services, Inc. would supply the material and the assistance of our pipefitters to a plumbing contractor such as J's Plumbing who we normally use for our plumbing requirements. Their quotation had been attached for your review. (Emphasis added)

25. The quotations submitted by Intervenor were from: (1) J's Plumbing for plumbing (C-37), dated June 22, 1999, in the sum of $8,300.00; (2) Associated Steel Workers, Ltd. For reinforcing steel (C-41), dated June 9, 1999, in the sum of $8,675.00; and (3) ALCAL Hawaii for roofing (C-42), dated June 10, 1999, in the sum of $12,560.00. The quotations from J's Plumbing and Associated Steel Workers, Ltd. were to furnish only the licensed labor with Intervenor to furnish the necessary materials and supplies to accomplish

the job, and, in the case of J's Plumbing, Intervenor was to also furnish pipefitters to assist J's Plumbing's licensed plumber to do the plumbing work.

26. On June 10, 1999, when Intervenor submitted its bid for the Project, it did not have a commitment from any subcontractor with a plumbing specialty classification (C-37) license to perform the necessary plumbing work and was, therefore, incapable of completing the Project for which it had submitted a bid. This inability continued until June 22, 1999 on which date it received J's Plumbing's proposal and commitment.

27. By letter dated July 28, 1999, Respondent informed PRP that the latter's request that Respondent reject bids that had failed to name all the specialty classification subcontractors needed to complete the Project, which Respondent had reviewed as a protest, was dismissed. Respondent informed PRP that the dismissal was based upon: (1) PRP's lack of standing to submit a protest; (2) the untimely submission of the protest; and (3) Respondent's authority to waive the non-responsive aspect of the bid based upon the provisions of HRS § 103D-302(b).

28. Intervenor prepared a listing which broke out the categories in bid item No. 2 which related to the installation of the booster pumping unit that required the use of a licensed plumber. Under the category Fabrication, Intervenor included $8,300.00 for J's Plumbing's services, and $4,136.00 for the cost of its pipefitters' labor for a total amount of $12,436.00 which was less than one percent of Intervenor's total bid amount.

29. The general practice of the general contractors in the Honolulu construction community is to request prospective subcontractors to submit proposals that include all necessary labor and materials to deliver a completed item.

30. Respondent in its evaluation of the bids submitted did not inquire into whether a bidder had all necessary licensed joint contractors and/or subcontractors committed to proceed with and complete the project, but instead relied upon the bidder's proposals as representing that the bidder had secured all the necessary licensed joint contractors and/or subcontractors to begin and to complete a project.

31. By letter dated July 28, 1999, Respondent notified Intervenor that the Project contract had been awarded to Intervenor in the sum of $1,349,160.00, and instructed Intervenor to complete the contract document which Respondent had enclosed.

32. By letter dated August 4, 1999, hand delivered to Respondent the same day, Neal K. Aoki, Esq. of Koshiba Agena & Kubota on behalf of Petitioner filed a protest of Respondent's award of the Project contract to Intervenor. The basis of its protest was that the Intervenor was not qualified and capable of completing the Project contract because Intervenor had not listed any subcontractors with specialty classification licenses in the plumbing, reinforcing steel and roofing specialties where work was necessary for the Projects completion. This basis of Petitioner's protest was essentially the same as the premise of PRP's letter of June 21, 1999, which Respondent had considered as a "protest" of its consideration of Intervenor's bid for acceptance.

33. By letter dated August 30, 1999, Respondent denied Petitioner's protest of the award of the Project contract to Intervenor stating: (1) that the protest was untimely as Petitioner, on June 10, 1999 when the bids were opened, knew or should have known of the facts which led to its filing of its protest; and, (2) that Respondent had the discretionary authority to waive Intervenor's failure to provide the names of all subcontractors when the unidentified subcontractor's work was less than one percent of the total bid amount.

34. Petitioner filed a timely request for review of Respondent's denial of its protest.

35. There is no statutory, regulatory or other standard that prohibits a general contractor from entering into a contract with a specialty classification subcontractor for the subcontractor to provide only the labor necessary to perform the job as opposed to providing all labor and materials.

III. CONCLUSIONS OF LAW

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

A. Jurisdiction

The provisions of HRS § 103D-709(a) extend jurisdiction to the Hearings Officer to review de novo the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§ 103D-310,

103D-701 or 103D-702. The Hearings Officer, in doing so, has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS § 103D-701. See: Carl Corp. v. State Dept. of Educ., 85 Haw. 431 (1997). And, in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accord with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS § 103D-709(f). In the present matter, the issues presented for the Hearings Officer's determination were: (1) whether Petitioner's protest was timely filed with Respondent, and (2) whether Intervenor's bid was responsive and Intervenor was a responsible bidder.

Petitioner as the party initiating the proceeding, had the burden of proof which included the burden of producing credible evidence and of persuasion, and establishing by a preponderance of the evidence that its allegations were correct. HRS § 103D-709(c).

B. Timeliness of Protest

The procedure for filing a protest of a procurement action concerning the solicitation or award of a contract is governed by the provisions HRS § 103D-701(1999) which stated:

> (2) Any actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. A protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract either under section 103D-302 or 103D-303 as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.

This was further amplified by HAR § 3-126-3(a) which stated:

> § 3-126-3 Filing of protest. (a) Protests shall be made in writing to the chief procurement officer or the head of a purchasing agency, and shall be filed in duplicate

> within five working days after the protestor knows or should have known of the facts leading to the filing of a protest. A protest is considered filed when received by the chief procurement officer or the head of a purchasing agency. Protests filed after the five-day period shall not be considered.
>
> (b) Protesters may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.

Respondent and Intervenor contended that on June 10, 1999, the Project bid opening date, Petitioner knew or should have known of the facts giving rise to the filing of its protest since Petitioner's protest was based upon Intervenor's failure to list its plumbing, reinforcing steel and/or roofing subcontractors which fact was known by Petitioner when the bids were opened and announced. Petitioner, on the other hand, alleged that its protest was not merely that Intervenor had failed to list subcontractors as required by the provisions of HRS § 103D-302(b) and HAR § 3-122-21(a)(8), but that Respondent, despite Intervenor's non-responsive bid, on July 28, 1999, awarded the Project contract to Intervenor. Petitioner received knowledge of the award on July 30, 1999 and filed its protest on August 4, 1999, which was within five working days of its receipt of information of the award.

The provisions of HRS § 103D-302(b) stated:

> (b) An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction, it shall specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. Construction bids that do not comply with this requirement may be accepted if acceptance is in the best interest 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 per cent of the total bid amount.

And, the provisions of HAR § 3-122-21(a)(8) stated:

> (8) For construction projects the bidder shall provide:

(A) The name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract; and

(B) The nature and scope of the work to be performed by each.

Construction bids that do not comply with the above requirements may be accepted if acceptance is in the best interest 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.

Had the procurement officer not waived Intervenor's bid, which failed to provide the names of its subcontractors for the Project and was therefore non-responsive, Petitioner would have had no grievance nor reason to file a protest with Respondent. However, the procurement officer's action in waiving the subcontractor listing requirement and awarding the Project contract to Intervenor gave rise to Petitioner's allegation that the award of the Project contract to Intervenor violated the provisions of the procurement statutes and rules.

Prior to Respondent's communication of its intent to award or its award of the Project contract to Intervenor, Petitioner's protest would have been premature since Respondent might have rejected Intervenor's non-responsive bid. See: In the Matter of GTE Hawaiian Telephone Company Incorporated v. Department of Finance, County of Maui, PCH-98-6 at 10 (HOFO December 9, 1998), citing Artais, Inc., 88-3 BCA, No. 21025 (1988). In the Artais, Inc. case at 106,207, the United States Board of Contract Appeals in reviewing whether the petitioner had made a timely protest under similar circumstances as presented here stated:

> Our rules require that a protest, other than one based upon alleged improprieties in a solicitation which are apparent before bid opening, shall be filed no later than ten working days after the basis for the protest is known or should have been known, whichever is earlier. Rules 2(c), 5(b)(ii), 7(f)(2).
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> Both the FAA and Qualimetrics, by arguing that ARTAIS should have known the basis for its protest at bid opening, evidence a misunderstanding of our timeliness rules. The 'basis' for a protest grounded upon the non-responsiveness of another bid, in addition to the alleged non-responsiveness itself, is the potential protester's knowledge that the Government has awarded, or

> intends to award, the contract to the non-responsive bidder. Prior to that time, the protest may be deemed premature since the Government could well reject the offending bid. In other words, the adverse action is the agency's acceptance of an alleged non-responsive bid, not merely the offeror's submission of such bid. (Emphasis added).

Petitioner's action was consistent with the foregoing in that, although it knew of Intervenor's non-responsive bid which was identified at the bid opening proceeding as the low bid, and, having brought the non-responsive aspects of Intervenor's bid to Respondent's attention, Petitioner waited to give Respondent an opportunity to make a determination on the course of action that it would follow. Petitioner, upon learning on July 30, 1999 that Respondent had awarded the Project contract to Intervenor, filed its written protest of such award on August 4, 1999, within five working days after it obtained knowledge of the award.

Intervenor contended that PRP's knowledge of Respondent's intention to award the Project contract to Intervenor, obtained sometime between 10 and 22 June 1999, should be imputed to Petitioner based upon the fact that the attorney who represented PRP, in sending PRP's letter dated June 21, 1999 to Respondent, also represented Petitioner in this matter, and, that PRP's employee Naone had discussions with Petitioner's employee Hubbard concerning the non-responsive bid submitted by Intervenor.[2] Hubbard testified that he had no knowledge of Respondent's pre-award intention, and, the information that Respondent had awarded the Project contract to Intervenor was the first knowledge he had that Respondent had made a determination on whether to waive the defect in the non-responsive bid or to reject Intervenor's bid proposal.

The Hearings Officer concludes that the knowledge that PRP's Naone possessed may not be imputed to Petitioner, as the requirement stated in HRS § 103D-701(a) and HAR § 3-126-3(a) refers to knowledge that the aggrieved person had or should have had and not knowledge possessed by another person. Accordingly, the Hearings Officer also

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[2] Evidence adduced neither established that Naone had passed on to Hubbard information of Respondent's intentions to award the Project contract to Respondent, nor that the attorney representing PRP, in such capacity, knew of Respondent's intention to waive the non-responsive aspect of Intervenor's bid and award the Project contract to Intervenor, nor that the attorney if he had such knowledge, had shared it with Petitioner whom the attorney subsequently represented. Additionally, the tenor of PRP's June 21, 1999 letter to Respondent submitting for Respondent's consideration the disqualification or rejection of all bids that were non-responsive, with reference to Intervenor's low bid, was suggestive of a course of action and not a protestation of a known intent on Respondent's part to award the Project contract to Intervenor.

concludes that the protest filed by Petitioner protesting the award of the Project contract to Intervenor who had submitted a non-responsive bid was properly and timely filed in compliance with the provisions of HRS § 103D-701(a) and HAR § 3-126-3(a).

C. Responsiveness and Responsibility of Awardee Contractor

Petitioner alleged that the bid submitted by Intervenor was non-responsive as it failed to list its subcontractors for plumbing, reinforcing steel and roofing work as required by the IFB and provisions of HRS § 103D-302(b) and HAR § 3-122-21(a)(8). Petitioner further alleged that Respondent's waiver of the non-responsive aspects of Intervenor's bid and the award of the Project contract to Intervenor was unlawful because (1) the plumbing subcontractor's proposal was obtained by Intervenor after the bid opening, and (2) the plumbing subcontractor's proposal was for labor only and not for labor and materials as a package bid which would have resulted in a plumbing subcontractor's proposal that would have been in an amount that was more than one percent of the total bid amount.

The provisions of HRS § 103D-302(b) and HAR § 3-122-21(a)(8), required that all bids for construction contracts identify the subcontractors to be engaged by the bidder in the performance of the contract, as well as the nature and scope of the work to be performed by the subcontractors. The fact that Intervenor had failed to comply with the statutes and rules in this regard and submitted a non-responsive bid was not disputed by the parties. Neither was there a dispute concerning the need for the performance of work by subcontractors with specialty classification licenses in plumbing (C-37), reinforcing steel (C-41) and roofing (C-42) for the completion of the Project nor that Intervenor did not hold the necessary specialty classification licenses to do that. However, the matter did not end there since the provisions of HRS § 103D-302(b) and HAR § 3-122-21(a)(8) provided that construction bids that did not comply with the subcontractor listing requirement may nevertheless be accepted if acceptance is (1) in the best interest of the State, and, (2) the value of the work to be performed by the subcontractor is equal to or less than one percent of the total bid amount. Respondent's procurement officer pursuant to these provisions determined that the value of the work to be performed by Intervenor's subcontractors for plumbing, reinforcing steel and roofing was each less than one percent of the total bid amount and that acceptance of Intervenor's bid was in the best interest of Respondent. The Project contract was thereupon awarded to Intervenor. Petitioner contended that the award

was nonetheless unlawful because the subcontract amounts were reduced to fall below one percent of the total bid amount by "breaking up" the plumbing and reinforcing steel subcontractor's portions of work by separating the labor portion from the materials and supplies portion and having the subcontractors submit proposals to provide only labor with Respondent supplying all necessary materials and supplies, and, in the case of the plumbing subcontractor also providing labor for pipefitting as well.

The Hearings Officer concludes that although Petitioner had established that the general practice within the Honolulu contractor community was to request subcontractors to submit proposals which included all labor and materials needed to accomplish their portion of the project, it had not established that it was unlawful or even improper for a general contractor to limit the subcontractor's proposal to that of providing only the necessary labor with the general contractor providing all materials and supplies and unskilled labor, as the case may be, to perform the subcontractor's portion of the project. Consequently, the Hearings Officer further concludes that: (1) Intervenor had not acted unlawfully in having the subcontractors who were to do the plumbing and reinforcing steel work submit proposals for labor only; and, (2) the proposals thus submitted amounted to less than one percent of Intervenor's total Project bid amount thereby qualifying Intervenor for Respondent's waiver of Intervenor's failure to list the plumbing, reinforcing steel and roofing subcontractors in its bid.

Petitioner, however, additionally contended that Intervenor's bid was non-responsive in another respect, specifically, that at the time of the submission of its bid and the time of bid opening on June 10, 1999, Intervenor did not have a subcontractor contractually bound to perform the necessary plumbing work required on the Project. The plumbing subcontractor's proposal was submitted to Intervenor on June 22, 1999, twelve days after the bid submission and bid opening date. The obtaining of the plumbing subcontractor's proposal was apparently in response to Respondent's inquiry, on or about June 18, 1999, concerning Intervenor's failure to list in its bid the subcontractors who were to perform the plumbing, reinforcing steel and roofing portions of the Project contract.[3]

[3] Petitioner presented no evidence to establish that the subcontractors who were to perform the reinforcing steel and roofing portions of the Project contract were not contractually bound to perform such construction for Intervenor at the time of Intervenor's bid submission or at the time of bid opening on June 10, 1999.

Respondent and Intervenor contended that the provisions of the statute and rules which authorized the procurement officer to exercise his discretion and, where the value of the subcontract is equal to or less than one percent of the total bid amount, waive the bidders failure to list the subcontractors who were to perform work on the construction project, also allowed the general contractor, Intervenor, to obtain written proposals from the subcontractor after the bid opening. Intervenor cited In the Matter of Fletcher Pacific Construction Co., Ltd. vs. State of Hawaii, Department of Transportation, PCH-98-2 (HOFO May 19, 1998) in support of such proposition.[4]

The circumstances in that case is distinguishable from the present matter as Intervenor here had no mistaken belief that a subcontractor with the required plumber's specialty license was not needed for the performance of the Project contract. To the contrary, Intervenor was fully aware that a properly licensed plumbing subcontractor was required for the performance of the Project contract, however, it contended that the provisions of HRS § 103D-302(b) and HAR § 3-122-21(a)(8) allowed a bidder to elect not to list the name of a subcontractor who was to perform work on the Project where the value of work to be performed by such subcontractor was equal to or less than one percent of Intervenor's total bid amount.

The provisions of the statutes and rules are clear and unequivocal. They state that the bidder shall provide the name of each subcontractor to be engaged to perform on the contract with the bidder. Consequently, Intervenor, the bidder, had no option to elect to provide or not to provide the name of its subcontractor even where the value of the work to be performed by the subcontractor was one percent or less than the total bid amount. The consequences of a bidder's failure to provide the name of each subcontractor as required by the IFB, statutes and rules would result in a non-responsive bid that must be rejected. HAR § 3-122-97(a)(2). However, in this matter, the procurement officer pursuant to the provisions

[4] In that case, the successful bidder had failed to list a subcontractor possessing a specialty classification license for the installation of wheelchair lifts believing that as a general contractor, it was authorized to perform the installation since the wheelchair lifts were to be purchased as fully factory assembled. The procurement officer in that case determined that: (1) contrary to the general contractor's belief, a subcontractor licensed in the elevator installation specialty was required to install the wheelchair lifts, (2) the value of the work for the wheelchair lifts was less than one percent of the total bid amount, and (3) that it was in the best interest of the State to allow the general contractor to add a properly licensed subcontractor for the installation of the wheelchair lifts. The Hearings Officer there determined that the petitioner had failed to establish that the procurement officer's determination that the post award addition of a licensed subcontractor was in the best interest of the State was unlawful.

of HRS § 103D-302(b) and HAR § 3-122-21(a)(8) had exercised his discretion and waived the non-responsive aspect of Intervenor's bid and accepted the bid based upon his determination that acceptance would be in the best interest of Respondent. Such determination might have precluded the need for further inquiry, however, Petitioner alleged that acceptance of Intervenor's bid was not in the best interest of the Respondent as it was contrary to the provisions and intent of the Hawaii Procurement Code.

The IFB in Section SP-1, INSTRUCTIONS TO BIDDERS stated in paragraph 5 RESPONSIBILITY AND QUALIFICATION OF BIDDERS:

> Prospective bidders or offerors must be capable of performing the work for which the bids are being called. The procurement officer shall determine whether the prospective bidder has the ability to perform the work intended. (Emphasis added).

The Hearings Officer concludes that such requirement subsumes the bidder, at the time of bid submission and no later than the bid opening date, was ready and able to perform the work required on the construction project if awarded the contract. Such ability and readiness to perform required that the bidder had its subcontractors "lined up" and contractually bound to perform their respective portions of work on the project. The provisions of HRS § 103D-302(b) and HAR § 3-122-21(a)(8), which required the listing of the names of all subcontractors to be engaged in performing on the project, is a logical and reasonable requirement to assure that the bidder was fully set to perform on the contract. Intervenor, had failed to provide the name of a plumbing subcontractor in its bid until June 22, 1999 because it did not have a contractually bound plumbing subcontractor to work on the project. At the time of bid opening, Intervenor's bid was therefore (1) a non-responsive bid, not merely because it failed to provide the name of its plumbing subcontractor but, additionally, because Intervenor did not have a plumbing subcontractor bound to perform on the contract at the time of bid submission and bid opening; and (2) Intervenor was not a "responsible bidder" since it did not have "the capability in all respects to perform fully the contract requirements...." HRS § 103D-104 and HAR § 3-120-2.

Subsequently, on June 22. 1999, twelve days after bid opening, Intervenor received a proposal from its plumbing subcontractor, J's Plumbing whereupon Intervenor

thereafter notified Respondent of such fact by letter which was dated June 21, 1999[5] however was date stamped as received by Respondent's engineering division ten days later on July 1, 1999. The procurement officer's determination that acceptance of Intervenor's non-responsive bid was in the best interest of Respondent was made after Intervenor had all its subcontractors named and contractually bound to assist Intervenor in performing on the Project contract. The issue then presented is whether the waiver of Intervenor's non-responsive bid which not only failed to provide the name of its subcontractors as required by the statutes, rules and IFB, but, also, failed to have, at the time of the bid submission and bid opening, a contractually bound subcontractor to perform the required plumbing work on the Project was in the best interest of Respondent.

By enactment of the Hawaii Public Procurement Code ("Procurement Code"), HRS Chapter 103D, the Legislature expressed its intent to revise, strengthen, and clarify Hawaii's laws governing the procurement of goods and services and construction of public works by establishing a comprehensive code that would:

(1) Provide for fair and equitable treatment of all persons dealing with the government procurement systems;
(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.

See: Standing Committee Report No. S8-93, 1993 Senate Journal at 39.

The above expressed Legislative purpose was implemented by the Procurement Policy Board which promulgated rules that would promote economy, efficiency, and effectiveness in the procurement process by:

(1) Simplifying, clarifying, and modernizing the law governing procurement;
(2) Requiring the continued development of procurement policies and practices;
(3) Making the procurement laws of the State and counties as consistent as possible;
(4) Ensuring the fair and equitable treatment of all persons who deal with the procurement system of the State and counties;

[5] Intervenor's letter to Respondent dated June 21, 1999, refers to J's Plumbing's quotation, supposedly attached for Respondent's review although such "quotation" in the form of J's Plumbing proposal did not exist and had not been sent to Intervenor until June 22, 1999.

(5) Providing increased economy in procurement activities and maximizing to the fullest extent practicable the purchasing value of public funds;
(6) Fostering effective broad-based competition within the free enterprise system;
(7) Providing safeguards for the maintenance of a procurement system of quality and integrity; and
(8) Increasing public confidence in the procedures followed in public procurement.

HAR § 3-120-1. Having reviewed the matter presented in light of the foregoing, the Hearings Officer concludes that acceptance of Intervenor's bid and award of the Project contract to Intervenor was not in the best interest of Respondent as it was contrary to the expressed purposes and principles of the Procurement Code and the implementing rules. Although acceptance of Intervenor's low bid would maximize the purchasing value of public funds, such award to Intervenor, conversely: (1) fails to ensure the fair and equitable treatment of all persons dealing with the procurement systems, (2) fails to promote the maintenance of a procurement system of quality and integrity, and (3) fails to increase the public confidence in the public procurement procedures being followed.

The question presented here was not merely one concerning the bidder's responsibility in fully performing on the contract, a matter that could be addressed and corrected after bid opening and before the award of the project contract, but was one that concerned the responsiveness of Intervenor's bid. The Hearings Officer's comments In the Matter of Hawaiian Dredging Construction Company v. Department of Budget and Financial Services, City and County of Honolulu, PCH-99-6 (HOFO August 9,1999), are instructive and helpful in addressing the present matter. There the issue presented was whether after bid opening the lowest bidder could be allowed to substitute a subcontractor who did not have the necessary experience required by the IFB with a subcontractor who had the required experience. The Hearings Officer there noted that the provision requiring the bidder to provide in the bid the names of subcontractors who are to perform on the project was primarily instituted to prevent bid shopping and bid peddling. Bid shopping is a practice whereby the low bidder uses its low bid to exert pressure upon other subcontractors into submitting still lower bids thereby increasing the general contractor's profits. In addressing the matters presented in that case it was stated:

> Thus, the listing requirement of HRS § 103D-302(b) was, in part, based upon the recognition that a low bidder who is allowed to replace a subcontractor after bid opening would generally have a greater leverage in its bargaining with other, potential subcontractors. By forcing the contractor to commit, when it submits its bid, to utilize a specified subcontractor, the Code seeks to guard against bid shopping and bid peddling. Thus, with one narrow exception, the failure to list a subcontractor in a bid for construction work renders a bid non-responsive under HRS § 103D-302(b). It therefore stands to reason that HRS § 103D-302(b) also precludes the substitution of a listed subcontractor after bid opening, at least in cases where the antibid shopping purpose of the listing requirement may be undermined. Any other conclusions would nullify the underlying intent of the listing requirement.

In the Matter of Hawaiian Dredging Construction Company, supra at 4. Citations and foot notes omitted.

The principle expressed in that matter is equally applicable here although the specific facts may not be the same. The situation presented in this matter in fact presents a more egregious situation for Intervenor had not only failed to provide the name of a plumbing subcontractor needed to perform construction on the Project, but, did not have a contractually bound plumbing subcontractor whose name it could provide at the time it submitted its bid or at the time of bid opening. The fact that Intervenor had obtained and identified J's Plumbing as its plumbing subcontractor after bid opening did not rectify the non-responsive aspect of its bid relating to Intervenor's failure to have a contractually bound subcontractor at the time Intervenor submitted its bid.[6] To allow such a procedure would be to allow bid shopping. Accordingly, the Hearings Officer concludes that Intervenor's failure to have a plumbing subcontractor bound and ready to perform on the contract at the time of bid submission, let alone at the time of bid opening, resulted in a non-responsive bid which should have been rejected. The attempt to allow Intervenor to rectify its failure by obtaining a plumbing subcontractor after bid opening, violated the provisions of the Procurement Code which were designed to treat all bidders fairly and equitably in their dealings with the

[6] It is problematic whether J's Plumbing would have submitted a proposal to provide only skilled labor and agree to have Intervenor provide the materials and pipefitters to assist J's Plumbing in performing its plumbing

government procurement system and to increase public confidence in the integrity of the government procurement system. The Hearings Officer concludes that Petitioner had established by a preponderance of the evidence that the procurement officer's determination waiving the non-responsive aspects of Intervenor's bid as being in the best interest of Respondent and awarding the Project contract to Intervenor was contrary to the provisions of the Procurement Code and the rules.

D. Remedies

The provisions of HRS §§ 103D-706 and 103D-707 address the remedies that are available where there is a determination that the Procurement Code had been violated. The provisions of HRS § 103D-707, categorize the remedies available after award of the contract into those where there is no fraud or bad faith present and those where fraud or bad faith is determined to be present. The Hearings Officer concludes that the evidence adduced do not support a conclusion that Intervenor had acted in bad faith, let alone acted fraudulently. Consequently, the only remedies available in the present instance are:

> (A) The contract may be ratified and affirmed, provided it is determined that doing so is in the best interest of the State; 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[.]

HRS § 103D-707(1).

The provisions of HAR § 3-126-38 offer excellent guidance in the formulation of an appropriate order for issuance by the Hearings Officer. At the outset the Hearings Officer concludes that a waiver of the violation would result in prejudice to Respondent and the unsuccessful bidders who had submitted responsive bids. Further, although Intervenor had been notified of its being awarded the Project contract it appeared that Respondent had not yet issued a notice to proceed to Intervenor. Additionally, although Respondent desired that work on the Project proceed quickly, evidence presented did not establish that there was

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work if it had been requested to submit a proposal prior to bid submission and not after bid opening and the announcement that Intervenor was the low bidder on the project.

no time to resolicit bids on the Project. The Hearings Officer therefore concludes that the appropriate remedy under the circumstances presented here would be a termination of the contract and Intervenor being compensated for actual expenses, if any, that were reasonably incurred under the contract and reasonable profit based upon any performance on the contract up to the time of termination.

IV. FINAL ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered that the contract awarded to Intervenor for Job 99-131, the construction of Kaluanui Booster Station, Phase II, Kaluanui, Koolauloa, Oahu, Hawaii be terminated.

DATED: Honolulu, Hawaii, NOV 10 1999.

GEORGE M. NAKANO
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs