



DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of)	PCH-96-8
)	
WALTER Y. ARAKAKI,)	HEARING OFFICER'S
GENERAL CONTRACTOR, INC.)	AMENDED DECISION
)	
Petitioner,)	
)	
vs.)	
)	
STATE OF HAWAII,)	
DEPARTMENT OF ACCOUNTING)	
AND GENERAL SERVICES,)	
)	
Respondent.)	

HEARINGS OFFICER'S AMENDED DECISION

Pursuant to and in accordance with the opinion of the Hawaii Supreme Court in **Walter Y. Arakaki, General Contractor, Inc., v. State of Hawaii, Department of Accounting and General Services**, ___ Haw. ___ (No. 20805; March 25, 1998) (PCH-96-8), the Hearings Officer amends the decision rendered herein on June 23, 1997, as follows:


The Hearings Officer orders that:

1. Respondent's rejection of Petitioner's bid is hereby set aside; and
2. Petitioner's bid is remanded to Respondent for reconsideration consistent with the

Hawaii Supreme Court opinion in this matter dated March 25, 1998 and the Hearing Officer's Findings of Fact and Conclusions of Law dated June 23, 1997.

Upon remand, Respondent shall reconsider Petitioner's bid, including the qualification and experience statement requested in the specifications, along with any other factor deemed appropriate by Respondent for the purpose of determining Petitioner's responsibility or nonresponsibility in conjunction with DAGS Job No. 12-16-0323.

Dated at Honolulu, Hawaii: APR - 6 1998



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

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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In the Matter of WALTER Y. ARAKAKI, GENERAL CONTRACTOR,
INC., Petitioner-Appellant, v. STATE OF HAWAI'I,
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES,
Respondent-Appellee

NO. 20805

APPEAL FROM THE OFFICE OF ADMINISTRATIVE HEARINGS,
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

(PCH-96-8)

MARCH 25, 1998

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

OPINION OF THE COURT BY MOON, C.J.

Petitioner-appellant Walter Y. Arakaki and General Contractor, Inc. [hereinafter, collectively Arakaki], the unsuccessful bidder for the contract to replace swimming pool chlorination systems for various public high schools, appeals from the decision of the Department of Commerce and Consumer Affairs (DCCA) Hearings Officer. The Hearings Officer canceled the entire solicitation¹ based on his conclusion that the process by which Arakaki's proposal was evaluated violated the State

¹ The record does not indicate whether a second solicitation process has commenced or will commence for the replacement of chlorination systems.

DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS
HEARINGS OFFICE
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CLERK SUPREME COURT

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Procurement Code, Hawai'i Revised Statutes (HRS) Chapter 103D (1993) [hereinafter, the Procurement Code].

For the reasons discussed below, we vacate that portion of the Hearings Officer's decision cancelling the solicitation and remand this case to the Hearings Officer for further action consistent with this opinion.

I. BACKGROUND

The following facts are undisputed.

On May 10, 1996, respondent-appellee State of Hawai'i Department of Accounting and General Services (DAGS) issued an Invitation for Bids (IFB) for job number 12-16-0323 to furnish labor and materials for the replacement of swimming pool chlorination systems at five public high schools. As part of the bidding procedure, the IFB required the submission of a bid together with a list of the pool bidder's qualifications and experience as set forth in Section 15480, part I, subsection 1.04 of the IFB [hereinafter, qualification and experience list]. Subsection 1.04 provides:

1.04 QUALITY ASSURANCE

Bidder Qualification: The pool bidders must have at least 5 years experience in the installation of swimming pool chemical treatment systems, must have a valid State of Hawaii C-49 swimming pool contractor's license, and must list at least 5 pool installations of this type which he has constructed in a satisfactory manner. Submit statement of qualification and experience list with bid. Experience list shall include project name, year constructed and phone number of pool manager at project site.

(Emphasis added.)

On June 20, 1996, Arakaki submitted the lowest bid at \$349,825.00. However, because his bid was not accompanied by a qualification and experience list, DAGS rejected Arakaki's bid as "non-responsive" on July 24, 1996.

On July 27, 1996, Arakaki appealed DAGS's rejection of his bid; however, State Comptroller Sam Callejo, on August 2, 1996, affirmed DAGS's rejection. On August 13, 1996, Arakaki requested reconsideration of the August 2, 1996 decision, which Callejo, by letter dated September 13, 1996, denied.

On September 20, 1996, Arakaki filed an administrative appeal with the DCCA. After conferring with the Hearings Officer on March 18, 1997, the parties stipulated to waive the hearing and to submit the matter for determination upon stipulated facts and exhibits. The Hearings Officer addressed whether Arakaki's failure to submit a qualification and experience list with his bid related to an issue of "responsibility" or "responsiveness."² If it was a matter of "responsibility," then Arakaki would be entitled to supplement his bid with a qualification and

² The hearings officer's conclusion of law, which is unchallenged by the parties explains:

Pursuant to HRS § 103D-104 and [Hawaii Administrative Rules] § 3-120-2, a "responsive bidder" is defined as "a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids or request for proposals." In contrast, a "responsible bidder" is "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."

(Footnote omitted.)

experience list. Pflueger v. City and County of Honolulu, 5 Haw. App. 13, 17, 674 P.2d 1019, 1023 (1984). If it was a matter of "responsiveness," then he would be prohibited from supplementing his bid unless the bid defect was a minor deficiency. Northeast Constr. Co. v. Romney, 485 F.2d 752, 760 (D.C. Cir. 1973).

The Hearings Officer issued his findings of fact (FOF), conclusions of law (COL), and decision on June 23, 1997. With respect to the issue of "responsibility" versus "responsiveness," the Hearings Officer concluded, in part:

As such, the Hearings Officer finds that the information required to be submitted was solely for the purpose of evaluating the bidder's experience and qualification, ie bidder performance capability, and was therefore a matter of responsibility.

....

Accordingly, these definitions³ are consistent with the above-cited cases and support the conclusion that responsibility under Chapter 103D may be determined at any time up to the award of the contract.

Based on all of these considerations, the Hearings Officer finds and concludes that [Arakaki] was entitled to present the statement to [DAGS] for its consideration following the opening of the bids and up to the time of the award.

(Emphases added).

Pursuant to his FOF and COL, the Hearings Officer entered the following decision:

Based on the foregoing, a fair and efficient resolution of this matter would consist of [DAGS's] reconsideration of [Arakaki's] bid, including the statement requested in the specifications, along with any other factor deemed appropriate by [DAGS.] for the purpose of determining [Arakaki's] responsibility or nonresponsibility. Notwithstanding that, Chapter 103D, expressly limits the remedies available prior to an award:

³ See supra note 2.

§ 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 the law, then the solicitation or proposed award shall be:

- (1) Canceled; or
- (2) Revised to comply with the law.

Accordingly, it is hereby ordered that the solicitation for [DAGS's] Job No. 12-16-0323 is canceled.

(Footnotes omitted.) (Bold emphasis in original.) (Underscored emphases added.) In a footnote, the Hearings Officer observed:

In this regard [referring to "any other factor deemed appropriate by DAGS"], the Hearings Officer notes that other factors may include those considerations alluded to in [DAGS's] letter to [Arakaki] dated September 13, 1996 (Stipulated Exhibit "F"). In that letter, [DAGS] stated among other things: "Your additional comments on the validity of our technical specifications are without merit. You should have addressed and resolved them according to the above sections before submitting your bid. This provides further evidence of your nonresponsibility as a bidder."

Arakaki's timely appeal followed.

II. STANDARD OF REVIEW

The standard by which this court reviews the decisions of a hearings officer is governed by HRS § 103D-710(e) (1993), which provides:

(e) 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.

Furthermore,

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 Hearings Officer's exercise of discretion under subsection (6). Accordingly, a reviewing court will reverse a Hearings Officer'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 Hearings Officer's conclusions of law are freely reviewable.

In re Carl Corp. v. State of Hawai'i Dep't of Educ., Hawai'i State Library Sys., 85 Hawai'i 431, 446-47, 946 P.2d 1, 16-17 (1997) (emphases added) (citation and brackets omitted).

Because HRS § 103D-706 offers the hearings officer a choice of remedies, the selection of an appropriate remedy is a matter within the hearings officer's discretion.

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.

Booker v. Midpac Lumber Co., 65 Haw. 166, 172, 649 P.2d 376, 380 (1982) (citations and internal 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." Craft v.

Peebles, 78 Hawai`i 287, 301, 893 P.2d 138, 152 (1995) (citation and internal quotation marks omitted).

III. DISCUSSION

In this appeal, our determination whether the Hearings Officer abused his discretion in cancelling the solicitation must be guided by the purposes underlying the Procurement Code.

Kawamata Farms, Inc. v. United Agri Products, 86 Hawai`i 214, 255, 948 P.2d 1055, 1096 (1997) (stating that appellate court's "foremost obligation is to ascertain and give effect to the intention of the legislature"). The legislative history of the Procurement Code reveals that:

The purpose of this bill is to revise, strengthen, and clarify Hawaii's laws governing procurement of goods and services and construction of public works.

Specifically, the bill establishes a new comprehensive code that will:

- (1) Provide for fair and equitable treatment of all persons dealing with the government procurement system;**
- (2) Foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and**
- (3) Increase public confidence in the integrity of the system.**

In re Carl, 85 Hawai`i at 455-56, 946 P.2d at 25-26 (quoting Sen. Stand. Comm. Rep. No. S8-93, in 1993 Senate Journal, at 39).

In the instant case, the Hearings Officer's cancellation of the solicitation does not compel the purchasing agency to commence a second solicitation process; thus, reconsideration of Arakaki's bid, which presumably would include his qualification and experience list, is not assured. Moreover, the amount of Arakaki's bid -- \$349,825.00 -- and the fact that

Arakaki's bid was the lowest bid, see FOF no. 3, has become publicly known by virtue of having been published in the Hearings Officer's FOF, COL, and Decision, which have also been included in the record on appeal. Consequently, if a second solicitation is commenced and Arakaki rebids, he stands to forfeit his position as the lowest bidder because it is not inconceivable to expect that others with knowledge of Arakaki's original bid price will attempt to underbid him.

Although, under these circumstances, the Hearings Officer's selection of cancellation offends the legislative objective of providing for the "fair and equitable treatment of all persons dealing with the government procurement system," In re Carl, 85 Hawai'i at 455, 946 P.2d at 25 (citation omitted), we believe that the Hearings Officer recognized the importance of this legislative objective. In his decision, the Hearings Officer specifically stated that "a fair and efficient resolution of this matter would consist of [DAGS'] reconsideration of [Arakaki's] bid, including the statement requested in the specifications[.]" It appears, however, that the Hearings Officer believed that the choice of remedies prescribed by HRS § 103D-706 (i.e., cancel or revise the solicitation) did not include what he believed would be a "fair and efficient resolution" as described above. Indeed, both parties concede that the Hearings Officer believed that HRS § 103D-706 did not

authorize him to remand Arakaki's bid for reconsideration and that, therefore, the Hearings Officer canceled the solicitation.

As noted in the Hearings Officer's decision, HRS § 103D-706 provides that, prior to award of the contract, where "a solicitation . . . is in violation of the law, then the solicitation . . . shall be . . . [r]evised to comply with the law." The parties do not dispute the Hearings Officer's determination that the solicitation was in violation of the law as a result of DAGS's erroneous denial of Arakaki's request to supplement his bid and the subsequent rejection of the bid as nonresponsive. Having determined that cancellation under the circumstances of this case offends the legislative objectives of the Procurement Code, the dispositive question is whether the alternative remedy to "revise" the solicitation to comply with the law includes remand and reconsideration as contemplated by the Hearings Officer.

DAGS argues that "'[r]evis[e]' does not mean remand and reconsider." Because "revise" is not statutorily defined, we look to its plain meaning. Kawamata Farms, 86 Hawai'i at 255, 948 P.2d at 1096 (stating "where the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning."). According to Webster's Third New International Dictionary (1967), "revise" means "to correct errors." Thus, "revise" encompasses remedies that are required to correct the violations of law related to the solicitation. As

such, the remedy in the instant case includes remanding Arakaki's bid for reconsideration after giving him an opportunity to supplement his bid with a qualification and experience list. Moreover, remanding the matter to DAGS for reconsideration is consistent with the legislative objective of providing fair and equitable treatment.

Although in In re Carl we dealt with remedies after the award of a contract under HRS § 103D-707, we squarely addressed the issue whether HRS § 103D-706 authorized the Hearings Officer to remand a bid for reconsideration where solicitation was in violation of the law. In that case, Carl Corporation (Carl), the unsuccessful bidder for the contract to provide automation and other services to the Hawai'i State Public Library System, argued that it should have been awarded the contract because: (1) the proposal of the successful bidder, Dynix, Inc. (Dynix), aka Ameritech, was nonresponsive; and (2) Dynix was disqualified from bidding.⁴ In re Carl, 85 Hawai'i at 449, 946 P.2d at 19. In discussing the remedies available under the Procurement Code, this court stated:

⁴ Carl argued that because Dynix prepared the specifications for the Request For Proposals, Dynix was disqualified from bidding based on HRS § 103D-405(d) (1993), which provides:

Outside contractors may be utilized to prepare specifications and work statements in the development of a solicitation. Contractors paid for those services shall be precluded from bidding on or receiving a contract when they participated in any in the development of the solicitation package or any resulting contract.

(Emphasis added.)

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

Id. at 450, 946 P.2d at 20 (emphases added). In a footnote, the court further explained:

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

Id. at 450 n.18, 946 P.2d at 20 n.18 (emphasis added). We, therefore, hold that the term "revise" in the context of HRS § 103D-706 includes remand and reconsideration. Because cancellation under the circumstances of this case is contrary to the purposes underlying the Procurement Code, we further hold that the Hearings Officer's selection of cancellation of the solicitation was an abuse of discretion.

IV. CONCLUSION

For the reasons discussed above, we vacate that portion of the Hearings Officer's Decision cancelling the solicitation and remand this case to the Hearings Officer with instructions to implement his "fair and efficient resolution of this matter," that is, to: (1) set aside DAGS' rejection of Arakaki's bid; and (2) remand to DAGS for "reconsideration of [Arakaki's] bid,

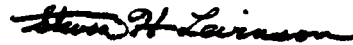
including the statement requested in the specifications, along with any other factors deemed appropriate by [DAGS]."

On the briefs:

Eric S. Yamagata,
for petitioner-appellant



Russell A. Suzuki and
Patricia Ohara, Deputy
Attorneys General, for
respondent-appellee



Patricia Ohara
Mavis R. Pamiel

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HEARINGS OFFICE



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

In the Matter of)	PCH-96-8
)	
WALTER Y. ARAKAKI,)	HEARINGS OFFICER'S
GENERAL CONTRACTOR, INC.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND DECISION
)	
vs.)	
)	
STATE OF HAWAII,)	
DEPARTMENT OF ACCOUNTING)	
AND GENERAL SERVICES,)	
)	
Respondent.)	

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION**

I. INTRODUCTION

By a letter dated September 20, 1996, Walter Y. Arakaki, General Contractor, Inc. ("Petitioner") submitted a request to the State Comptroller, Department of Accounting and General Services ("Respondent") for an administrative hearing to contest Respondent's decision to reject Petitioner's bid submitted in conjunction with Respondent's Job No. 12-16-0323. Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709 and Hawaii Administrative Rules ("HAR") §3-126-42.

On September 25, 1996, Respondent transmitted Petitioner's request for hearing to the Office of Administrative Hearings. By letter dated September 26, 1996, the undersigned Hearings Officer informed Petitioner that the matter would be set for hearing upon receipt of the supplemental information described in HAR §16-126-59.

On October 18, 1996, Petitioner, by and through its attorney, Eric S. Yamagata, Esq., filed an amended request for hearing in compliance with HAR §16-126-59. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On November 1, 1996, Respondent, by and through its attorneys, Russell A. Suzuki, Esq. and Patricia T. Ohara, Esq., filed a response to Petitioner's Request for Hearing.

On December 2, 1996, Respondent filed a motion to dismiss or, in the alternative, for summary judgment. Petitioner's memorandum opposing the motion was filed on December 19, 1996. On February 4, 1997, following a hearing, an order was issued denying the motion.

On March 18, 1997, the parties stipulated to waive the hearing and to submit the matter to the Hearings Officer on the basis of a stipulation of facts and exhibits, and proposed findings of fact and conclusions of law and recommended orders.

Having reviewed and considered the evidence and arguments presented by the respective parties, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. The written bid specifications for the Replacement of Swimming Pool Chlorination System at Various Schools, being Department of Accounting and General Services ("DAGS") Job No. 12-16-0323, are all set forth in the Invitation for Bids ("IFB"): (a) the Specifications for Furnishing Labor and Materials Required for Replacement of Swimming Pool Chlorination System at Various Schools dated May 10, 1996, which incorporates by reference, among other things, the Interim General Conditions issued by DAGS, and dated August, 1994; and (b) Addendum No. 1 dated June 10, 1996.

2. An application for prequalified and approved substitution of the chlorine generation system specified in the IFB was submitted by Leon Thompson, dba Specialized Services. The application proposed the use of the Autopilot Sanitizing System in lieu of the IFB specified system, and was submitted with information of the Autopilot manufacturer's and manufacturer's representative's, C.L. Marketing, prior

installations. The application was approved and the Autopilot system included in the IFB as Addendum No. 1, dated June 10, 1996.

3. Petitioner submitted the lowest bid at \$349,825.00, which bid designated Leon Thompson as a subcontractor.

4. Section 15480, part I, subsection 1.04 of the Specifications required, among other things, a statement of the bidder's qualifications and experience regarding swimming pool chlorination systems to be submitted with the bid.

5. Petitioner's bid was not accompanied by a statement of its qualifications and experience as required by Section 15480, part I, subsection 1.04 of the IFB.

6. On July 24, 1996, the State rejected Petitioner's bid as nonresponsive because it was not accompanied by a statement of Petitioner's qualifications and experience as required by Section 15480, part I, subsection 1.04 of the IFB. The State did not consider the information of prior installations by the Autopilot manufacturer or manufacturer's representative which was submitted to the State with the application for substitution. The State did not permit Petitioner to submit any additional or supplemental evidence of the bidder's or the bidder's swimming pool system subcontractor, Leon Thompson's, qualifications and experience.

7. On July 27, 1996, Petitioner met with the State to discuss the rejection of Petitioner's bid, and by letter dated August 2, 1996, the State retained its position that Petitioner's bid was nonresponsive and was rejected.

8. By letter dated August 13, 1996, Petitioner requested the State to reconsider the rejection of its bid, and by letter dated September 13, 1996, the State affirmed its prior decision to reject the bid.

III. CONCLUSIONS OF LAW

At the outset, the Hearings Officer must determine whether the statement of qualifications and experience required to be submitted with the bids relates to bidder responsibility or responsiveness. Petitioner contends that the statement relates to the responsibility of the bidder rather than the responsiveness of the bid and as such, may be provided after the opening of the bids. Respondent, on the other hand, maintains that Petitioner's failure to include the statement in its bid rendered the bid nonresponsive to the requirements of the IFB.

In 1992, the Legislature requested that the State Auditor conduct a study to provide information and recommendations for the enactment of a comprehensive procurement code. **Act 274, Session Laws of Hawaii, 1992.** In Act 274, the Legislature specifically asked that the study review among other things, the American Bar Association's *Model Procurement Code for State and Local Governments* ("model code") and the procurement codes from the federal government and other states. And, in enacting Chapter 103D, the Legislature noted that "[a]fter careful review of various procurement models and thoughtful discussion and debate, your Committees agreed to use the American Bar Association's (ABA) Model Procurement Code for State and Local Governments as their guide in establishing a comprehensive procurement system for Hawaii. **Standing Committee Report No. S8-93, 1993 Senate Journal, at 39.** Thus, where appropriate, the Hearings Officer will look to the decisions of the federal government as well as to other states' interpretations of the model code for guidance.¹

Pursuant to HRS §103D-104 and HAR §3-120-2, a "responsive bidder" is defined as "a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids or request for proposals." In contrast, a "responsible bidder" is "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."²

Decisions considering similar definitions have held that responsiveness refers to the question of whether a bidder has promised to perform in the precise manner requested by the government. **Blount, Inc. v. U.S., 22 Cl.Ct. 221 (1990).** 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. **Bean Dredging Corp. v. U.S., 2 Cl. Ct. 519 (1991).** Therefore, a bid which contains a material nonconformity must be rejected as nonresponsive. In this regard, material terms and

¹ See **Appeals of Neoplan USA Corp., Nos. 1186 and 1202 (MSBCA Sept. 18, 1984)** holding that a procurement appeals board did not commit error by applying federal common law to an appeal by an unsuccessful bidder, since state procurement law incorporated federal common law principles and it was thus appropriate for the board to look to federal common law for guidance in interpreting and applying the procurement law and regulations.

² These definitions are similar or identical to the definitions found in the recommended regulations to the model code, §3-101. Furthermore, the Federal Acquisition Regulations ("FAR") provide that "[t]o be considered for award, a bid must comply in all material respects with the invitation for bids." 48 C.F.R. §§14.301(a) (1988).

conditions of a solicitation involve price, quality, quantity, and delivery. **Blount, supra.** “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 bids on an equal basis.” **Blount, supra, citing Cibinic and Nash, Formation of Government Contracts (2nd Ed., 1986), p. 394.**

On the other hand, responsibility involves an inquiry into the bidder’s ability and will to perform the subject contract as promised. Responsibility concerns how a bidder will accomplish conformance with the material provisions of the contract; it addresses the performance capability of the bidder, and normally involves an inquiry into the potential contractor’s financial resources, experience, management, past performance, place of performance, and integrity. **Blount, supra.** See also **Federal Elec. Corp. v. Fasi, 56 Haw. 54 (1974).** “Responsibility . . . refers to a bidder’s apparent ability and capacity to perform the contract requirements and is determined not at bid opening but at any time prior to award based on any information received by the agency up to that time.” See **Peterson Accounting-CPA Practice, Comp Gen Decision No. 108,524 (1994)**(emphasis added). See also **Blount, supra.**

In **Bean Dredging Corp., supra,** the court addressed the issue of whether information about the equipment to be used on a project related to the bidder’s responsibility. The court concluded that such information was a matter of responsibility and noted that:

[w]hen information or data is required to be submitted with the bid, the Comptroller General will consider the purpose for which the data or information is to be used when determining whether it is a matter of responsiveness or responsibility. Thus, if descriptive data is to be used to determine a bidder’s ability or capacity to perform, the matter will be one of responsibility, and failure to submit information with the bid will have no adverse effect on the bidder. **J. Cibinic & R. Nash, Formation of Government Contracts 405-06 (1986)**(citing Comptroller General cases).

Bean Dredging Corp. at 523.

In this case, Section 15480, part I, subsection 1.04 of the Specifications states:

1.04 QUALITY ASSURANCE

Bidder Qualifications: The pool bidders must have at least 5 years experience in the installation of swimming pool chemical treatment systems, must have a valid State of Hawaii C-49 swimming pool contractor's license, and must list at least 5 pool installations of this type which he has constructed in a satisfactory manner. **Submit statement of qualifications and experience list with bid. Experience list shall include project name, year constructed and phone number of pool manager at project site.**

(Emphasis added).

The IFB thus required bidders to submit a statement containing information as to their "qualifications" and "experience" in the type of work called for in the specifications. In a letter dated September 13, 1996 to Petitioner, Respondent explained that, "[w]e included the requirement in the specifications because we needed **assurance that qualified bidders would bid.**" (Stipulated Exhibit "F")(emphasis added). As such, the Hearings Officer finds that the information required to be submitted with the bid was solely for the purpose of evaluating the bidder's experience and qualifications, ie bidder performance capability, and was therefore a matter of responsibility.

Having arrived at this determination, it becomes necessary to consider whether Petitioner was entitled to submit the statement of qualifications and experience required by Section 15480, part I, subsection 1.04 of the IFB following the opening of the bids. The Hearings Officer takes notice of the decisions of the United States Claims Court and the comptroller general holding that a bidder may present evidence of responsibility after bid opening up until the time of the award. **Blount at 226 (citing Mack Trucks, Inc. v. United States, 6 Cl. Ct. 68,71 (1984))**. This conclusion is apparently based on the rationale that matters of responsibility are determined not at bid opening but at any time prior to award and further, that the information would not relieve the bidder from complying with the material terms and conditions of the solicitation. See **Peterson Accounting-CPA Practice, supra**. See also **Blount, supra**.

Cases construing Maryland's model code-based procurement law have also reached the same conclusion.³ For example, in **Appeal of Peninsula General Hospital Medical Center, No. 1248 (MSCBA Aug. 19, 1985)**, the board found that information bearing on a prospective contractor's ability to perform in accordance with the terms of the contract related to responsibility and might properly be received and evaluated after bid opening. And in **Appeal of Aquatel Industries, Inc., No. 1192 (MSBCA Aug. 30, 1984)**, the board similarly held that materials related to the determination of a bidder's responsibility could be submitted by the bidder after bid opening. The **Aquatel** board also found that a matter of responsibility could not be made into a question of responsiveness by the terms of the solicitation. See also **Kings Point Industries, Comp Gen Decision No. B-223824 (1986)**; **Coastal Industries, Inc., Comp Gen Decision No. B-230226.2 (1988)**.

A review of Chapter 103D and Hawaii Administrative Rules, Title 3, Subtitle 11 leads the Hearings Officer to the same conclusion. A "responsible bidder" means "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." **HRS §103D-104; HAR §3-120-2** (emphasis added). "Capability" refers to "capability at the time of award of contract." **HAR §3-122-1** (emphasis added). Accordingly, these definitions are consistent with the above-cited cases and support the conclusion that responsibility under Chapter 103D may be determined at any time up to the awarding of the contract.

Based on all of these considerations, the Hearings Officer finds and concludes that Petitioner was entitled to present the statement to Respondent for its consideration following the opening of the bids and up to the time of award.

Petitioner also argued that the omission of the statement with the bid constituted a "minor informality" or an "obvious mistake" under **HAR §16-122-31**. Because Petitioner has established its entitlement to submit the statement notwithstanding the opening of the bids, it is unnecessary to address these alternative theories.

³ Maryland's procurement law, MD. STATE FIN. & PROCUREMENT CODE ANN. §§11-101 - 19-218 was based on the model code and was enacted on July 1, 1981.

IV. DECISION

Based on the foregoing, a fair and efficient resolution of this matter would consist of Respondent's reconsideration of Petitioner's bid, including the statement requested in the specifications, along with any other factor deemed appropriate by Respondent⁴ for the purpose of determining Petitioner's responsibility or nonresponsibility⁵. Notwithstanding that, Chapter 103D, expressly limits the remedies available prior to an award:


§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 the law, then the solicitation or proposed award shall be:

- (1) Cancelled; or
- (2) Revised to comply with the law.

Accordingly, it is hereby ordered that the solicitation for Department of Accounting and General Services Job No. 12-16-0323 is canceled.

Dated at Honolulu, Hawaii: JUN 23 1997



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

⁴In this regard, the Hearings Officer notes that other factors may include those considerations alluded to in Respondent's letter to Petitioner dated September 13, 1996 (Stipulated Exhibit "F"). In that letter, Respondent stated among other things: "Your additional comments on the validity of our technical specifications are without merit. You should have addressed and resolved them according to the above sections before submitting your bid. This provides further evidence of your nonresponsibility as a bidder."

⁵The determination of a bidder's responsibility is a matter reserved for the procurement officer's judgment and a finding of nonresponsibility will not be disturbed absent a showing that the determination was grounded on an unreasonable basis. See *Peninsula General Hospital Medical Center, supra*; *Appeal of Lamco Corp., No. 1227 (MSCBA Feb. 21, 1985)*.