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NOS. CAAP-14-0001160 AND CAAP-14-0001190

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

**CAAP-14-0001160**

CERTIFIED CONSTRUCTION, INC., Petitioner-Appellant,

v.

COLLINS TOMEI, as Director of the Department of  
Finance, County of Hawai'i, Respondent-Appellee  
(CIVIL NO. 14-1-0303)

AND

**CAAP-14-0001190**

In the matter of CERTIFIED CONSTRUCTION, INC.,  
Petitioner-Appellant/Appellee,

v.

COLLINS TOMEI, as Director of the Department of  
Finance, County of Hawai'i,  
Respondent-Appellee/Appellant  
(CIVIL NO. 14-1-0200)

APPEALS FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT

**MEMORANDUM OPINION**

(By: Foley, Presiding Judge, Reifurth and Ginoza, JJ.)

In this consolidated appeal, Respondent-  
Appellee/Appellant Collins Tomei,<sup>1</sup> as Director of the Department

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<sup>1</sup> Pursuant to Hawai'i Rules of Civil Procedure Rule 43(c), because Nancy Crawford is no longer the Director of the Department of Finance (Director) and Collins Tomei (Tomei) is now the Director, Tomei is automatically substituted as a party.

of Finance, County of Hawai'i (**County**) and Petitioner-Appellant/Appellee Certified Construction, Inc. (**CCI**) appeal from two separate judgments filed in the Circuit Court of the Third Circuit (**circuit court**) related to a procurement bid protest.<sup>2</sup>

On March 21, 2016, this court published an opinion holding that CCI's bid protest was untimely and therefore the Office of Administrative Hearings (**OAH**), Department of Commerce and Consumer Affairs (**DCCA**) did not have jurisdiction to hear this matter and the DCCA had properly dismissed the case. Certified Constr., Inc. v. Crawford, 137 Hawai'i 281, 369 P.3d 864 (App. 2016).

The Hawai'i Supreme Court subsequently accepted CCI's application for writ of certiorari and, in an opinion issued on September 20, 2016, vacated this court's opinion. Certified Constr. Inc. v. Crawford, 138 Hawai'i 315, 382 P.3d 127 (2016). The supreme court held that CCI's bid protest was timely, that OAH had jurisdiction to consider the merits of CCI's protest, and thus, the case was remanded to this court to address the remaining issues presented on appeal. Id. at 321, 382 P.3d at 133.

The County's remaining point of error on appeal is its contention that the circuit court erred when it determined that the County's "Proposal and Specifications for Reroofing for Fire Maintenance Shop & Fire Dispatch/Warehouse Job No. B-4190" (**Bid Solicitation**) did not require a C-44 license.

In turn, CCI's remaining points of error are that the circuit court erred when it upheld the "Hearings Officer's Findings of Fact Conclusions of Law and Decision" issued on July 30, 2014 (**7/30/14 Hearings Officer Decision**), because the Hearings Officer incorrectly: (1) concluded that OAH did not have jurisdiction to consider whether the County must defer to the opinion of the Contractors Licensing Board (**CLB**) and to consider the CLB opinion issued on April 8, 2014; (2) concluded that CCI

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<sup>2</sup> The Honorable Glenn S. Hara presided.

could not utilize the CLB opinion to determine the gooseneck hood ventilator issue; (3) concluded that the County did not agree to defer to a ruling by the CLB; and (4) concluded that any assertion by CCI that the installation of ventilators was incidental and supplemental to its roofing work was an admission that such work was not covered by CCI's C-42 license.

For the reasons discussed below, the circuit court's judgments are affirmed.

**I. Brief Background**

On December 24, 2013, the County, through its Director of the Department of Public Works, published the Bid Solicitation, which gave notice to bidders for "SEALED BIDS for furnishing all tools, equipment, materials and labor necessary for the construction of 'REROOFING FOR FIRE MAINTENANCE SHOP & FIRE DISPATCH/WAREHOUSE,'" a project in Hilo, Hawai'i.

On February 5, 2014, CCI submitted its bid proposal to the County. On February 14, 2014 the Director of the Department of Public Works, Warren H.W. Lee (**Director Lee**), sent a written notification to CCI that its bid was disqualified (**Disqualification Letter**). On February 19, 2014, CCI submitted a letter to the County protesting its disqualification and the rejection of CCI's bid proposal for the project (**Protest Letter**).

On March 11, 2014, CCI wrote a letter to the CLB requesting a determination from the CLB that the "project work may be performed under a C-42 and C-44A license and that a C-44 Sheet Metal License is not required."

On March 21, 2014, Director Lee wrote a letter informing CCI that he was upholding the disqualification of CCI's bid as being non-responsive and he was denying CCI's bid protest.

On April 8, 2014, the CLB sent a letter to CCI, responding to CCI's inquiry regarding the licenses required for the project (**CLB Response Letter**). The letter, based on information that CCI provided, listed the licenses that the CLB believed were required to complete the project.

After a hearing on April 17, 2014 addressing CCI's bid protest, on May 8, 2014, OAH filed "Hearings Officer's Findings of Fact, Conclusions of Law and Decision" (**5/8/14 Hearings Officer Decision**). The Hearings Officer concluded, *inter alia*, that the Bid Solicitation "required a C-44 specialty contractor license for the Project." This decision also determined that CCI's bid protest was untimely and should be dismissed (which is the issue that was addressed and resolved by the recent supreme court opinion).

On May 16, 2014, CCI filed a notice of appeal to the circuit court from the 5/8/14 Hearings Officer Decision.

On June 16, 2014, the circuit court filed an "Order Granting Petitioner-Appellant Certified Construction, Inc.'s Application for Judicial Review of the Hearings Officer's Findings of Fact, Conclusion of Law and Decision and Exhibit 'A'" (**6/16/14 Order**). The circuit court reversed the 5/8/14 Hearings Officer Decision and remanded the matter to the Hearings Officer for further proceedings. On November 20, 2014, the circuit court entered a Final Judgment related to this first appeal.

On July 30, 2014, on remand, the Hearings Officer issued the 7/30/14 Hearings Officer Decision. The Hearings Officer concluded, *inter alia*, that the OAH did not have jurisdiction to consider CCI's claim that the County must defer to the April 8, 2014 CLB Response Letter. The Hearings Officer nonetheless addressed CCI's arguments on the merits and determined that CCI's protest to the Disqualification Letter should be dismissed.

On August 11, 2014, CCI filed its notice of appeal to the circuit court from the 7/30/14 Hearings Officer Decision. On September 19, 2014, the circuit court issued an order (**9/19/14 Order**) in which it affirmed the 7/30/14 Hearings Officer Decision. On October 28, 2014, the circuit court entered Final Judgment affirming the 7/30/14 Hearings Officer Decision.

The County timely appealed from the circuit court's Final Judgment entered on November 20, 2014. CCI timely appealed from the circuit court's Final Judgment entered on October 28, 2014.

**II. County's Appeal**

**A. C-44 license requirement**

The County contends that the circuit court erred when it reversed the Hearings Officer's determination that the Bid Solicitation required the listing of a C-44 contractor license. The County contends that the "Special Notice, taken in its totality, clearly establishes the Specialty Classifications, including the C-44 licensed contractor as requirements of the Bid Solicitation."

The Bid Solicitation states that the "Bidder must possess a valid State of Hawai'i, General Contractor's License 'B'" and that additional licencing requirements were noted in the "Special Notice to Bidders." Regarding licensing requirements, the Special Notice to Bidders provides:

As stated in the Notice to Bidders, Bidders must possess a valid State of Hawai'i, General Building Contractor's "B" license.

Each of the following specialty contractor classifications listed in the table below have been determined by the County of Hawai'i as qualified to perform all of the work on this project based on the project's scope and the County's understanding of the State's licensing requirements and specialty contractor classifications' scopes of work. By way of the minimum licensing requirement stated for this project, no additional specialty contractor classifications are required to perform the work; however, the Bidder may list additional licensed subcontractors at its discretion.

Following this statement, is a table for "Specialty Contractor Classification & Scope of Work," which lists "C-33 Painting and decorating contractor," "C-44 Sheet metal contractor," and "C-48 Structural steel contractor." Below the listing of the specialty contractor specifications is a section titled "SPECIAL INSTRUCTIONS TO BIDDERS REGARDING SPECIALTY CONTRACTOR CLASSIFICATIONS AND REGARDING JOINT CONTRACTORS & SUBCONTRACTORS" (**Special Instructions**), which provides in pertinent part:

- 2) In the circumstance where a specialty contractor classification license listed in the above table may be deemed unnecessary by a Bidder due to its intent to employ a plausible alternative means or method, the Bidder shall in its Proposal clearly state such intent and provide a detailed plan that meets with the satisfaction of the Director. The Director reserves the sole discretion and right to determine whether the Bidder's proposed justification for not listing the required license is acceptable. [(Special Instruction Number Two).]
- 3) In the circumstance where the Bidder is licensed in one or more specialty contractor classifications required of the project (whether automatically as a general engineering contractor "A", general building contractor "B", or outright) and it intends to perform all or some of the work of those classifications using its own workforce, the Bidder shall, in its Proposal, list itself accordingly and in consideration of the balance of the instructions herein provided.
- 4) In the circumstance where a specialty contractor classification required in the above table may, in part or in whole (as applicable to the classification's scope of work), be within the licensed scope of work of another listed specialty contractor classification (e.g. overlapping scopes of licenses), the Bidder shall clearly delineate in its Proposal the extent of each subcontractor's responsibility on the project such that the Director can reasonably determine which classification is responsible for the corresponding scopes. Where a listed specialty contractor classification is rendered completely unnecessary due to overlapping scopes of work, the Bidder, in its Proposal, shall clearly state such as the reason for not listing that respective entity in its Proposal.

Anyone who disagrees with the determination in the above table shall submit their written objection, to the Director identifying the specialty contractor classification(s) in question and the justification(s) for such position at least 10 consecutive calendar days prior to bid opening. If no such written objections are received by the Director prior to such date, it will be presumed that all Bidders and affected parties are in agreement with the listing set forth above. No other specialty license will be required unless noted otherwise in an addendum.

(Emphasis added.)

The 5/8/14 Hearings Officer Decision concluded in relevant part:

The Special Notice to Bidders did not specifically say that a C-44 specialty contractor license was required for the Project . . . . [T]he Special Notice to Bidders identified the C-44 specialty contractor license as one of the "minimum licensing requirement stated for the project, and no additional specialty contractor classifications are

required to perform the work" and provided that it would be presumed that "all Bidders and affected parties are in agreement with the listing set forth above" if written objections were not filed with the [County] ten consecutive days prior to the bid opening. Additionally, in allowing for the bidder to identify an alternate means or method to perform the work for a specialty classification license listed in the table, [County] "reserved the sole discretion and right to determine whether the Bidder's proposed justification for not listing the required license is acceptable." Taken as a whole, the Hearings Officer finds that the Proposal required a C-44 specialty contractor license for the Project.

(Brackets in original omitted.)

At a hearing on June 13, 2014, the circuit court stated:

Given what is clarified to now [sic] the Court to be the posture of the parties with respect to this appeal the Court's inclination is to vacate the order to dismiss and remand. And the basis of that would be that it appears to the Court that the listing of the C-44, looking at all of the terms that were referred to, appear to not establish the C-44 subspecialty classification as a requirement but as a minimum requirement, and to me when they stated it as a minimum it invited the bidders to say, "Okay, you know, we've met the minimum in other ways than the C-44."

Further, in the 6/16/14 Order, Finding of Fact (**FOF**) 2 states that the Bid Solicitation "did not require the use or listing of a contractor, joint contractor, or subcontractor having a C-44 specialty contractor classification" and conclusion of law (**COL**) 1 states that the Hearings Officer's finding that the Bid Solicitation "required a C-44 specialty contractor license for the Project, is clearly erroneous[.]"

We agree with the circuit court that the Bid Solicitation did not require a C-44 license. Under Special Instruction Number Two, if a bidder deemed a listed specialty contractor license unnecessary due to an intent to employ a plausible alternative means or method, "the Bidder shall in its Proposal clearly state such intent and provide a detailed plan that meets with the satisfaction of the Director." Thus, at a minimum, Special Instruction Number Two provides an alternate means of satisfying the licensing requirements for the project and contemplates the possibility that a bidder would not base its

bid on the specialty contractor licenses set out in the Special Notice to Bidders.

Therefore, we affirm the circuit court in that the Hearings Officer's finding -- that the Bid Solicitation required a C-44 specialty contractor license for the Project -- was clearly erroneous. See Hawaii Revised Statutes (HRS) § 103D-710(e)(5) (2012); S. Foods Grp., L.P. v. Dep't of Educ., 89 Hawai'i 443, 452, 974 P.2d 1033, 1042 (1999) ("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." (citation omitted)). Nonetheless, this issue is not dispositive and the parties further litigated the matter on remand from the circuit court.

### **III. CCI's Appeal**

#### **A. OAH's Jurisdiction To Consider CLB Letter**

On remand from the circuit court's 6/16/14 Order, OAH requested that CCI and the County brief the following jurisdictional question for the OAH Hearings Officer: "Does the [OAH] have jurisdiction in this matter to consider [CCI's] claim that the County must defer to an opinion of the [CLB] that was not brought to the County's attention until after the County's protest denial letter [dated] March 21, 2014?"

On appeal, CCI challenges the circuit court ruling affirming the 7/30/14 Hearings Officer Decision that the OAH did not have jurisdiction "to consider CCI's arguments (1) that 'the County had agreed to defer to a decision by the CLB' and (2) that 'the CLB's opinion was in favor of CCI's position on the C-42 licensing issue and should be followed.'" (Brackets omitted.) CCI contends that it "could not raise these 2 issues because it did not have a favorable decision from the CLB until the CLB orally decided the C-42 licensing question at its March 21, 2014 meeting and issued [its Response Letter] on April 8, 2014." Further, CCI asserts the CLB's Response Letter was not a "claim,"

as described by the OAH Hearings Officer, but instead "evidence in support of CCI's bid protest argument that it had all the proper licensure to perform the required project work."

Under the Public Procurement Code, HRS § 103D-709 (2012) addresses administrative proceedings for review and provides that hearings officers

shall have jurisdiction to review and determine de novo, any request from any bidder, offeror, contractor, or person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.

HRS § 103D-709(a). Further, "[t]he hearings officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision . . . ." HRS § 103D-709(b). "All parties to the proceeding shall be afforded an opportunity to present oral or documentary evidence, conduct cross-examination as may be required, and present argument on all issues involved. Fact finding under [HRS §] 91-10<sup>3</sup> shall apply." HRS § 103D-709(c). Finally,

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<sup>3</sup> HRS § 91-10 (2012) provides:

**§91-10 Rules of Evidence; official notice.** In contested cases:

- (1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law;
- (2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original;
- (3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence;
- (4) Agencies may take notice of judicially recognizable facts.

[t]he hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract and shall order such relief as may be appropriate in accordance with this chapter.

HRS § 103D-709(h).

In the 7/30/14 Hearings Officer Decision, the Hearings Officer concluded:

the hearings officer can only make a decision about the "determinations" of the chief procurement officer, and the chief procurement officer can only make "determinations" about complaints brought before that officer. [HRS § 103D-709(a) and (h)] The statute literally leaves no room for the hearings officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer. . . .

In the present case, [CCI] did not assert as a basis for its protest that the County had agreed to defer to a decision by the [CLB], and that the [CLB's] opinion was in favor of [CCI's] position on the C-42 licensing issue and should be followed, until after the County had issued its protest denial letter of [sic] March 21, 2014. The County's chief procurement officer or that officer's designee never made a "determination" on either of these two claims.

. . . .

[T]he Hearings Officer concludes that there is no jurisdiction in this matter to consider [CCI's] claim that County must defer to the opinion of the [CLB Response Letter] dated April 8, 2014.

Thus, the OAH Hearings Officer treated the CLB Response Letter as an independent "determination" for which the OAH had no jurisdiction to hear.

By contrast, and as CCI asserts, we view the CLB Response Letter as *evidence* regarding CCI's contention that the sheet metal work could be performed under the C-42 and C-44A

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In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed; and

- (5) Except as otherwise provided by law, 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.

licenses. Under HRS § 103D-709(c), CCI was entitled to present this documentary evidence to the OAH in support of its protest. The OAH Hearings Officer's conclusion that it did not have jurisdiction "to consider [CCI's] claim that County must defer to the opinion of the [CLB Response Letter] dated April 8, 2014" or to consider the CLB letter was incorrect, and the circuit court erred in affirming the OAH decision in this regard.

We note that, although the OAH Hearings Officer erred in finding that it lacked jurisdiction to consider the content of the CLB Response Letter, the OAH Hearings Officer, "out of an excess of caution given the protracted proceedings in this matter," went on to consider whether the County agreed to defer to a CLB ruling. The OAH Hearings Officer's error regarding its jurisdiction over the CLB Response Letter issue is harmless because, as discussed below, we affirm the OAH Hearings Officer's decision that the County did not agree to defer to the decision in the CLB Response Letter.

**B. Gooseneck hood ventilator issue**

The 7/30/14 Hearings Officer's Decision determined that the CLB Response Letter could not be used to decide the gooseneck hood ventilator issue<sup>4</sup> because (1) the CLB Response letter was informal in nature; (2) the County did not have an opportunity to present to the CLB; (3) the gooseneck hood ventilator situation was never presented to the CLB; and (4) the CLB's opinion regarding turbo ventilators could not be extended to gooseneck hood ventilators. CCI challenges the circuit court's decision affirming these rulings.

We conclude that the CLB Response Letter, while relevant evidence, was not binding on the OAH. Title 16 of Hawaii Administrative Rules (HAR) Chapter 201, Subchapter 5,

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<sup>4</sup> The "gooseneck hood ventilator issue" refers to an issue addressed at a hearing held on July 17, 2014 and determined in the 7/30/14 Hearings Officer Decision. In essence, the issue involves whether the CLB's letter addressing the licensing requirements for installing "non-motorized prefabricated roof vents" applies to gooseneck hood ventilators.

guides the CLB in its informal proceedings and interpretations. HAR §§ 16-201-85 et seq. HAR § 16-201-85(a) provides:

**§16-201-85 Purpose, scope, and construction.** (a) The purpose [of Subchapter 5] is to clarify that any board or commission may issue informal interpretations in addition to and supplemental to any power to grant declaratory relief provided for elsewhere in this chapter. The purpose of this subchapter is to facilitate prompt decision making in matters where no formal ruling is desired or needed by any person and where the interpretation can be stated without the necessity of an evidentiary hearing and without consideration of legal arguments.

See also HRS § 444-4(9) (2013) ("In addition to any other powers and duties authorized by law, the [CLB] shall . . . [i]ssue informal nonbinding interpretations or declaratory rulings, and conduct contested case proceedings pursuant to chapter 91[.]").

CCI cites to HAR § 16-201-88(b) to support its position, which provides:

In determining whether a particular injury is appropriate for the issuance of an informal interpretation, the following factors shall be among those considered:

- (1) Whether the facts set forth by the requester are sufficiently detailed and clear to allow the board or commission to understand the requester's circumstance;
- (2) Whether the question being asked is clear; and
- (3) Whether there has been a consistent historical pattern of deciding similar inquiries upon which the board or commission can base its response.

CCI uses the above factors to suggest that the CLB Response Letter is determinative of issues it considered, including the "gooseneck hood ventilator issue." These factors do not, however, lead to the conclusion that an informal opinion of the CLB is binding on the OAH.

Moreover, as noted in the 7/30/14 Hearings Officer's Decision, the County had no opportunity to address any issues with the CLB, and further, it does not appear from the record that the gooseneck hood ventilator issue was specifically presented to the CLB.

CCI does not provide any authority that undermines the OAH Hearings Officer's conclusion that the CLB Response Letter was not binding on the OAH. Based on CCI's challenge, we cannot hold that the OAH Hearings Officer's conclusion was in violation of constitutional or statutory provisions, was in excess of its statutory authority or jurisdiction, or was affected by other error of law. See HRS § 103D-710(e). Therefore, the circuit court did not err in affirming the 7/30/14 Hearings Officer Decision in this regard.

**C. Whether the County agreed to defer to the CLB**

The 7/30/14 Hearings Officer Decision found that the County did not agree to defer to a ruling by the CLB. The circuit court affirmed, and CCI challenges this finding. In support of its argument, CCI cites to a February 18, 2014 email from James Imanaka (**Imanaka**) to Kevin Simpkins (**Simpkins**), in which Imanaka wrote: "We will need a [CLB] determination allowing the C-42 to provide the classification scope of work listed under the C-44, in order for us to negate the requirement for a C-44 Sheet metal contractor."

In addition to the email from Imanaka, Simpkins, President of CCI, testified at the OAH hearing that in his telephone conversation with Imanaka, his recollection was that "[the County] had stated their position [in the Disqualification Letter] and that [CCI] would have to get a ruling from the [CLB] with respect to the issue at hand which was the C-44 which was not listed." Simpkins explained, "I don't know exactly [whether it was] before or after I received the [Disqualification Letter], but I did have a conversation with [Imanaka] regarding the [CLB] and that they would defer to a ruling from the [CLB]."

Imanaka, on the other hand, was asked whether he promised Simpkins that the awarding of the contract would be delayed for a ruling or other information provided by CCI, to which Imanaka responded "No." Explaining his email to Simpkins, Imanaka testified:

I asked if we will need a [CLB] determination allowing the C-42 to provide the scope of work listed under the C-44 in order for us to negate the requirement for a C-44 with -- to give it the benefit of the doubt in case my interpretation was wrong.

And what normally we'd do if that determination was that a 42 can do the work, I did not tell this to [Simpkins] though, this is for my knowledge and my information to go back to the Director who -- because it's up to his discretion yeah.

CCI bore the burden of proof as well as the burden of persuasion under HRS § 103D-709(c).<sup>5</sup> We cannot say that the OAH Hearings Officer's finding that the County did not agree to defer to the CLB was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. See HRS § 103D-710(e).

**D. Whether CCI admitted that the installation of the vents was not within the scope of the C-42 license**

CCI challenges the conclusion in the 7/30/14 Hearings Officer Decision that any assertion by CCI that the installation of the gooseneck hood ventilators was incidental and supplemental to the roofing work was an admission that the installation of those vents was not within the scope of its C-42 license.

The OAH Hearings Officer's conclusion was based on CCI's February 19, 2014 Protest Letter, which stated, in the section titled "Sheet Metal Work Can Be Performed Under the C-42

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<sup>5</sup> HRS § 103D-709(c) provides:

**§ 103D-709 Administrative proceedings for review.**

. . . . .

(c) Only parties to the protest made and decided pursuant to sections 103D-701, 103D-709(a), 103D-310(b), and 103D-702(g) may initiate a proceeding under this section. 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 present argument on all issues involved. Fact finding under section 91-10 shall apply.

and C-44A Licenses," "the issue of whether roof flashing installation may be performed by a roofing contract because it is expressly included within or because it is incidental and supplemental to the scope of work of [CCI's] C42 roofing contractor license, has been considered in the past by other State/County procurement agencies." (Footnote omitted).

In the 7/30/14 Hearings Officer Decision, the Hearings Officer did not cite to any authority supporting its conclusion that CCI's statement may be an admission that a C-42 license was insufficient for the installation of ventilators. The language of CCI's Protest Letter suggests that CCI was reciting the issue under protest to the County, and was not a definitive assertion that the roofing work was "incidental and supplemental"<sup>6</sup> to the scope of work under the C-42 license.

Nonetheless, CCI does not identify a particular holding the Hearings Officer made that was supported by this conclusion. The conclusion CCI challenges appears to be *dicta*. Although the OAH Hearings Officer's conclusion that CCI may have admitted its license did not cover the roofing work appears to be erroneous, it was harmless error. See Hawai'i Rules of Civil Procedure Rule 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

#### **IV. Conclusion**

In light of the supreme court's opinion in this case, the Judgment entered on November 20, 2014 in the Circuit Court of the Third Circuit is affirmed in that OAH had jurisdiction to address the bid protest. For the reasons set forth above, the finding in the 5/18/14 Hearings Officer Decision that a C-44 license was required is vacated, but that finding is not dispositive.

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<sup>6</sup> HAR § 16-77-34 defines "incidental and supplemental" as "work in other trades directly related to and necessary for the completion of the project undertaken by a licensee pursuant to the scope of the licensee's license."

With regard to the circuit court's Judgment entered on October 28, 2014, we affirm on the merits.

DATED: Honolulu, Hawai'i, December 16, 2016.

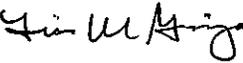
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Presiding Judge

  
Associate Judge

  
Associate Judge