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IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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IN THE MATTER OF SOUTHERN FOODS GROUP, L.P., dba MEADOW GOLD DAIRIES, Petitioner-Appellant, v. STATE OF HAWAI`I, DEPARTMENT OF EDUCATION, Respondent-Appellee, and HOUSE FOODS HAWAII CORPORATION, dba FOREMOST DAIRIES HAWAII, Intervenor

NO. 21715

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

(PCH-98-3)

MARCH 23, 1999

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

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OPINION OF THE COURT BY RAMIL, J.

The instant appeal arises from respondent-appellee State of Hawai`i Department of Education (hereinafter referred to as the "DOE")'s procurement of a supplier to furnish and deliver fresh milk to public schools in the State of Hawai`i for the 1998/1999 school year. Petitioner-appellant Southern Foods Group, L.P. dba Meadow Gold Dairies (hereinafter referred to as Meadow Gold) appeals from the Department of Commerce and Consumer

Affairs (DCCA) Administrative Hearings Officer's affirmance<sup>1</sup> of the DOE's rejection of Meadow Gold's bid and the award of the contract to intervenor House Foods Hawaii Corporation, dba Foremost Dairies Hawai'i (hereinafter referred to as Foremost).

Because Meadow Gold submitted a bid with "multiple or alternate offers" in violation of Hawai'i Administrative Rules (HAR) § 3-122-4 (1995), the DOE correctly rejected Meadow Gold's bid as nonresponsive, under Hawai'i Revised Statutes (HRS) § 103D-104 (1996).<sup>2</sup> Accordingly, inasmuch as the instant Invitation for Bids (IFB) prohibited "multiple or alternate offers," the hearings officer correctly interpreted HRS Chapter 103D in concluding that the best interests of the DOE, as addressed in HRS § 103D-308 (1993 & Supp. 1997) and HAR § 3-122-95 (1995), were irrelevant and in concluding that the accompanying rules adopted pursuant to Chapter 103D mandated rejection of Meadow Gold's bid. Therefore, we affirm.

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<sup>1</sup> The Hawai'i Supreme Court retains exclusive jurisdiction to review administrative hearings based upon HRS Chapter 103D, the Hawai'i Public Procurement Code. See Hawai'i Revised Statutes (HRS) § 103D-710(a) (1993). "The review shall be . . . conducted on the record of the administrative proceedings, and briefs and oral argument." HRS § 103D-710(d) (emphasis added.) Despite this legislative mandate, this court retains the authority to decide which matters shall be set for oral argument. See HRS § 602-10 (1979); Hawai'i Rules of Appellate Procedure (HRAP) 34(a).

<sup>2</sup> HRS § 103D-104, the definitions section of HRS Chapter 103D, provides in pertinent part that a "[r]esponsive bidder" means a person who has submitted a bid which conforms in all material respects to the invitation for bids."

I. BACKGROUND

A. The Invitation for Bids

The following facts are largely undisputed. On February 5, 1998, the DOE's Procurement and Distribution Section issued an Invitation for Sealed Bids for job number E98-21 (IFB No. E98-21), in order to procure the delivery and furnishing of fresh 2%, whole and lowfat chocolate milk for various schools in the State of Hawai'i (the "Bid Solicitation"). The Bid Solicitation consisted of four contracts and provided four respective bid pages for the islands of O`ahu, Hawai`i, Maui, and Kaua`i. The present appeal only challenges the award of the O`ahu contract.

In addition to the bid page,<sup>3</sup> pursuant to statute, the Bid Solicitation contained special conditions regarding the form of the bid.<sup>4</sup> For example, the Bid Solicitation contained

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<sup>3</sup> The O`ahu contract's bid page was numbered "OF-3."

<sup>4</sup> The Bid Solicitation contained in relevant part the following special conditions:

1A.1 PROVISION - The furnishing and delivery of FRESH MILK . . . shall be in accordance with these Special Conditions, the specifications, the General Conditions, which is included and made a part hereof.

The period of this agreement shall be from July 1, 1998 through June 30, 1999. . . .

1C.2 PRODUCT PREFERENCE - Registered and qualified "Hawaii Produced or Manufactured" products, Class III, shall have ten percent price preference when one or more offer(s) are of non-registered and qualified Hawaii Produced or Manufactured products. When all offers are registered and

(continued...)

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qualified Hawaii Produced or Manufactured products, no preferences shall be applied.

Preference, when applicable, shall be used to determine lowest responsive and responsible evaluated offer and not to be used as awarded amount.

1D.1 AWARD OF CONTRACT - Award shall be made to offeror(s) submitting the lowest responsive and responsible bid price for each Group numbers . . . .

2A.2 EXAMINATION OF GENERAL CONDITIONS, SPECIFICATIONS, SITE OF WORK, ETC. - It shall be conclusively understood and agreed herein that it shall be the interested party's responsibility to examine the documents provided and to familiarize himself with all of the requirements herein. No additional allowance shall be granted because of the lack of knowledge of such conditions.

2A.10 DISQUALIFICATION OF BIDDERS - Any one or more of the following causes will be considered as sufficient for disqualification of the bidder:

- b. More than one proposal from an individual, firm, corporation or joint venture under the same or different names.
- h. If the proposal shows any noncompliance with applicable law or contains any unauthorized additions or deletions, conditional bid, incomplete bid, or irregularities of any kind which may tend to make the bid/proposal incomplete, indefinite, or ambiguous as to its meaning.

2B.1 AWARD OF CONTRACT - Award will be made to the responsive and responsible bidder submitting the lowest bid price. Normally, award is within sixty (60) days after the bid opening but in no case will award be made until all necessary investigations are made.

If the lowest bid or any other bid is rejected, or if the bidder to whom the contract was awarded fails to enter into the contract, the Superintendent may, at his discretion, award the contract to the next lowest bidder or may publish another call for bidders . . . .

2C.4 PREFERENCE FOR LOCAL PRODUCTS - Section 103-42 and 103-43, Hawaii Revised Statutes, provides for preference to bidders submitting bids and claiming local product preferences for products qualified and registered with the State Comptroller, Department of Accounting and General Services. . . .

(continued...)

condition 2A.1, which provided the following:

A proposal that contains any omission, erasure, addition not called for, conditional bid or irregularity of any kind may be rejected. . . .  
The bid price shall be all inclusive. . . .

.....  
Unless otherwise stated, bidder shall offer only one (1) bid item/number. If more than one bid is offered, all bids shall be rejected for that item/number.

The record reveals that, in response to the Bid Solicitation, only Meadow Gold and Foremost submitted bid sheets for the island of O`ahu. It is undisputed that Meadow Gold submitted two OF-3 pages. Meadow Gold's first OF-3 page indicated that all of the milk would consist of Class III Hawai`i products, arguably entitling the bid to a 10% preference consideration, and provided the following prices per half pint of milk: (1) Group I - \$.26; (2) Group II - \$.25; (3) Group III - \$.235; (4) Group IV - \$.24; (5) Group V - \$.24; (6) Group VI - \$.26; (7) Group VII - \$.26; and (8) Group VIII - \$.26. Meadow Gold's second OF-3 page did not indicate a Hawai`i products preference, yet provided the following prices: (1) Group I - \$.236363; (2) Group II - \$.227272; (3) Group III - \$.213636; (4) Group IV - \$.218181; (5) Group V - \$.218181; (6) Group VI -

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^(...continued)

(Brackets and emphases added.) HRS §§ 103-41 to 103-45 (1993) regarding Hawaii product preference were repealed. See 1994 Haw. Sess. L. Act 186, § 21 at 428. HRS § 103D-1002 (Supp. 1998) now addresses Hawai`i product preference.

\$.236363; (7) Group VII - \$.236363; and (8) Group VIII - \$.236363.

Foremost submitted one OF-3 page, which also indicated that all of the milk would consist of Class III Hawai`i products, arguably entitling the bid to a 10% preference consideration, and provided the following prices: (1) Group I - \$.2259; (2) Group II - \$.2824; (3) Group III - \$.2223; (4) Group IV - \$.2824; (5) Group V - \$.2824; (6) Group VI - \$.2337; (7) Group VII - \$.2259; and (8) Group VIII - no bid.

#### B. The Bid Opening

The DOE opened the IFB No. E98-21 bids on February 25, 1998. A DOE representative quickly discovered that Meadow Gold submitted two OF-3 pages and announced "I have a duplicate bid for Oahu which means a rejection." This prompted a series of meetings and communications between Meadow Gold and the DOE.

The first written communication, a letter dated March 2, 1998, was from Meadow Gold to Mr. Eric Tom, a DOE Procurement and Distribution Specialist. Therein, Meadow Gold stated that

this letter is an explanation of our actions in connection with the sealed bid for the Oahu school milk and to assist you in making a decision regarding this matter.

At the outset, our two bids for the Oahu school milk were in no way intended to mislead or deceive the [DOE]. . . .

Our best intent behind these two bid sheets was to offer the DOE the best milk prices available on Oahu, thereby reducing the DOE's costs. As long as milk supplies are available, Meadow Gold would supply

locally processed milk; however, the poor economy in Hawaii has caused many local milk producers to close operation or reduce production. If the trend continues there may be a significant shortage of locally produced milk and Meadow Gold would have to rely on mainland suppliers. Therefore, we were merely offering the DOE the best possible alternatives available to us in the market.

If the dual bid sheets are interpreted as a violation of 2A.10 of the Special Conditions, we believe that the withdrawal of one bid sheet would not unfairly taint the sealed bid process and would provide the DOE with the best possible offer that Meadow Gold is able to make. We believe that this would be governed by § 3-122-31(c)(3) of the Hawaii Administrative Rules, Title 3 . . . which provides in part:

If the mistake is not allowable under paragraphs (1) [arithmetical] and (2) [minor informality not affecting price, quantity, delivery or contractual conditions], but is an obvious mistake that if allowed to be corrected or waived is in the best interests of the government agency or for the fair treatment of other bidders, and the chief procurement officer or . . . the head of the purchasing agency concurs with this determination, the procurement officer shall correct or waive the mistake.

(Emphases added.) Interpreting the March 2, 1998 communication as a request to withdraw one of the two OF-3 pages, by letter dated March 9, 1998, Eric Tom responded:

... In addition and during our meeting you/your representatives further advised me that one of [the] bids did not meet our procedures in that it was not a qualified product.

Based on above, your position of providing the DOE a choice but at the same time arguing one of the bid pages was for a non qualified product [sic], I must invite your attention to paragraph 7 of section 2A.1 page SC 2-1 within the Special Conditions entitled Bid/Proposal Requirements. Reference reads as follows: "Unless otherwise stated, bidder shall offer only one (1) bid per item/number. If more than one bid is offered, all bids shall be rejected for that item/number."

On March 12, 1998, Meadow Gold formally protested the rejection of its bid pursuant to HRS § 103D-701 (1993 & Supp. 1997) and HAR § 3-126-3 (1995) by writing to Mr. Alfred Suga, DOE Assistant Superintendent in charge of the DOE's purchasing agency. Meadow

Gold sought reversal of the rejection or a rebid of the contract.

Notwithstanding its March 2, 1998 description of "our two bids for the Oahu school milk," Meadow Gold contended that it "did not submit two bids for the contracts . . . [but] submitted one, integrated bid reflected on two bid sheets identified as OF-3. Meadow Gold intended these bid sheets to be treated as a single, unconditional bid." Meadow Gold further argued that, because it did not condition its bid to gain unfair advantage over other bidders, it was a responsive bidder under HRS § 103D-104, and that "[t]here is no prohibition in the bid specifications for submitting a bid price structured in this manner." Meadow Gold conceded that its bid may have been "'irregular' or a mistake," but urged the DOE to exercise its discretion in correcting the bid. Finally, without citing to which price it submitted, Meadow Gold argued that its bid prices on Groups Nos. II, IV, and V were the lowest and would result in a savings of approximately \$595,000.00.

On March 18, 1998, Suga issued a final decision,<sup>5</sup> affirming the rejection of Meadow Gold's bid as nonresponsive in violation of the requirement that the bidder submit "only one bid offer per item/number."

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<sup>5</sup> Because of Suga's characterization of Meadow Gold's March 12, 1998 letter as both a protest and a request for reconsideration, the DOE issued another letter on April 2, 1998 notifying Meadow Gold of its right to an administrative appeal before the DCCA.



C. The Administrative Hearing

On April 8, 1998, Meadow Gold appealed the DOE's rejection of its bid to the DCCA's Office of Administrative Hearings, pursuant to HRS § 103D-709 (1993 & Supp. 1997).<sup>6</sup> The DCCA hearings officer issued a notice of hearing and pre-hearing conference on April 23, 1998; the pre-hearing conference was set for May 4, 1998, and the hearing was set for May 11, 1998. However, because of scheduling conflicts of both parties, the pre-hearing conference was rescheduled to May 7, 1998, and the parties agreed to set a date for the hearing. Because the parties had not agreed on a hearing date and HRS § 103D-709(b)

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<sup>6</sup> HRS § 103D-709 provides in part:

**Administrative proceedings for review.** (a) The several hearings officers appointed by the director of the [DCCA] . . . pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo any request from any bidder . . . aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer . . . .

(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. . . . .

(Emphases added.)

required the hearing be held within twenty-one (21) days of receipt of the appeal, on May 12, 1998, the hearings officer set the hearing for the next day, on May 13, 1998. Although the notice was sent by facsimile to Meadow Gold's attorneys,<sup>7</sup> Meadow Gold was unaware of the hearing. At the hearing, without Meadow Gold present, the hearings officer granted Foremost's motion to intervene and the DOE's oral motion to dismiss without prejudice. That same day, on May 13, 1998, the hearings officer issued a written order of dismissal.

After learning that the hearing was held and that the matter was dismissed, by letter dated May 13, 1998, Meadow Gold requested that the matter be reopened. However, the hearings officer declined, because the request was not in the form of a formal motion. On May 15, 1998, Meadow Gold moved to set aside the order dismissing Meadow Gold's request for an administrative hearing and to reset a hearing date.<sup>8</sup> On June 5, 1998, Meadow Gold's motion was granted and the hearing was reset for June 15,

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<sup>7</sup> Meadow Gold explains and the record reveals that the facsimile transmission was smudged and the hearing date appeared to be May 18, 1998.

<sup>8</sup> Because the ten-day time period for judicial review with the supreme court was about to expire, Meadow Gold also filed an application for judicial review on May 21, 1998. On June 5, 1998, this court granted Meadow Gold's motion to remand the matter to the DCCA's Office of Administrative Hearings for a hearing on the merits.

On June 9, 1998, Meadow Gold also moved, before the DCCA, for the hearings officer's disqualification based upon personal bias. The motion was summarily denied. On June 10, 1998, the parties stipulated to dismiss the application for judicial review filed on May 21, 1998.

1998. At the hearing, Meadow Gold attempted to present evidence regarding its intent to submit an "integrated" bid and regarding the savings the DOE would receive if its bid were not rejected. Apparently based upon Hawai'i Rules of Evidence (HRE) Rule 402 (1993), the hearings officer excluded this evidence as irrelevant. Meadow Gold was limited to making offers of proof with respect to both issues.

On July 16, 1998, the hearings officer entered, in pertinent part, the following COLs:

The evidence presented established that Petitioner submitted two OF-3 sheets in response to the Bid Solicitation, one page representing the price for locally produced milk, for which the Hawaii preference was claimed, and a second page of non-Hawaii produced milk, for which the Hawaii preference was not claimed. The evidence also established that respondent rejected Petitioner's submission on the basis that Petitioner's bid was not responsive to the Bid Solicitation, which required one bid per item.

Hawaii Administrative Rules § 3-122-4 provides:

**§ 3-122-4 Multiple or alternate offers.** (a) Unless multiple or alternate offers are specifically provided for, the solicitation shall state that multiple or alternate offers shall not be accepted.

(b) When prohibited, multiple or alternate offers shall be rejected, provided that if an offeror clearly indicates a primary offer, it shall be considered for award as though it were the only offer submitted by the offeror.

(c) This section shall be set forth in the solicitation, and if multiple or alternate offers are allowed, it shall specify their treatment.

It is not disputed that Petitioner did not indicate a primary offer. Instead, petitioner argued that it submitted an "integrated" bid, consisting of one bid with two bid sheets, and its "integrated bid was responsive to the Bid Solicitation because: (1) when rounding is properly conducted, the two prices are identical, and (2) when the two bid sheets are considered together, the amount to be charged to respondent is readily ascertainable. . . . Petitioner's calculations add ten percent to the non-Hawaii product price in order to determine the Hawaii product price. HRS § 103D-1002 provides in part:

[(a) A purchasing agency shall review all specifications in a bid or proposal for purchase from the Hawai'i products list where these products are available; provided that the products:

...]

- (3) Unloaded, including applicable general excise tax and use tax, does not exceed the lowest delivered price of a similar non-Hawai'i product by more than:

....

- (c) Ten per cent where class III Hawai'i products are involved.

....

(d) Where a bid or proposal contains both Hawai'i and non-Hawai'i products, then for the purpose of selecting the lowest bid or purchase price only, the price bid or offered for a Hawai'i product item shall be decreased by subtracting therefrom: three per cent, five per cent, or ten per cent for the class I, class II, or class III Hawai'i product items bid or offered, respectively. The lowest total bid or proposal, taking the preference into consideration, shall be awarded the contract unless the bid or offer provides for additional award criteria. The contract amount of any contract awarded, however, shall be the amount of the bid or price offered, exclusive of the preferences.

Consequently, for purposes of bid evaluation only, the prices reflected on the two OF-3 pages submitted by Petitioner would have been equal had Petitioner's non-Hawaii product OF-3 page reflected Petitioner's Hawaii product price less ten per cent, as provided by HRS § 103D-1002.

However, Petitioner added 10 per cent to the non-Hawaii product price, resulting in a price that, for purposes of bid evaluation, is not equivalent. Accordingly, the Hearings Officer finds that Petitioner offered more than one bid for the same item without clearly indicating a primary offer, and concludes that pursuant to the terms of the Bid Solicitation and HAR § 3-122-4, Petitioner's bid was nonresponsive and must be rejected. The Hearings Officer also concludes that, contrary to Petitioner's assertions that the amount to be charged to Respondent is readily ascertainable when the two OF-3 pages are read together, the bid submitted by Petitioner contained an irregularity which made its bid indefinite or ambiguous, requiring Petitioner to be disqualified pursuant to Section 2A.10 of the Bid Solicitation.

In the alternative, Petitioner argued that Respondent failed to follow the provisions of HAR § 3-122-95(b) when Respondent rejected its bid. HAR § 3-122-95(b) provides:

**§ 3-122-95 (1995) Cancellation of solicitations and rejection of offers.**

[....]

- (b) The reasons for the cancellation or rejection shall:

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

HAR § 3-122-95 implements HRS § 103D-308 [(1993 & Supp. 1997)], which states:

An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interest of the governmental body which issued the invitation, request or other solicitation, in accordance with the rules adopted by the policy board. The reasons therefor shall be made a part of the contract file.

The Hearings Officer finds HAR § 3-122-95(b) to be inapplicable to the case at bar. Petitioner's bid was rejected because it was nonresponsive to the Bid Solicitation. It was not rejected because Respondent deemed it to be in the best interest to cancel the Bid Solicitation and/or reject the Petitioner's offer, which pursuant to HAR § 3-122-95(b), would then require Respondent to articulate cogent and compelling reasons why rejection is in Respondent's best interests.

Petitioner also argued that it should be allowed to correct its mistake, as allowed by HAR § 3-122-31(c)(3) which provides:

**§ 3-122-31 Mistakes in bids.** (a) Correction or withdrawal of a bid because of an obvious mistake in the bid is permissible to the extent it is not contrary to the best interest of the government agency or to the fair treatment of other bidders.

....

(c) Corrections to bids after opening but prior to award may be made under the following conditions:

....

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

The Procurement Code prescribes strict procedures for the procurement of goods and services by state agencies for the purposes of:

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

Carl Corp. v. State Department of Education, 85 Haw. 431 at 459 (1997). Because the prices set forth on the two OF-3 pages were not found to be identical, and it is not clearly evidenced from the bid document which of the two OF-3 pages Petitioner intended as its bid price, allowing Petitioner to correct its bid after bid opening would give Petitioner "two bites at the apple" and a competitive advantage over other bidders. Accordingly, the Hearings Officer concludes that Petitioner should not be allowed to correct its bid as it would not result in the fair treatment of the other bidders.

.....  
Based upon the foregoing considerations, the Hearings Officer finds and concludes that Petitioner was not a responsive bidder, and that Petitioner failed to prove by a preponderance of the evidence that Respondent's rejection of its bid was improper and not in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation.

(Brackets and emphases added.) (Footnotes omitted.)

Meadow Gold filed an application for judicial review of the hearings officer's decision on July 16, 1998.

## II. STANDARD OF REVIEW

When reviewing decisions of an administrative hearings officer based upon the Hawai'i Public Procurement Code, the appellate standard of review is governed by HRS § 103D-710(e) (1993). See In re Carl Corp. v. State, Dep't of Educ., 85 Hawai'i 431, 446, 946 P.2d 1, 16-17 (1997) (stating that HRS § 103D-710(e) is "virtually identical to HRS § 91-14(g)"). 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.

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.

Arakaki v. State, Dep't of Accounting and General Serv., 87

Hawai'i 147, 149-50, 952 P.2d 1210, 1212-13 (1998) (citing In re Carl Corp., 85 Hawai'i at 446-47, 946 P.2d at 16-17) (original emphasis and brackets omitted).

"A COL 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." Price v. Zoning Bd. of Appeals of City and County of Honolulu, 77 Hawai'i 168, 172, 883 P.2d 629, 633 (1994). 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. Dole Hawaii Division-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990). "[T]he court should not substitute its own judgment for that of the agency." Id. (citing Camara v. Apsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984)).

Boe v. Hawai'i Labor Relations Bd., 87 Hawai'i 191, 195, 953 P.2d 569, 573 (1998).

Regarding an agency's discretion, appellate courts must consider that

[d]iscretion 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).

Arakaki, 87 Hawai'i at 149-50, 952 P.2d at 1212-13. 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. See In re Application of Hawaiian Elec. Co., 81 Hawai'i 459, 465, 918 P.2d 561, 567 (1996) (citing Outdoor Circle v. Harold K.L. Castle Trust Estate, 4 Haw. App. 633, 638, 675 P.2d 784, 789 (1983), cert. denied, 67 Haw. 1, 677 P.2d 965 (1984)).

Finally, expressing further caution with regard to reviewing administrative determinations, this court has verbalized the following caveat:

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. (citing In re Application of Hawaii Elec. Light Co., Inc., 60 Haw. 625, 629, 594 P.2d 612, 617 (1979)) (internal citations and quotation marks omitted) (emphasis added).

### III. DISCUSSION

The DOE and Foremost contend that the dispositive issue is whether the statute mandated rejection of Meadow Gold's bid as nonresponsive under the Hawai'i Public Procurement Code, HRS Chapter 103D. We agree. Therefore, this appeal tenders a question of statutory interpretation.

"The starting point in statutory construction is to determine the legislative intent from the language of the statute itself." State v. Kaakimaka, 84 Hawai'i 280, 289, 933 P.2d 617, 626, reconsideration denied 84 Hawai'i 496, 936 P.2d 191 (1997) (quoting State v. Ortiz, 74 Haw. 343, 351-52, 845 P.2d 547, 551-52 (citations omitted), reconsideration denied, 74 Haw. 650, 849 P.2d 81 (1993)).

When construing a statute, our 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, "[t]he meaning of the ambiguous words may be sought by examining the context, with which ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(10) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. Gray v. Administrative Dir. of the Court, 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997) (quoting State v. Toyomura, 80 Hawai'i 8, 18-19, 904 P.2d 893, 903-04 (1995)) (brackets and ellipsis points in original) (footnote omitted). This 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 of Hawaii, 87 Hawai'i at 229-30, 953 P.2d at 1327-28 (quoting State v. Cullen, 86 Hawai'i 1, 8-9, 946 P.2d 955, 963-64 (1997) (some brackets in original and some added)).

"[A] statute is ambiguous if it is capable of being understood by reasonably well-informed people in two or more different senses." State v. Toyomura, 80 Hawai'i 8, 19, 904 P.2d 893, 904 (1995) (citing 2A N. Singer, Sutherland Statutory Construction, § 45.02, at 6 (5th ed. 1992)) (internal quotation marks omitted). "[A] rational, sensible and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable[.]" State v. Jumila, 87 Hawai'i 1, 9, 950 P.2d 1201, 1209 (1998) (quoting Keliipuleole v. Wilson, 85 Hawai'i 217, 221-22, 941 P.2d 300, 304-05 (1997) (brackets, internal quotation marks, and citations omitted)). "The legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction[,] and illogicality." State v. Arceo, 84 Hawai'i 1, 19, 928 P.2d 843, 861 (1996) (citation and internal quotation marks omitted).

Kim v. Contractor's License Bd., 88 Hawai'i 264, 269-70, 965 P.2d 806, 811-12 (1998) (some brackets added and some in original).

A. Meadow Gold's Bid for the O`ahu Contract to Furnish Milk to Hawai'i Schools Was Properly Rejected by the DOE.

Turning to the procurement code, HRS § 103D-302 (Supp. 1997), entitled "Competitive Sealed Bidding," provides in relevant part:

(a) Contracts shall be awarded by competitive sealed bidding except as otherwise provided in section 103D-301.<sup>9</sup> Awards of contracts

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<sup>9</sup> HRS 103D-301 (1993) provides for the "Methods of source selection":

Unless otherwise authorized by law, all contracts shall be awarded by competitive sealed bidding pursuant to section 103D-302, except as provided in:

- (1) Section 103D-303 (Competitive sealed proposals);
- (2) Section 103D-304 (Professional services procurement);
- (3) Section 103D-305 (Small purchases);
- (4) Section 103D-306 (Sole source procurement); and

(continued...)

by competitive sealed bidding may be made after single or multi-step bidding. Competitive sealed bidding does not include negotiations with bidders after the receipt and opening of bids. Award is based on the criteria set forth in the invitation for bids.

(b) An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. . . .

(c) Adequate public notice of the invitation for bids shall be given a reasonable time before the date set forth in the invitation for the opening of bids. . . .

(d) Bids shall be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids. The amount of each bid and other relevant information specified by rule, together with the name of each bidder shall be recorded. The record and each bid shall be open to public inspection.

(e) Bids shall be unconditionally accepted without alteration or correction, except as authorized in this chapter or by rules adopted by the policy board.

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

(g) Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of invitations for bids, awards, or contracts based on such bid mistakes, shall be permitted in accordance with rules adopted by the policy board. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the public or to fair competition shall be permitted. Except as otherwise provided by rule, all decisions to permit the correction or withdrawal of bids, or 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.

(h) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. . . .

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<sup>9</sup>(...continued)

(5) Section 103D-307 (Emergency procurements).

(Emphases and footnote added.)

As noted above, special condition No. 2A.1 of IFB No. E98-21 provided that "[a] proposal that contains any omission, erasure, addition not called for, conditional bid or irregularity of any kind may be rejected. . . . Unless otherwise stated, bidder shall offer only one (1) bid item/number. If more than one bid is offered, all bids shall be rejected for that item/number." (Emphases added). Further, HAR § 3-122-4 (1995), which is incorporated by reference into the Bid Solicitation, provided:

**Multiple or alternate offers.** (a) Unless multiple or alternate offers are specifically provided for, the solicitation shall state that multiple or alternate offers shall not be accepted.

(b) **When prohibited, multiple or alternate offers shall be rejected, provided that if an offeror clearly indicates a primary offer, it shall be considered for award as though it were the only offer submitted by the offeror.**

(c) This section shall be set forth in the solicitation, and if multiple or alternate offers are allowed, it shall specify their treatment.

(Emphasis added.)

Based upon its interpretation of the foregoing, the DOE concluded that Meadow Gold's bid, which contained two OF-3 sheets, i.e., two bids for the O`ahu contract with different prices and different products representing Hawai`i versus mainland products, was nonresponsive. Consequently, the DOE rejected the bid.

Meadow Gold contends, however, that the DOE was obligated to provide cogent and compelling reasons why the rejection of its offer was in the DOE's best interests. In this regard, Meadow Gold relies upon HAR §§ 3-122-32 and 3-122-95 (1995). HAR § 3-122-32 (1995) provides that the "[c]ancellation and rejection of bids shall be pursuant to subchapter 11[,]"" which includes HAR §§ 3-122-95 and 3-122-97. HAR § 3-122-95, entitled "Cancellation of solicitations and rejection of offers," provides in relevant part:

- (a) An invitation for bids, a request for proposals, or any other solicitation may be cancelled [sic], or a bid, proposal, or any other offer may be rejected in whole or in part as may be specified in the solicitation, in accordance with the provisions of this section.
- (b) The reasons for the cancellation or rejection shall:
  - (1) Include but not be limited to cogent and compelling reasons why the cancellation of the solicitation or rejection of the offer is in the purchasing agency's best interest . . . .<sup>[10]</sup>

(Emphases and footnote added.)

Meadow Gold places misguided reliance upon the permissive language of HAR § 3-122-95 and, apparently, ignores the mandatory language of HAR § 3-122-97, which provides, in pertinent part:

- (a) Bids shall be rejected for reasons including but not limited to:
  - (1) The bidder that submitted the bid is nonresponsible as determined by subchapter 13;

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<sup>10</sup> As noted by the hearings officer, HAR § 3-122-95 appears to implement HRS § 103D-308 (1993 & Supp. 1997).

- (2) The bid is not responsive, that is, it does not conform in all material respects to the invitation for bids under the provisions of subchapter 13:<sup>11</sup> or
- (3) The good, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the invitation for bids under the provisions of section 3-122-33.

....

(d) A notice of rejection shall be sent to the individual offeror advising of the reasons therefor.

(Emphases and footnote added.) Therefore, if Meadow Gold's bid was nonresponsive, the DOE should have rejected the bid and was not compelled, under HAR § 3-122-97, to provide cogent or compelling reasons why it was in the DOE's best interests to reject the bid.

1. Meadow Gold's "Bid" Was Nonresponsive Because Meadow Gold Submitted Multiple Bids in Direct Violation of the Special Conditions of the Bid Solicitation.

Under HRS § 103D-104 a "[r]esponsive bidder" means a person who has submitted a bid which conforms in all material respects to the invitation for bids." Accordingly, a bid that does not conform in all material respects to the Bid Solicitation is nonresponsive. However, this begs the question of what constitutes conformance "in all material respects."

Although addressing the United States government's alleged breach of an awarded contract, the United States Court of

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<sup>11</sup> The reference in HAR § 3-122-97 to subchapter 13 must be in error inasmuch as subchapter 13 addresses the responsibility of prospective bidders, which is largely irrelevant to the responsiveness of the bid.

Claims, in Toyo Menka Kaisha, Ltd. v. United States, 597 F.2d 1371, 1376-77 (Ct. Cl. 1979), penned a discussion on bid responsiveness that is particularly insightful.

Where a government contract is awarded under competitive bidding, "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." Prestex Inc. v. United States, 320 F.2d 367, 372, 162 Ct.Cl. 620, 627 (1963) (footnote omitted). . . . Federal procurement regulations incorporate these principles.

When the issue of the "responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only when the illegality is plain" and should "uphold the award unless its invalidity is clear." John Reiner & Co. v. United States, 325 F.2d 438, 440, 163 Ct.Cl. 381, 386, 387 (1963), cert. denied, 377 U.S. 931, 84 S.Ct. 1332, 12 L.Ed.2d 295 (1964) (footnote omitted). On the other hand, the government

may disclaim the contract on the ground of voidness ab initio because of the nonresponsiveness of the bid. Where a public contract is to be let pursuant to formal advertising, the strictures upon defendant's contracting agent are such "that the contract awarded must be the contract advertised and \* \* \* if it is not, the Government is not bound, since defendant's contracting agent could not bind the Government beyond his actual authority." Prestex Inc. v. United States, 320 F.2d 367, 371, 162 Ct.Cl. 620, 625 (1963).

Albano Cleaners, Inc. v. United States, [455 F.2d 556, 559, 197 Ct.Cl. 450, 455 (1972)]. . . .

These principles rest upon and effectuate important public policies. "Rejection of [non]responsive bids is necessary if the purposes of formal advertising are to be attained, that is, to give everyone an equal right to compete for Government business, to secure fair prices, and to prevent fraud." Prestex, Inc. v. United States, supra, 320 F.2d at 372, 162 Ct.Cl. at 626 (footnote omitted). The 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. See R. Nash & J. Cibinic, Federal Procurement law, 260 (3d Ed. 1977).

Responsiveness is determined by reference to when they are opened and not by reference to subsequent changes in a bid. Id. at 261. Allowing a bidder to modify a nonresponsive bid when, upon opening the bids, it appears that the variations will preclude an award, would permit the very kind of bid manipulation and negotiation that the rule is designed to prevent. Otherwise bidders would be encouraged to submit nonresponsive bids on terms favorable to the government but subject to certain conditions, in the hope that if their bids were the top ones, they could then negotiate about and retain some of their proposed changes. In this way they could obtain a contract that they could not have received had they complied with the specification in the invitation for bids.

Id. (ellipsis in original) (footnote omitted) (brackets and emphases added). See also Northeast Constr. Co. v. Romney, 485 F.2d 752, 758-59 (D.C. Cir. 1973) ("And whether a bid complies in all material respects with the invitation depends on whether the method and timeliness of submission maintains the integrity of the procurement system." (Citing 41 C.F.R. § 1-2.301 (Sept. 24 1965).)); Blount, Inc. v. United States, 22 Ct.Cl. 221, 226-27 (1990) ("[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." (Citation omitted.)); Firth Constr. Co. Inc. v. United States, 36 Fed. Cl. 268, 272, 274, 275 (1996); cf. ECDC Envtl. L.C. v. United States, 40 Fed.Cl. 236, 242 (1998) (citing Firth and Prestex, supra, but applying a standard of review akin to abuse of discretion). Further,



[c]ontracting is a sentient process. There must be objective proof of a meeting of the minds. The prospective contracting parties are not expected to engage in telepathy. There must be a confluence of assent around specific terms. For that reason, . . . a bid which is ambiguous must be rejected as non-responsive.

Firth Constr. Co., Inc., 36 Fed.Cl. at 276 (citation omitted).

It is undisputed that Meadow Gold submitted two OF-3 bid sheets for the O`ahu contract. The record reveals that Meadow Gold's initial response to the DOE's rejection of its "bid" was to explain its intentions behind submitting the "two bids." When that argument failed, Meadow Gold then argued that it did not submit two bids, but that it submitted an integrated bid, which is not expressly prohibited. However, the above discussion of the relevant statutory provisions and attending rules demonstrates that submission of a multiple bid is prohibited.

It is elementary that submission of two bids in a sealed competitive bidding process that permits submission of only one bid is a material deviation from the Bid Solicitation special conditions and is nonresponsive. Moreover, Meadow Gold's deviation directly involved the price, a term that is typically and traditionally material. Furthermore, Meadow Gold's double bid was ambiguous. As noted above, the DOE is not required to engage in telepathy to discern what Meadow Gold intended by

submitting two apparently different bids.<sup>12</sup> Meadow Gold's multiple or double bid was nonresponsive to the instant Bid Solicitation and was properly rejected.

2. Meadow Gold's Argument that It Submitted an Integrated Bid Lacks Merit.

Meadow Gold has complicated the seemingly simple question of whether it submitted two bids. Meadow Gold argues that, if the 10% price preference for Hawai'i products is calculated, the figures on the two OF-3 bid sheets are equivalent. Meadow Gold's argument fails for three reasons.

First, the question whether Meadow Gold submitted a "multiple bid" in violation of special conditions Nos. 2A.1 and 2A.10 and HAR § 3-122-4 presents a mixed question of law and fact. "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. . . . '[T]he court should not substitute its own judgment for that of the agency.'" Poe, 87 Hawai'i at 195, 953 P.2d at 573 (citations omitted). As the DOE immediately determined upon opening the bids that Meadow Gold had submitted a "multiple bid" by submitting two OF-3 pages with different prices and products, we defer to the DOE's determination on this issue.

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<sup>12</sup> It is noted again that Meadow Gold did not specify a primary bid.

Second, condition No. 1C.2 of the special conditions to the Bid Solicitation provides that no preference will be given, i.e., no 10% reduction will be calculated, when all of the bids submitted consist of Hawai`i products. Here, only Meadow Gold and Foremost submitted bids for the O`ahu contract, both of which contained Hawai`i products. Meadow Gold's submission of an impermissible second OF-3 page containing non-Hawai`i products will not render the preference provision applicable.

Third and finally, even assuming that the 10% preference is calculated, the prices are not equivalent. Meadow Gold submitted exhibits to the hearings officer adding 10% to its OF-3 page containing non-Hawai`i products and rounded those figures up to equal the prices on its OF-3 page containing Hawai`i products prices. The plain language of HRS § 103D-1002 (Supp. 1998)<sup>13</sup> provides that 10% will be subtracted from the Class III Hawai`i products price. This is important insofar as

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<sup>13</sup> HRS § 103D-1002 provides in relevant part:

**Hawai`i products.** (a) A purchasing agency shall review all specifications in a bid or proposal for purchase from the Hawai`i products list where these products are available; provided that the products:

(d) Where a bid or proposal contains both Hawai`i and non-Hawai`i products, then for the purpose of selecting the lowest bid or purchase price only, the price bid or offered for a Hawai`i product item shall be decreased by subtracting therefrom: . . . ten per cent for . . . class III Hawai`i product items bid or offered, respectively. The lowest total bid or proposal, taking the preference into consideration, shall be awarded the contract unless the bid or offer provides for additional award criteria. . . .

no "rounding" of figures properly calculated would render the two OF-3 pages equivalent.<sup>14</sup> Therefore, Meadow Gold's argument that the DOE improperly rejected its bid because its bid was "integrated" is meritless.

B. The DOE Was Not Obligated to Permit Meadow Gold to Correct Its "Mistake."

Meadow Gold argues that the DOE should have permitted Meadow Gold to correct its mistake of basically submitting two bids, despite its argument that it submitted an integrated bid.

HAR § 3-122-31 (1995) provides:

Mistakes in bids. (a) Correction or withdrawal of a bid because of an obvious mistake in the bid is permissible to the extent it is not contrary to the best interest of the government agency or to the fair treatment of other bidders.

....

(c) Corrections to bids after opening but prior to award may be made under the following conditions:

- (1) If the mistake is attributable to an arithmetical error, the procurement officer shall so correct the mistake. In case of error in extension of bid price, unit price shall govern.
- (2) If the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions,

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<sup>14</sup> As one can see, rounding the figures of Meadow Gold's first OF-3 page, after the 10% price preference, does not equal Meadow Gold's second OF-3 page figures.

Meadow Gold's 1ST OF-3 page of Hawai'i products:

| <u>Group 1</u> | <u>Group 2</u> | <u>Group 3</u> | <u>Group 4</u> | <u>Group 5</u> | <u>Group 6</u> | <u>Group 7</u> | <u>Group 8</u> |
|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| \$.26          | \$.25          | \$.235         | \$.24          | \$.24          | \$.26          | \$.26          | \$.26          |

Meadow Gold's 2ND OF-3 page of non-Hawai'i products:

| <u>Group 1</u> | <u>Group 2</u> | <u>Group 3</u> | <u>Group 4</u> | <u>Group 5</u> | <u>Group 6</u> | <u>Group 7</u> | <u>Group 8</u> |
|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| \$.236363      | \$.227272      | \$.213636      | \$.218181      | \$.218181      | \$.236363      | \$.236363      | \$.236363      |

Meadow Gold's 1ST OF-3 page of Hawai'i products lessened 10%:

| <u>Group 1</u> | <u>Group 2</u> | <u>Group 3</u> | <u>Group 4</u> | <u>Group 5</u> | <u>Group 6</u> | <u>Group 7</u> | <u>Group 8</u> |
|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|
| \$.234         | \$.225         | \$.2115        | \$.216         | \$.216         | \$.234         | \$.234         | \$.234.        |

the procurement officer may waive the informalities or allow the bidder to request correction by submitting proof of evidentiary value which demonstrates that a mistake was made. The procurement officer shall prepare a written approval or denial in response to this request. Examples of mistakes include:

- (A) Typographical errors;
- (B) Transposition errors;
- (C) Failure of a bidder to sign the bid or provide an original signature, but only if the unsigned bid or photocopy is accompanied by other material indicating the bidder's intent to be bound.

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

....  
(f) The determination required by this section shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

(Emphasis added.)

Correction of a mistake that is neither an arithmetical error or a minor informality must be in the best interests of the DOE. However, "[q]uestions of the 'responsiveness' of [a] bid . . . relate to 'conformity with the invitation' and are generally not curable after bid opening." Northeast Constr. Co., 485 F.2d at 760. The discretion of the head of the DOE in concurring with such determinations "shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law."

As noted above, such a correction in the instant case would not have been in the best interests of the DOE, inasmuch as it would have been unfair to the other bidder. Similar to Northeast Constr. Co., 485 F.2d at 760, "the specifications furnished [Meadow Gold] were clear and specific, and they were ignored. [Meadow Gold] cannot realistically be heard to say that [it] was relying on the minor irregularities clause of [HAR § 3-122-31]. If [Meadow Gold] knew much about government procurement, [Meadow Gold] knew enough to know that [it] was governed by the" special conditions of the Bid Solicitation. On this record, there was no abuse of discretion.

C. Meadow Gold's Challenges to the Hearings Officer's Decisions Are without Merit.

1. The Hearings Officer Correctly Excluded Evidence Irrelevant to the Responsiveness of Meadow Gold's Bid.

Meadow Gold argues that the hearings officer erred in excluding evidence regarding the best interests of the DOE and regarding its intent to submit an integrated bid. The DOE and Foremost contend that this evidence was properly excluded as irrelevant. We agree with the DOE and Foremost.

HRE Rule 402 provides that "[a]ll relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence

to the determination of the action more probable or less probable than it would be without the evidence." HRE Rule 401 (1993).

The above discussion regarding responsiveness makes clear that the best interests of the DOE as well as the savings the DOE would have received are irrelevant, insofar as applicable statutory provisions and rules mandated the rejection of Meadow Gold's multiple bid. Meadow Gold focuses upon the speculative savings the DOE lost and ignores how its actions nearly compromised the integrity of the competitive bidding system.

In fact, the DOE's conclusion that Meadow Gold's bid must have been rejected was in the best interests of the DOE for two reasons. First, rejection of a bid that does not materially conform to the special conditions of a bid solicitation maintains the competitive bidding system's integrity by insuring fairness to other bidders. The hearings officer correctly concluded that the DOE's failure to reject Meadow Gold's bid would have been unfair to the other bidder, here Foremost. Second, any contract that the DOE might have entered with Meadow Gold, based upon its bid for the instant contract, would likely have been void in light of Meadow Gold's material deviation from the special conditions of the Bid Solicitation.

Finally, Meadow Gold's evidence of its intent to submit an integrated bid was similarly irrelevant. As noted above,

responsiveness is determined when the bids are opened. Neither Meadow Gold, nor any bidder, can be permitted to explain, after the bids are opened, how its bid is responsive, despite the bid's apparent nonresponsiveness. The hearings officer correctly excluded this evidence.

2. The Hearings Officer Did Not Prejudice Meadow Gold's Substantial Rights.

Meadow Gold argues that the hearings officer prejudiced its substantial rights by (1) scheduling the May 13, 1998 hearing without prior legal notice, (2) making no attempt to contact Meadow Gold and insure that it was aware of the hearing, (3) granting Foremost's motion to intervene without hearing from Meadow Gold, (4) granting the DOE's oral motion to dismiss, (5) failing to rule on the DOE's motion to reschedule the hearing and then permitting the DOE to withdraw its motion, and (6) entering its July 16, 1998 FOFs, COLs, and judgment on the same day the DOE awarded the contract in dispute. In short, Meadow Gold's arguments are without merit.

First, the record reveals that the May 13, 1998 hearing was held after notice was given, albeit short notice, to both the DOE and Meadow Gold. Foremost's motion to intervene was properly granted, and Meadow Gold has offered no argument as to why the next lowest bidder on the challenged contract would not have a right to intervene. Further, although the first hearing was held



without Meadow Gold's presence on May 13, 1998, the hearings officer, upon an appropriate motion for reconsideration, withdrew its order dismissing the matter without prejudice and re-set the matter for another hearing. A full administrative hearing was held on the matter on June 15, 1998.

Second, Meadow Gold's argument that, essentially, the hearings officer was biased and failed to act impartially is without merit. Rulings that are in the opposing party's favor do not equal a lack of impartiality. In light of the foregoing, Meadow Gold's argument fails.

Third and finally, Meadow Gold's cryptic challenge to the hearing officer's entering judgment on July 16, 1998, the same day the DOE awarded the contract to Foremost, also lacks merit. Meadow Gold appears to be alleging that some form of collusion existed between the hearings officer and the DOE. A thorough review of the record on appeal shows that this implicit argument has no factual basis. Furthermore, nothing in HRS Chapter 103D precludes an agency from executing such a contract on the same day that the hearings officer enters judgment. Therefore, Meadow Gold's substantial rights have not been prejudiced.

IV. CONCLUSION

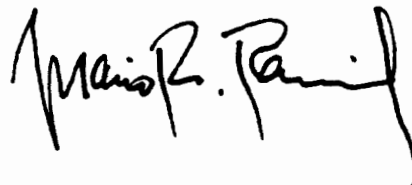
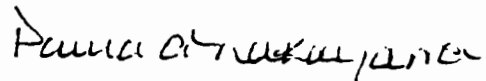
Based upon the foregoing, the DOE's rejection of Meadow Gold's bid was in accordance with the Constitution, statutes, regulations, and the terms and conditions of the Bid Solicitation. Therefore, the DCCA hearings officer's decision correctly affirmed the DOE's rejection of the bid and is hereby affirmed.

On the briefs:

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House Foods Hawaii  
Corporation dba Foremost  
Dairies Hawaii



JUL 16 8 50 AM '98

HEARINGS OFFICE



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

|                            |   |                                 |
|----------------------------|---|---------------------------------|
| In the Matter of           | ) | PCH-98-3                        |
|                            | ) |                                 |
| SOUTHERN FOODS GROUP, L.P. | ) | HEARINGS OFFICER'S FINDINGS OF  |
| dba MEADOW GOLD DAIRIES,   | ) | FACT, CONCLUSIONS OF LAW AND    |
|                            | ) | DECISION; APPENDICES "A" TO "D" |
| Petitioner,                | ) |                                 |
| vs.                        | ) |                                 |
|                            | ) |                                 |
| STATE OF HAWAII,           | ) |                                 |
| DEPARTMENT OF EDUCATION,   | ) |                                 |
|                            | ) |                                 |
| Respondent,                | ) |                                 |
|                            | ) |                                 |
| and                        | ) |                                 |
|                            | ) |                                 |
| HOUSE FOODS HAWAII         | ) |                                 |
| CORPORATION, dba FOREMOST  | ) |                                 |
| DAIRIES HAWAII,            | ) |                                 |
|                            | ) |                                 |
| Intervenor.                | ) |                                 |
|                            | ) |                                 |

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

I. CHRONOLOGY OF CASE

On April 8, 1998, Southern Foods Group, L.P. dba Meadow Gold Dairies ("Petitioner") transmitted its request for administrative hearing to Alfred Suga, Assistant Superintendent, Office of Business Services, Department of Education, State of Hawaii ("Respondent") to contest Respondent's decision to reject Petitioner's bid to furnish and

deliver fresh milk to various schools in the State of Hawaii. Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") § 103D-709 and Hawaii Administrative Rules ("HAR") §§ 3-126-8(e) and 3-126-42.

The Office of Administrative Hearings, Department of Commerce and Consumer Affairs received Petitioner's request for administrative hearing on April 22, 1998.

The matter was set for hearing on May 11, 1998, and the Notice of Hearing and Prehearing Conference was duly served on the parties. At the prehearing conference held on May 7, 1998, which was attended by Marc E. Rousseau, Esq. on behalf of Petitioner, and Patricia T. Ohara, Esq., on behalf of Respondent, the parties agreed to continue the hearing from May 11, 1998, to the week of June 1, 1998. The parties were instructed to notify the Hearings Officer of the exact date of the hearing as soon as possible.

On May 11, 1998, the Hearings Officer was informed that the parties were unable to agree on a hearing date. Because the parties had not agreed to waive the statutory requirement to commence the hearing within twenty-one calendar days of receipt of the request for hearing, the hearing was rescheduled to May 13, 1998 at 9:00 a.m., and on May 12, 1998, a Notice of Rescheduled Hearing was issued and served on the parties by facsimile transmission and certified mail.

The events which subsequently transpired are set forth in the following orders: **(A)** Order Granting Respondent's Motion to Dismiss, filed on May 13, 1996; **(B)** Certification Re Petitioner's Motion to (1) Set Aside or Vacate Order Dismissing Request for an Administrative Hearing, and (2) Reset Hearing Date for Administrative Appeal, and to (3) Confirm and Restate Motion to Reopen Hearing Filed By Letter Dated May 13, 1998, filed on May 28, 1998, and **(C)** Order Granting Petitioner's Motion to (1) Set Aside or Vacate Order Dismissing Request for an Administrative Hearing, and (2) Reset Hearing Date for Administrative Appeal, and to (3) Confirm and Restate Motion to Reopen Hearing Filed By Letter Dated May 13, 1998, and Notice of Rescheduled Hearing, filed on June 5, 1998. True and correct copies of these Orders are attached hereto and incorporated herein by reference as Appendix "A". The hearing was rescheduled to June 10, 1998 at 9:00 a.m.

On June 9, 1998, Petitioner filed a Motion to Disqualify the Hearings Officer Pursuant to Haw. Rev. Stat. § 601-7(b). The hearing on Petitioner's Motion was scheduled

for June 10, 1998. On June 10, 1998, Respondent filed a memorandum in opposition to Petitioner's Motion.

On June 10, 1998, the hearing was reconvened by the Hearings Officer. Petitioner was represented by C. Michael Hare, Esq. and Mr. Rousseau. Respondent was represented by Ms. Ohara, and Intervenor was represented by John T. Komeiji, Esq. and Michael C. Bird, Esq. After hearing arguments on Petitioner's Motion, the Hearings Officer denied Petitioner's Motion. When the Hearings Officer attempted to proceed with the hearing on the merits, Petitioner questioned whether the Hearings Officer had jurisdiction to proceed, as the Application for Judicial Review filed with the Hawaii Supreme Court had not yet been dismissed. Because of the uncertainty, the parties agreed to postpone the hearing to June 15, 1998, based on the condition that notice could be given to the Hearings Officer and the parties on or before 3:00 p.m. on June 12, 1998, that the stipulation dismissing the Application had been approved and filed by the Hawaii Supreme Court. The Stipulation was approved and filed by the Hawaii Supreme Court on June 10, 1998, and the Hearings Officer received a facsimile copy of the Stipulation on June 11, 1998 and a hard copy on June 12, 1998.

On June 15, 1998, the hearing was reconvened by the Hearings Officer. Petitioner was present through a representative and was represented by Messrs. Hare and Rousseau. Respondent was present through a representative and was represented by Ms. Ohara. Intervenor was also present through representatives and was represented by Messrs. Komeiji and Bird.

Pursuant to an agreement by the parties at the hearing, a document entitled Stipulated Facts and Stipulated Issues; Exhibits S-1, F-1, MG1, MG3, MG4, MG5, MG6, MG7, and MG8 was filed on June 17, 1998.

Having reviewed and considered the evidence and arguments presented, 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

Findings of Fact numbers 1 through 12 have been taken from the Stipulated Facts filed on June 17, 1998.

1. Petitioner is a limited partnership organized under the laws of Delaware. Petitioner is licensed to do business in Hawaii.

2. Respondent is a sovereign governmental entity authorized and existing under the Constitution of the United States of America and the Constitution of the State of Hawaii.

3. Intervenor is a corporation duly organized under the laws of the State of Hawaii, and is authorized to do business in the State of Hawaii.

4. Mr. Glenn Muranaka and Mr. Ron Sugai are, respectively, the President and General Manager and the Sales Manager of Petitioner. Both are authorized to represent and act on behalf of Petitioner with regard to IFB No. E98-21 and its subsequent protest/reconsideration, the administrative hearing and the appeal.

5. Mr. Alfred Suga is the Assistant Superintendent and Mr. Eric Tom is the Procurement and Distribution Specialist, both of the Office of Business Services of the Department of Education ("DOE"). Each is authorized to represent and act on behalf of Respondent with regard to IFB No. E98-21 and its subsequent protest/reconsideration, the administrative hearing, and the appeal.

6. On February 5, 1998, the Respondent's Procurement and Distribution Section issued an Invitation for Sealed Bids, identified as IFB No. E98-21, for furnishing and delivering fresh milk to various schools in the State of Hawaii (the "Bid Solicitation").

7. Petitioner and Intervenor each submitted bids in response to the Bid Solicitation. A copy of the two OF-3 pages submitted by Petitioner is attached hereto and incorporated herein by reference as Appendix "B", and a copy the OF-3 page submitted by Intervenor is attached hereto and incorporated herein by reference as Appendix "C".

8. Petitioner's bid for the Oahu portion of IFB No. E98-21 contained two bid sheets identified as OF-3.

9. The first OF-3 page of Petitioner's bid sets forth the following prices for Oahu groups I through VIII for 1/2 pint servings of 2% whole milk and chocolate milk: \$.26, \$.25, \$.235, \$.24, \$.24, \$.26, \$.26 and \$.26, respectively. On this same OF-3 page, Petitioner indicated that its products qualified under the Hawaii product preference law as Class III products and entitled to a 10% preference consideration.

10. On the second OF-3 page, Petitioner inserted the following prices for Oahu groups I through VIII for 1/2 pint servings of 2% whole milk and chocolate milk: \$.236363, \$.227272, \$.213636, \$.218181, \$.218181, \$.236363, \$.236363, and \$.236363, respectively. Petitioner did not indicate any preference on this OF-3 page.

11. On Intervenor's OF-3 page, Intervenor inserted the following prices for Oahu school groups I through VII for 1/2 pint servings of 2% whole milk and chocolate milk: \$.2259, \$.2824, \$.2223, \$.2824, \$.2824, \$.2337, and \$.2259, respectively. Intervenor did not submit a bid for group no. VIII. On its OF-3 bid sheet, Intervenor indicated that its products qualified under the Hawaii product preference law as Class III products and entitled to a 10% preference consideration.

12. There is no factual dispute that Petitioner is a responsible bidder on IFB No. E98-21.

13. Section 2A.1 of the Bid Solicitation, entitled "Bid/Proposal Forms provides in part:

...  
A proposal that contains any omission, erasure, addition not called for, conditional bid or irregularity of any kind may be rejected[.]  
...

Unless otherwise stated, bidder shall offer only one (1) bid per item/number. If more than one bid is offered, all bids shall be rejected for that item/number.  
...

14. Section 2A.10 of the Bid Solicitation, entitled "Disqualification of Bidders" provides in part:

Any one or more of the following causes will be considered as sufficient for disqualification of the bidder:

...  
b. More than one proposal from an individual, firm, corporation or joint venture under the same or different names.  
...

h. If the proposal shows any noncompliance with applicable law or contains any unauthorized additions or deletions, conditional bid, incomplete bid, or irregularities of any kind which may tend to make the bid/proposal incomplete, indefinite, or ambiguous as to its meaning.

15. In a letter dated March 2, 1998 from Petitioner to Respondent, Respondent states in part:

This letter is an explanation of our actions in connection with the sealed bid for the Oahu school milk and to assist you in making a decision regarding this matter.

At the outset, our two bids for the Oahu school milk were in no way intended to mislead or deceive the Department of Education. The first OF-3 sheet lists our bid prices utilizing local milk and its 10% price advantage over nonregistered (mainland) products. The second OF-3 sheet lists our bid prices using mainland milk shipped to Oahu and processed at our Honolulu plant.

Our best intent behind these two bid sheets was to offer the DOE the best milk prices available on Oahu, thereby reducing the DOE's costs. As long as milk supplies are available, Meadow Gold would supply locally processed milk; however, the poor economy in Hawaii has caused many local milk producers to close operation or reduce production. If the trend continues there may be a significant shortage of locally produced milk and Meadow Gold would have to rely on mainland suppliers. Therefore, we were merely offering the DOE the best possible alternatives available to us in the market.

If the dual bid sheets are interpreted as a violation of Section 2A.10 of the Special Conditions, we believe that the withdrawal of one bid sheet would not unfairly taint the sealed bid process and would provide the DOE with the best possible offer that Meadow Gold is able to make[.]

16. By a letter dated March 9, 1998, Respondent responded to Petitioner's March 2, 1998 letter and a March 4, 1998 meeting. Respondent's letter states in part:



Based on above, your position of providing the DOE a choice but at the same time arguing one of the bid pages was for a non qualified product, I must invite your attention to paragraph 7 of section 2A.1 page SC 2-1 within the Special Conditions entitled Bid/Proposal Requirements. Reference reads as follows: 'Unless otherwise stated, bidder shall offer only one (1) bid per item/number. If more than one bid is offered, all bids shall be rejected for that item/number.'

17. By a letter dated March 12, 1998, Petitioner informed Respondent that it decided to formally protest the rejection of its bid. Petitioner goes on to state:

Meadow Gold did not submit two bids for the contracts to supply fresh milk to Oahu school districts in IFB No. E98-21. Meadow Gold submitted one, integrated bid reflected on two bid sheets identified as OF-3. Meadow Gold intended these bid sheets to be treated as a single, unconditional bid[.]

18. By a letter dated March 18, 1998, Respondent informed Petitioner that the requirement was for only one bid offer per item/number, and that Petitioner's protest/request for reconsideration was being denied.

19. After receiving a letter from Petitioner requesting clarification of its March 18, 1998 letter, Respondent, by a letter dated April 2, 1998, informed Petitioner that its March 18, 1998 letter was intended to reply to Petitioner's protest in accordance with HAR § 3-126-3, and was a final determination of Petitioner's request for reconsideration pursuant to HAR § 3-126-8.

20. Petitioner's calculations of the non-Hawaii product price is attached hereto and incorporated herein by reference as Appendix "D". Appendix "D" states in part:

$$\text{Hawaii Product Price} = \text{Non-Hawaii Product Price} \times 1.1$$

$$\frac{\text{Hawaii Product Price}}{1.1} = \text{Non-Hawaii Product Price}$$

### III. CONCLUSIONS OF LAW

Petitioner contends that Respondent's rejection of its bid based on Respondent's determination that Petitioner submitted two bids was improper. Petitioner also contends that even if it is determined that Petitioner submitted two bids, Respondent's

rejection was improper because (1) Respondent failed to articulate cogent and compelling reasons why the offer was rejected, as required by HAR § 3-122-95(b) and/or (2) pursuant to HAR § 3-122-31(c)(3), Petitioner should have been allowed to correct its bid. Petitioner has the burden of proving by a preponderance of the evidence that Respondent's conduct was not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation or contract.

The evidence presented established that Petitioner submitted two OF-3 sheets in response to the Bid Solicitation, one page representing the price for locally produced milk, for which the Hawaii preference was claimed, and a second page for non-Hawaii produced milk, for which the Hawaii preference was not claimed. The evidence also established that Respondent rejected Petitioner's submission on the basis that Petitioner's bid was not responsive to the Bid Solicitation, which required one bid per item.

Hawaii Administrative Rules § 3-122-4 provides:

**§ 3-122-4 Multiple or alternate offers.** (a) Unless multiple or alternate offers are specifically provided for, the solicitation shall state that multiple or alternate offers shall not be accepted.

(b) When prohibited, multiple or alternate offers shall be rejected, provided that if an offeror clearly indicates a primary offer, it shall be considered for award as though it were the only offer submitted by the offeror.

(c) This section shall be set forth in the solicitation, and if multiple or alternate offers are allowed, it shall specify their treatment.

It is not disputed that Petitioner did not indicate a primary offer. Instead, Petitioner argued that it submitted an "integrated" bid, consisting of one bid with two bid sheets, and that its "integrated" bid was responsive to the Bid Solicitation because: (1) when rounding is properly conducted, the two prices are identical, and (2) when the two bid sheets are considered together, the amount to be charged to Respondent is readily ascertainable.

Petitioner relied on the calculations contained in Appendix "D" to support its contention that the prices on the two bid sheets are identical. Petitioner's calculations add ten

percent to the non-Hawaii product price in order to determine the Hawaii product price. HRS § 103D-1002 provides in part:

**§ 103D-1002 Hawaii products.**

(c) All persons submitting bids or proposals to claim a Hawaii products preference shall designate in their bids which individual product and its price is to be supplied as a Hawaii product.

(d) Where a bid or proposal contains both Hawaii and non-Hawaii products, then for the purpose of selecting the lowest bid or purchase price only, the price bid or offered for a Hawaii product item shall be decreased by subtracting therefrom...ten per cent for...class III Hawaii product items bid or offered respectively. The lowest total bid or proposal, taking the preference into consideration, shall be awarded the contract unless the bid or offer provides for additional award criteria. The contract amount of any contract awarded, however, shall be the amount of the bid or price offered, exclusive of the preferences.

Consequently, for purposes of bid evaluation only, the prices reflected on the two OF-3 pages submitted by Petitioner would have been equal had Petitioner's non-Hawaii product OF-3 page reflected Petitioner's Hawaii product price less ten per cent, as provided by HRS § 103D-1002.<sup>1</sup> However, Petitioner added 10 per cent to the non-Hawaii product price, resulting in a price that, for purposes of bid evaluation, is not equivalent.<sup>2</sup> Accordingly, the Hearings Officer finds that Petitioner offered more than one bid for the same item without clearly indicating a primary offer, and concludes that pursuant to the terms of the Bid Solicitation and HAR § 3-122-4, Petitioner's bid was nonresponsive and must be rejected. The Hearings Officer also concludes that, contrary to Petitioner's assertions that the amount to be charged to Respondent is readily ascertainable when the two OF-3 pages are read together, the bid submitted by Petitioner contained an irregularity which made its bid indefinite

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<sup>1</sup> If another bidder had offered a non-Hawaii product, its bid could then be compared to Petitioner's non-Hawaii product OF-3 page and if Petitioner's price was lower, Petitioner would have been awarded the contract at the rate specified on the OF-3 page specifying the Hawaii product price.

<sup>2</sup> Using group No. I as an example, Petitioner's Hawaii product price is \$.26. Ten per cent of \$.26 is \$.026.  $$.26 - $.026 = $.234$ . Petitioner's non-Hawaii product price, as reflected on its OF-3 page is \$.236363, which even with rounding, does not equal to \$.234.

or ambiguous, requiring Petitioner to be disqualified pursuant to Section 2A.10 of the Bid Solicitation.

In the alternative, Petitioner argued that Respondent failed to follow the provisions of HAR § 3-122-95(b) when Respondent rejected its bid. HAR § 3-122-95(b) provides:

**§ 3-122-95 Cancellation of solicitations and rejection of offers.**

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

HAR § 3-122-95 implements HRS § 103D-308, which states:

An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interest of the governmental body which issued the invitation, request or other solicitation, in accordance with the rules adopted by the policy board. The reasons therefor shall be made a part of the contract file.

The Hearings Officer finds HAR § 3-122-95(b) to be inapplicable to the case at bar. Petitioner's bid was rejected because it was not responsive to the Bid Solicitation. It was not rejected because Respondent deemed it to be in its best interest to cancel the Bid Solicitation and/or reject the Petitioner's offer, which, pursuant to HAR § 3-122-95(b), would then require Respondent to articulate cogent and compelling reasons why rejection is in Respondent's best interests.

Petitioner also argued that it should be allowed to correct its mistake, as allowed by HAR § 3-122-31(c)(3) which provides:

**§ 3-122-31 Mistakes in bids.** (a) Correction or withdrawal of a bid because of an obvious mistake in the bid is permissible to the extent it is not contrary to the best interest of the government agency or to the fair treatment of other bidders.

(c) Corrections to bids after opening but prior to award may be made under the following conditions:

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

The Procurement Code prescribes strict procedures for the procurement of goods and services by state agencies for the purposes of:

- (1) providing fair and equitable treatment of all persons dealing with the government procurement system; (2) fostering broad-based competition among venders while ensuring accountability, fiscal responsibility, and efficiency; and (3) increasing public confidence in the integrity of the system.

Carl Corp. v. State Department of Education, 85 Haw. 431 at 459 (1997). Because the prices set forth on the two OF-3 pages were not found to be identical, and it is not clearly evident from the bid document which of the two OF-3 pages Petitioner intended as its bid price, allowing Petitioner to correct its bid after bid opening would give Petitioner “two bites at the apple” and a competitive advantage over other bidders. Accordingly, the Hearings Officer concludes that Petitioner should not be allowed to correct its bid as it would not result in the fair treatment of the other bidders.

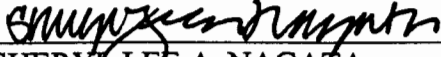
#### IV. DECISION

Based on the foregoing considerations, the Hearings Officer finds and concludes that Petitioner was not a responsive bidder, and that Petitioner failed to prove by a preponderance of the evidence that Respondent’s rejection of its bid was improper and not in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation.

Accordingly, it is hereby ordered that Respondent's rejection of Petitioner's bid is affirmed.

JUL 16 1998

DATED: Honolulu, Hawaii, \_\_\_\_\_.

  
\_\_\_\_\_  
SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs



AND CONSUMER AFFAIRS  
JUN 5 11 52 AM '98  
HEARINGS OFFICE

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

|   |   |                                |
|---|---|--------------------------------|
| In the Matter of                                  | ) | PCH-98-3                       |
|   | ) |                                |
| SOUTHERN FOODS GROUP,<br>dba MEADOW GOLD DAIRIES, | ) | ORDER GRANTING PETITIONER'S    |
|   | ) | MOTION TO (1) SET ASIDE OR     |
|   | ) | VACATE ORDER DISMISSING        |
| Petitioner,                                       | ) | REQUEST FOR AN                 |
| vs.   | ) | ADMINISTRATIVE HEARING, AND    |
|   | ) | (2) RESET HEARING DATE FOR     |
| STATE OF HAWAII,<br>DEPARTMENT OF<br>EDUCATION,   | ) | ADMINISTRATIVE APPEAL, AND TO  |
|   | ) | (3) CONFIRM AND RESTATE MOTION |
|   | ) | TO REOPEN HEARING FILED BY     |
|   | ) | LETTER DATED MAY 13, 1998; AND |
| Respondent,                                       | ) |                                |
|   | ) | NOTICE OF RESCHEDULED          |
| and   | ) | HEARING                        |
|   | ) |                                |
| HOUSE FOODS HAWAII<br>CORPORATION, dba            | ) |                                |
| FOREMOST DAIRIES HAWAII,                          | ) |                                |
|   | ) |                                |
| Intervenor.                                       | ) |                                |

**ORDER GRANTING PETITIONER'S MOTION TO (1) SET ASIDE  
OR VACATE ORDER DISMISSING REQUEST FOR AN  
ADMINISTRATIVE HEARING, AND (2) RESET  
HEARING DATE FOR ADMINISTRATIVE APPEAL,  
AND TO (3) CONFIRM AND RESTATE MOTION TO  
REOPEN HEARING FILED BY LETTER DATED MAY 13, 1998;  
AND NOTICE OF RESCHEDULED HEARING**

On May 13, 1998, an Order Granting Respondent's Motion to  
Dismiss ("Order") was issued.

On May 15, 1998, Petitioner filed its Motion to (1) Set Aside or Vacate Order Dismissing Request for an Administrative Hearing, and (2) Reset Hearing Date for Administrative Appeal, and to (3) Confirm and Restate Motion Letter Dated May 13, 1998 ("Motion"). The hearing on the Motion was set for May 26, 1998 at 9:00 a.m.

On May 21, 1998, House Foods Hawaii Corporation, dba Foremost Dairies - Hawaii ("Intervenor") filed a memorandum in opposition to the Motion.

On May 22, 1998, the Hearings Officer received a copy of an Application for Judicial Review of the Hearings Officer's Order Granting Respondent's Motion to Dismiss Issued on May 13, 1998, ("Application") which was filed with the Supreme Court of the State of Hawaii on May 21, 1998.

On May 22, 1998, the State of Hawaii, Department of Education ("Respondent") filed its memorandum in opposition to the Motion and Petitioner filed its reply memorandum to Intervenor's memorandum in opposition to the Motion.

On May 26, 1998, Petitioner filed its reply memorandum to Respondent's memorandum in opposition to the Motion.

On May 26, 1998, a hearing was held on the Motion. Petitioner was represented by Dennis J. Gaughan, Esq. and Marc E. Rousseau, Esq. Respondent was represented by Patricia T. Ohara, Esq. Intervenor was represented by Michael C. Bird, Esq. After hearing arguments on the Motion, the matter was taken under advisement.

On May 28, 1998, the Hearings Officer issued a Certification Re Petitioner's Motion.

On June 1, 1998, Petitioner filed a Motion to Remand This Matter to the Office of Administrative Hearings in the Supreme Court of the State of Hawaii.

On June 4, 1998, the Supreme Court of the State of Hawaii issued an Order granting Petitioner's Motion for Remand, and directed the Office of Administrative Hearings to enter an order regarding Petitioner's May 15, 1998



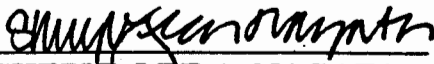
Motion within five (5) days of the Court's Order. Accordingly, as the evidence presented established that Petitioner's failure to appear at the scheduled hearing on May 13, 1998 was the result of mistake and excusable neglect,

IT IS HEREBY ORDERED that Petitioner's Motion is granted, and the hearing in this matter has been rescheduled to:

DATE: June 10, 1998  
TIME: 9:00 a.m.  
PLACE: Ka Lanakila Room, Penthouse  
250 South King Street  
Honolulu, Hawaii

JUN - 5 1998

DATED: Honolulu, Hawaii, \_\_\_\_\_.

  
\_\_\_\_\_  
SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs



MAY 28 9 07 AM '96

HEARINGS OFFICE

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

|                           |   |                                   |
|---------------------------|---|-----------------------------------|
| In the Matter of          | ) | PCH-98-3                          |
|                           | ) |                                   |
| SOUTHERN FOODS GROUP,     | ) | CERTIFICATION RE PETITIONER'S     |
| dba MEADOW GOLD DAIRIES,  | ) | MOTION TO (1) SET ASIDE OR VACATE |
|                           | ) | ORDER DISMISSING REQUEST FOR AN   |
| Petitioner,               | ) | ADMINISTRATIVE HEARING, AND       |
| vs.                       | ) | (2) RESET HEARING DATE FOR        |
|                           | ) | ADMINISTRATIVE APPEAL, AND TO     |
| STATE OF HAWAII,          | ) | (3) CONFIRM AND RESTATE MOTION    |
| DEPARTMENT OF EDUCATION,  | ) | TO REOPEN HEARING FILED BY        |
|                           | ) | LETTER DATED MAY 13, 1998         |
| Respondent,               | ) |                                   |
|                           | ) |                                   |
| and                       | ) |                                   |
|                           | ) |                                   |
| HOUSE FOODS HAWAII        | ) |                                   |
| CORPORATION, dba FOREMOST | ) |                                   |
| DAIRIES HAWAII,           | ) |                                   |
|                           | ) |                                   |
| Intervenor.               | ) |                                   |

**CERTIFICATION RE PETITIONER'S MOTION TO (1) SET ASIDE OR VACATE ORDER DISMISSING REQUEST FOR AN ADMINISTRATIVE HEARING, AND (2) RESET HEARING DATE FOR ADMINISTRATIVE APPEAL, AND TO (3) CONFIRM AND RESTATE MOTION TO REOPEN HEARING FILED BY LETTER DATED MAY 13, 1998**

On May 13, 1998, an Order Granting Respondent's Motion to Dismiss ("Order") was issued.

On May 15, 1998, Petitioner filed its Motion to (1) Set Aside or Vacate Order Dismissing Request for an Administrative Hearing, and (2) Reset Hearing Date

for Administrative Appeal, and to (3) Confirm and Restate Motion Letter Dated May 13, 1998 ("Motion"). The hearing on the Motion was set for May 26, 1998 at 9:00 a.m.

On May 21, 1998, House Foods Hawaii Corporation, dba Foremost Dairies - Hawaii ("Intervenor") filed a memorandum in opposition to the Motion.

On May 22, 1998, the Hearings Officer received a copy of an Application for Judicial Review of the Hearings Officer's Order Granting Respondent's Motion to Dismiss Issued on May 13, 1998, ("Application") which was filed with the Supreme Court of the State of Hawaii on May 21, 1998.

On May 22, 1998, the State of Hawaii, Department of Education ("Respondent") filed its memorandum in opposition to the Motion and Petitioner filed its reply memorandum to Intervenor's memorandum in opposition to the Motion.

On May 26, 1998, Petitioner filed its reply memorandum to Respondent's memorandum in opposition to the Motion.

On May 26, 1998, a hearing was held on the Motion. Petitioner was represented by Dennis J. Gaughan, Esq. and Marc E. Rousseau, Esq. Respondent was represented by Patricia T. Ohara, Esq. Intervenor was represented by Michael C. Bird, Esq. After hearing arguments on the Motion, the matter was taken under advisement.

The Order issued on May 13, 1998, was a final order, as it disposed of all issues as to all parties.<sup>1</sup> Accordingly, upon Petitioner's filing of the Application for Judicial Review on May 21, 1998, jurisdiction over this matter was transferred to the Hawaii Supreme Court, and the Hearings Officer is without jurisdiction to proceed further with the case. Shimote v. Vincent, 80 Haw. 96, 905 P.2d 71 (1995); MDG Supply, Inc. v. Diversified Inv., Inc., 51 Haw. 375, 463 P.2d 525 (1969).

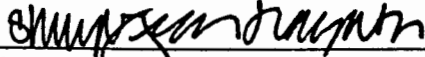
Although the Administrative Procedures Act, the Procurement Code, and its rules do not specifically address a motion to set aside or vacate an order, such a motion is akin to a Rule 60(b) motion under the Hawaii Rules of Civil Procedure ("HRCP"). In Life of the Land v. Ariyoshi, 57 Haw. 249, 553 P.2d 464, (1976), the Hawaii Supreme Court held that even where an appeal has been taken, the trial court may entertain a Rule 60(b) motion, but may not issue an order unless the case is

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<sup>1</sup> Under the Administrative Procedures Act, the Procurement Code, and the rules promulgated thereunder, there is no requirement that a separate judgment be filed. See, Rule 58, Hawaii Rules of Civil Procedure ("HRCP").

remanded.<sup>2</sup> In the case at bar, the evidence presented established that Petitioner's failure to appear at the scheduled hearing on May 13, 1998, was the result of mistake and excusable neglect. Accordingly, pursuant to the procedures adopted in Life of the Land, supra, the Hearings Officer hereby certifies that upon remand of the case, an order will be entered which grants Petitioner's Motion.

DATED: Honolulu, Hawaii, MAY 28 1998

  
\_\_\_\_\_  
SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs

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<sup>2</sup> Petitioner's Motion was based on Article I, Section 5 of The Constitution of the State of Hawaii, Hawaii Revised Statutes §§ 91-9 and 103D-709, and Hawaii Administrative Rules §§ 3-126-47, 48, 51, 67 and 71. Although Rule 60(b), HRCF was neither cited nor argued as a basis for Petitioner's Motion, the Hearings Officer has determined that the application of the procedures adopted in Life of the Land, supra, would be reasonable and appropriate in this matter.



DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

MAY 13 3 54 PM '98

HEARINGS OFFICE

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

|                          |   |                             |
|--------------------------|---|-----------------------------|
| In the Matter of         | ) | PCH-98-3                    |
|                          | ) |                             |
| SOUTHERN FOODS GROUP,    | ) | ORDER GRANTING RESPONDENT'S |
| dba MEADOW GOLD DAIRIES, | ) | MOTION TO DISMISS           |
|                          | ) |                             |
| Petitioner,              | ) |                             |
|                          | ) |                             |
| vs.                      | ) |                             |
|                          | ) |                             |
| STATE OF HAWAII,         | ) |                             |
| DEPARTMENT OF            | ) |                             |
| EDUCATION,               | ) |                             |
|                          | ) |                             |
| Respondent,              | ) |                             |
|                          | ) |                             |
| and                      | ) |                             |
|                          | ) |                             |
| HOUSE FOODS HAWAII       | ) |                             |
| CORPORATION, dba         | ) |                             |
| FOREMOST                 | ) |                             |
| DAIRIES HAWAII,          | ) |                             |
|                          | ) |                             |
| Intervenor.              | ) |                             |

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

By a letter dated April 8, 1998 Marc E. Rousseau, Esq., attorney for Southern Foods Group, L.P. dba Meadow Gold Dairies ("Petitioner") filed a request with the Assistant Superintendent of the Department of Education, State of Hawaii ("Respondent") for an administrative hearing to contest the

rejection of its bid on the Oahu portion of the fresh milk contract identified as IFB No. E98-21. Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") § 103D-709 and Hawaii Administrative Rules ("HAR") § 3-126-59.

By a letter dated April 20, 1998, Respondent transmitted Petitioner's request for hearing to the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii ("OAH"). The request for hearing was received by the OAH on April 22, 1998.

The matter was set for hearing within the twenty-one (21) calendar day period required under HRS § 103D-709(b) and HAR § 3-126-60(b), and the notice of hearing and prehearing conference was duly served on the parties. The prehearing conference set for May 4, 1998 was continued to May 7, 1998 by agreement of the parties.

At the prehearing conference held on May 7, 1998 and attended by Mr. Rousseau on behalf of Petitioner and Patricia T. Ohara, Esq., on behalf of Respondent, the parties agreed to continue the hearing from May 11, 1998 to the week of June 1, 1998. The parties were instructed to notify the Hearings Officer of the exact date of the hearing as soon as possible.

By a letter dated May 11, 1998, Petitioner informed the Hearings Officer that it objected to any continuance beyond May 15, 1998. Although the Hearings Officer was informed by Respondent that the parties had agreed to hold the hearing on June 8, 1998, by a second letter dated May 11, 1998, to Respondent and the Hearings Officer, Petitioner denied entering into such an agreement, and that therefore, the Hearings Officer should issue a revised schedule of hearing.

Consequently, because there was no agreement by the parties to waive the statutory requirement to commence the hearing within twenty-one (21) calendar days of receipt of the request for hearing, the hearing was rescheduled to May 13, 1998 at 9:00 a.m., in compliance with HRS § 103D-709(b)

and HAR § 3-126-60(b).<sup>1</sup> On May 12, 1998, a Notice of Rescheduled Hearing was issued. The Notice was transmitted by facsimile transmission to the parties and mailed to them by certified mail, return receipt requested.

Thereafter, on May 12, 1998, Respondent filed a Motion to Reschedule Hearing. The hearing on Respondent's Motion to Reschedule Hearing was set for May 13, 1998, at 9:00 a.m. Respondent's Motion was hand delivered to counsel for Petitioner on May 12, 1998.


On May 13, 1998 at 9:17 a.m., the hearing was convened by the undersigned Hearings Officer. Respondent was represented by Ms. Ohara. Petitioner was not present, nor was anyone present to represent the Petitioner. Michael C. Bird, Esq., representing House Foods Hawaii Corporation, dba Foremost Dairies Hawaii, ("Foremost") entered an appearance, requesting that Foremost be allowed to intervene in this matter. Respondent supported Foremost's intervention, and the request to intervene was granted.

Respondent then moved to dismiss the proceeding for failure of Petitioner to appear and prosecute its claim. Foremost joined in the motion, clarifying that dismissal should be granted with prejudice. Respondent joined in Foremost's clarification. The Hearings Officer orally granted the Motion to Dismiss, but reserved ruling on whether the dismissal would be with prejudice. Accordingly,.

IT IS HEREBY ORDERED that this matter is dismissed without prejudice.

MAY. 13 1998

DATED: Honolulu, Hawaii, \_\_\_\_\_.

  
\_\_\_\_\_  
SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs

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<sup>1</sup> Because the parties had not reached an agreement regarding the date for the hearing, at the very least, the hearing on May 13, 1998, was required to formally determine when the parties would be able to proceed with the full evidentiary hearing.

**BID PAGE - OAHU**

**ANTICIPATED AVERAGE DAILY LUNCH SALES FOR FY 1999**

| Group Nos. | Includes Schools in Following Districts | *Daily Average Usage |               | Price Per 1/2 Pint |                  |
|------------|---|----------------------|---------------|--------------------|------------------|
|            |   | 2%/Whole             | Chocolate     | 2%/Whole           | Chocolate        |
| I          | Central, Windward                       | 2,450                | 7,055         | <u>\$.236363</u>   | <u>\$.236363</u> |
| II         | Central                                 | 3,310                | 11,415        | <u>.227272</u>     | <u>.227272</u>   |
| III        | Leeward                                 | 3,020                | 21,125        | <u>.213636</u>     | <u>.213636</u>   |
| IV         | Central, Leeward                        | 5,135                | 17,335        | <u>.218181</u>     | <u>.218181</u>   |
| V          | Honolulu, Central                       | 4,230                | 9,650         | <u>.218181</u>     | <u>.218181</u>   |
| VI         | Honolulu                                | 7,196                | 15,286        | <u>.236363</u>     | <u>.236363</u>   |
| VII        | Windward                                | 2,795                | 10,675        | <u>.236363</u>     | <u>.236363</u>   |
| VIII       | Honolulu                                | <u>3,398</u>         | <u>6,295</u>  | <u>.236363</u>     | <u>.236363</u>   |
|            | <b>TOTAL</b>                            | <b>31,534</b>        | <b>98,836</b> |                    |                  |

\*Daily Sales by schools on Exhibit A.

Per case charge for lost milk case = \$ 4.00

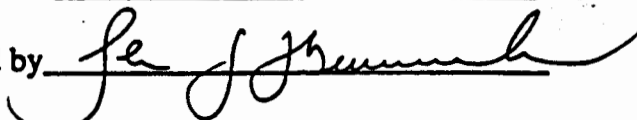
Approximate number of days of service: 181 days

Indicate class & percentage you qualify and wish to claim under the Hawaii preference law:

2%/Whole: Class - Percentage -

Chocolate: Class - Percentage -

Name of Firm Southern Foods Group, L.P.  
dba Meadow Gold Dairies

Submitted by 

IFB No. E98-21



**BID PAGE - OAHU**

**ANTICIPATED AVERAGE DAILY LUNCH SALES FOR FY 1999**

| Group Nos. | Includes Schools in Following Districts | *Daily Average Usage |                  | Price Per 1/2 Pint |                  |
|------------|---|----------------------|------------------|--------------------|------------------|
|            |   | <u>2%/Whole</u>      | <u>Chocolate</u> | <u>2%/Whole</u>    | <u>Chocolate</u> |
| I          | Central, Windward                       | 2,450                | 7,055            | <u>\$.26</u>       | <u>\$.26</u>     |
| II         | Central                                 | 3,310                | 11,415           | <u>.25</u>         | <u>.25</u>       |
| III        | Leeward                                 | 3,020                | 21,125           | <u>.235</u>        | <u>.235</u>      |
| IV         | Central, Leeward                        | 5,135                | 17,335           | <u>.24</u>         | <u>.24</u>       |
| V          | Honolulu, Central                       | 4,230                | 9,650            | <u>.24</u>         | <u>.24</u>       |
| VI         | Honolulu                                | 7,196                | 15,286           | <u>.26</u>         | <u>.26</u>       |
| VII        | Windward                                | 2,795                | 10,675           | <u>.26</u>         | <u>.26</u>       |
| VIII       | Honolulu                                | <u>3,398</u>         | <u>6,295</u>     | <u>.26</u>         | <u>.26</u>       |
|            | <b>TOTAL</b>                            | <b>31,534</b>        | <b>98,836</b>    |                    |                  |

\*Daily Sales by schools on Exhibit A.

Per case charge for lost milk case = \$4.00

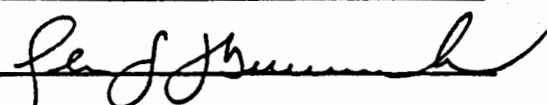
Approximate number of days of service: 181 days

Indicate class & percentage you qualify and wish to claim under the Hawaii preference law:

2%/Whole: Class III Percentage 10

Chocolate: Class III Percentage 10

Name of Firm Southern Foods Group, L.P.  
dba Meadow Gold Dairies

Submitted by 

IFB No. E98-21

OAHU

OF-3

Appendix B

BID PAGE - OAHU

ANTICIPATED AVERAGE DAILY LUNCH SALES FOR FY 1999

| Group Nos. | Includes Schools in Following Districts | *Daily Average Usage |               | Price Per 1/2 Pint |           |
|------------|---|----------------------|---------------|--------------------|-----------|
|            |   | 2%/Whole             | Chocolate     | 2%/Whole           | Chocolate |
| I          | Central, Windward                       | 2,450                | 7,055         | \$ 0.2259          | \$ 0.2259 |
| II         | Central                                 | 3,310                | 11,415        | \$ 0.2824          | \$ 0.2824 |
| III        | Leeward                                 | 3,020                | 21,125        | \$ 0.2223          | \$ 0.2223 |
| IV         | Central, Leeward                        | 5,135                | 17,335        | \$ 0.2824          | \$ 0.2824 |
| V          | Honolulu, Central                       | 4,230                | 9,650         | \$ 0.2824          | \$ 0.2824 |
| VI         | Honolulu                                | 7,196                | 15,286        | \$ 0.2337          | \$ 0.2337 |
| VII        | Windward                                | 2,795                | 10,675        | \$ 0.2259          | \$ 0.2259 |
| VIII       | Honolulu                                | 3,398                | 6,295         | no bid             | no bid    |
|            | <b>TOTAL</b>                            | <b>31,534</b>        | <b>98,836</b> |                    |           |

\*Daily Sales by schools on Exhibit A.

Per case charge for lost milk case = \$ 4.35

Approximate number of days of service: 181 days

Indicate class & percentage you qualify and wish to claim under the Hawaii preference law:

2%/Whole: Class III Percentage 10%

Chocolate: Class III Percentage 10%

Name of Firm HOUSE FOODS HAWAII CORPORATION  
dba FOREMOST DAIRIES - HAWAII

Submitted by Emmi E. Keii

IFB No. E98-21

OF-3

OAHU

# MEADOW GOLD'S CALCULATIONS OF NON-HAWAII PRODUCT PRICE

## O'AHU PORTION OF IFB E98-21

Step 1.  $\text{Hawaii's Product Price} = \text{Non-Hawaii's Product Price} \times 1.1$

Step 2.  $\frac{\text{Hawaii's Product Price} = \text{Non-Hawaii's Product Price}}{1.1}$

| Group Nos. | Includes Schools In the Following Districts | Hawaii's Product Price. | Non-Hawaii's Product Price (Step 2 above) | Non-Hawaii's Product Price with 10% preference added | Non-Hawaii's Product Price rounded |
|------------|---|-------------------------|---|--|------------------------------------|
| I          | Central, Windward                           | \$ .26                  | \$ .236363                                | \$ .259999   | \$ .26000                          |
| II         | Central                                     | \$ .25                  | \$ .227272                                | \$ .249999   | \$ .25000                          |
| III        | Leeward                                     | \$ .235                 | \$ .213636                                | \$ .234999   | \$ .23500                          |
| IV         | Central, Leeward                            | \$ .24                  | \$ .218181                                | \$ .239999   | \$ .24000                          |
| V          | Honolulu, Central                           | \$ .24                  | \$ .218181                                | \$ .239999   | \$ .24000                          |
| VI         | Honolulu                                    | \$ .26                  | \$ .236363                                | \$ .259999   | \$ .26000                          |
| VII        | Windward                                    | \$ .26                  | \$ .236363                                | \$ .259999   | \$ .26000                          |
| VIII       | Honolulu                                    | \$ .26                  | \$ .236363                                | \$ .259999   | \$ .26000                          |