IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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ALAKAʻI NA KEIKI, INC., Petitioner/Plaintiff-Appellant,

vs.

KATHRYN MATAYOSHI, in her official capacity as Superintendent of Education, Respondent/Defendant-Appellee.

NO. SCWC-29742

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29742; CIV. NO. 05-1-1658)

MAY 11, 2012

OPINION BY RECKTENWALD, C.J., CONCURRING IN PART AND DISSENTING IN PART, IN WHICH NAKAYAMA, J. JOINS

I respectfully dissent from the majority's conclusion that agency decisions on protests regarding the procurement of health and human services are reviewable pursuant to the declaratory judgment statute, Hawaiʻi Revised Statutes (HRS) § 632-1.[1] As set forth below, I would hold that the legislature clearly intended to preclude judicial review of these protest

[1] However, I concur in the majority's conclusion that sovereign immunity bars Alakaʻi Na Keiki's negligence claim. Majority opinion at 50-52.

decisions under the health and human services procurement code, HRS chapter 103F. I would further hold that preclusion of judicial review does not raise separation of powers concerns in the circumstances presented here. Because the legislature has the power to establish the jurisdiction of the courts, see Haw. Const. art. VI, § 1 ("The several courts shall have original and appellate jurisdiction as provided by law[.]"), the legislature may, with certain limitations described infra, exclude agency decisions from judicial review.

Finally, I note that the majority's conclusion that protest decisions are reviewable under the declaratory judgment statute undermines this court's caselaw concerning HRS § 91-14, which generally limits judicial review of administrative agency action to decisions and orders in contested cases, unless review is otherwise provided by law. Additionally, this conclusion will introduce uncertainty into the procurement of health and human services contracts, and will delay the prompt and final resolution of disputes involving those contracts. In contrast to HRS chapter 103F, which provides that a protest must be filed within five working days, and a request for reconsideration must be filed within five working days of the written protest decision, HRS §§ 103F-501 and 103F-502, the majority's approach will permit procurement decisions to be challenged much later under the more generous statutes of limitations applicable to declaratory judgment actions.

Based on the foregoing, I would affirm the judgment of the Intermediate Court of Appeals (ICA), which affirmed the Circuit Court of the First Circuit's (circuit court) March 4, 2009 judgment in favor of Patricia Hamamoto, in her official capacity as Superintendent of Education, and against Alakaʻi Na Keiki, Inc. (ANK).

I. Background

On October 12, 2004, the Department of Education (DOE) issued a request for proposals (RFP) pursuant to HRS chapter 103F, seeking proposals to provide "intensive instructional support services to eligible students in need of such services" from July 1, 2005 through June 30, 2006. ANK submitted a proposal under the RFP, but its proposal was not selected by the DOE.

ANK protested the DOE's decision on three grounds: (1) the Proposal Evaluators "ignor[ed] or fail[ed] to consider express language in the Proposal and the RFP"; (2) the RFP did not "establish criteria for justifying a multiple contract award" as allegedly required under the applicable statute and administrative rules; and (3) the DOE did not provide ANK "reasonable discovery" following ANK's notice of protest. On August 9, 2005, Christian H. Butt, "Procurement and Contracts Specialist" for the DOE, denied the protest. ANK submitted a request for reconsideration. On August 25, 2005, Assistant Superintendent Rae M. Loui denied the request for

reconsideration.

ANK filed its complaint in the instant case on September 16, 2005, and subsequently filed a first and second amended complaint.[2] ANK alleged four counts. In Count I, ANK asserted that the circuit court had express and inherent powers to review the DOE's actions pursuant to article VI, section 1 of the Hawaiʻi Constitution[3] and HRS § 603-21.9.[4] ANK asserted that the circuit court should "utilize the criteria for judicial review" in HRS § 91-14[5] to evaluate the DOE's actions, and should

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[2] ANK also appealed the denial of its request for reconsideration to the circuit court pursuant to HRS chapter 91. Alakaʻi Na Keiki, Inc. v. Hamamoto (Alakaʻi I), No. 27559, 2007 WL 158980 (Haw. Jan. 22, 2007) (SDO). The circuit court dismissed for lack of jurisdiction. Id. at *1. This court affirmed on the ground that the protest proceeding did not constitute a "contested case" as required under HRS § 91-14. Id. at *2.

[3] Article VI, section 1 provides:

> The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules.

[4] HRS § 603-21.9 (1993) provides in relevant part:

> The several circuit courts shall have power:
>
> (6) To make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them.

[5] HRS § 91-14(g) (1993) provides:

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may

(continued...)

vacate the DOE's decision on ANK's protest based on alleged errors in the protest procedures. Count II sought a declaration that HRS chapter 103F, as applied to the DOE, is unconstitutional or invalid because it delegates judicial power to an administrative agency and permits the DOE to adjudicate the propriety of its own actions. Count II also sought a declaration that the DOE acted unlawfully in the contract award and protest processes. Count III alleged that the DOE acted negligently in the contract award and protest processes. Finally, Count IV sought to enjoin the DOE from continuing to administer contracts awarded pursuant to HRS chapter 103F, and sought to have a special master appointed to oversee health and human services procurement until defects in HRS chapter 103F and the Hawaiʻi Administrative Rules (HAR) could be cured. Alternatively, ANK

[5](...continued)

> reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
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> (1) In violation of constitutional or statutory provisions; or
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> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (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.

sought award of the contract under the RFP at issue in the instant case.

On May 9, 2008, Hamamoto moved for judgment on the pleadings or in the alternative for summary judgment. Also on May 9, 2008, ANK moved for summary judgment. The circuit court denied ANK's motion for summary judgment, and granted summary judgment in favor of Hamamoto. The circuit court entered judgment in favor of Hamamoto and against ANK on March 4, 2009.

On appeal, the ICA concluded that HRS chapter 103F does not allow for judicial review. Alakaiʻi Na Keiki, Inc. v. Hamamoto, 125 Hawaiʻi 200, 206, 257 P.3d 213, 219 (App. 2011). The ICA further determined that it is constitutional for the legislature to preclude judicial review of chapter 103F protest proceedings.[6] Id. at 205-07, 257 P.3d at 218-20. Accordingly, the ICA affirmed. Id. at 210, 257 P.3d at 223.

II. Discussion

A. The legislature clearly intended to preclude judicial review of protests brought pursuant to HRS chapter 103F

ANK, Hamamoto, and the ICA are in agreement that chapter 103F does not allow for judicial review. See id. at 206, 257 P.3d at 219. As explained below, when the legislature adopted chapter 103F, it specifically declined to bring health

[6] The ICA also rejected ANK's argument that the circuit court had the inherent power to review the protest decision, and concluded that ANK could not proceed on its tort claim because the legislature had not created a private right of action under chapter 103F. Id. at 208-09, 257 P.3d at 221-222.

and human services procurement under the general Public Procurement Code, chapter 103D, and instead created a new chapter that did not contain chapter 103D's detailed provisions concerning judicial review. Because the legislature specifically declined to apply the provisions of chapter 103D to health and human services procurement, see HRS § 103F-104 (Supp. 2008) ("Contracts to purchase health and human services required to be awarded pursuant to this chapter shall be exempt from the requirements of chapter 103D, unless a provision of this chapter imposes a requirement of chapter 103D on the contract or purchase."), the absence of judicial review provisions in chapter 103F evidences the legislature's intent to preclude judicial review under that chapter, see State v. Ribbel, 111 Hawaiʻi 426, 430, 142 P.3d 290, 294 (2006) ("Where a statute with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed."). I therefore respectfully disagree with the majority's conclusion that judicial review is not prohibited by chapter 103F. Majority opinion at 33-38.

Chapter 103D, the Hawaii Public Procurement Code applies "to all procurement contracts made by governmental bodies[,]" HRS § 103D-102 (Supp. 2008), while chapter 103F, the health and human services procurement code, specifically applies "to all contracts made by state agencies . . . to provide health

or human services to Hawaii's residents[,]" HRS § 103F-101 (Supp. 2008). The health and human services procurement code provides that the protest procedures and remedies set forth in chapter 103F "shall be the exclusive means available for persons aggrieved in connection with the award of a contract to resolve their concerns." HRS § 103F-504 (Supp. 2008). Protests concerning an award of a health and human services contract may be submitted to the head of the purchasing agency, as follows:

> (a) A person who is aggrieved by an award of a contract may protest a purchasing agency's failure to follow procedures established by this chapter, rules adopted by the policy board, or a request for proposals in selecting a provider and awarding a purchase of health and human services contract, provided the contract was awarded under section 103F-402 or 103F-403. Amounts payable under a contract awarded under section 103F-402 or 103F-403, and all other awards of health and human services contracts may not be protested and shall be final and conclusive when made.

HRS § 103F-501 (Supp. 2008).

A protesting party may seek reconsideration of the decision of the head of the purchasing agency, as follows:

> (a) A request for reconsideration of a decision of the head of the purchasing agency under section 103F-501 shall be submitted to the chief procurement officer not later than five working days after the receipt of the written decision, and shall contain a specific statement of the factual and legal grounds upon which reversal or modification is sought.
>
> (b) A request for reconsideration may be made only to correct a purchasing agency's failure to comply with section 103F-402 or 103F-403, rules adopted to implement the sections, or a request for proposal, if applicable.
>
> (c) The chief procurement officer may uphold the previous decision of the head of the purchasing agency or reopen the protest as deemed appropriate.
>
> (d) A decision under subsection (c) shall be final and conclusive.

HRS § 103F-502 (Supp. 2008) (emphasis added).

Chapter 103D similarly provides that "[t]he procedures and remedies provided for in this part, and the rules adopted by the policy board, shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract, a suspension or debarment proceeding, or in connection with a contract controversy, to resolve their claims or differences." HRS § 103D-704 (1993 & Supp. 2008). Chapter 103D further provides that "[a]ny actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation." HRS § 103D-701(a). The aggrieved bidder, offeror, or contractor may seek further review of the chief procurement officer's decision before a hearings officer of the Department of Commerce and Consumer Affairs (DCCA). HRS § 103D-709(a) (Supp. 2008). Significantly, the hearings officer "shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision not later than forty-five days from the receipt of the request [for further review], that shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal[.]" HRS § 103D-709(b) (Supp. 2008) (emphasis added). Chapter 103D also contains detailed procedural provisions that govern the timing and standard of judicial

review. HRS § 103D-710 (Supp 2008).

In sum, HRS § 103F-502 provides only that the reconsideration decision of the chief procurement officer "shall be final and conclusive." I agree with the majority that the words "final and conclusive," standing alone, might not be sufficient to evidence a clear intent to preclude judicial review. Majority opinion at 33-35. However, when the phrase "final and conclusive" in HRS § 103F-502 is viewed alongside the language of HRS § 103D-709(b), the legislature's intent to preclude judicial review is clear. Again, in contrast to HRS § 103F-502, which provides only that the reconsideration decision of the chief procurement officer "shall be final and conclusive[,]" HRS § 103D-709(b) provides that the reconsideration decision of the DCCA hearings officer "shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal[.]" (Emphasis added). Ribbel, 111 Hawaiʻi at 430, 142 P.3d at 294 ("[T]he omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed."). In addition, chapter 103F does not contain any provisions governing judicial review. Compare chapter 103F with HRS § 103D-710.

Moreover, the legislative history of chapter 103F confirms that the legislature specifically intended to omit the appeal and judicial review provisions contained in chapter 103D.

See First Ins. Co. of Hawaii v. A&B Props., 126 Hawaiʻi 406, 415, 271 P.3d 1165, 1174 (2012) (noting that, where the language of a statute is ambiguous, "we may look to the statute as a whole and its legislative history for guidance in construing the language in question."). Accordingly, a review of the historical context in which both chapter 103F and chapter 103D arose is instructive.

Article VII, section 4 of the Hawaiʻi Constitution was adopted in 1978, and provides the foundation for appropriating public funds to private entities. Haw. Const. art. VII, § 4 ("No grant of public money or property shall be made except pursuant to standards provided by law.") (emphasis added). In 1981, cognizant of the 1978 constitutional amendment, the legislature adopted a statutory regime to govern three types of appropriations: grants, subsidies, and purchase of service.[7] 1981 Haw. Sess. Laws Act 207, § 1 at 394. Act 207 was subsequently codified as HRS chapter 42. HRS chapter 42 (Supp. 1981). Under chapter 42, potential providers submitted proposals for review by the appropriate agency. HRS § 42-4(b)-(e) (Supp. 1981). The agency's recommended proposal would be included in the executive or judiciary budget for consideration by the legislature, HRS § 42-5(a) (Supp. 1981), or would be submitted by way of a separate bill, HRS § 42-6(a) (Supp. 1981). Chapter 42 did not provide for a protest procedure or an appeals process.

[7] However, prior to Act 207, the procurement of public works construction contracts was already governed by portions of HRS chapter 103. See, e.g., HRS §§ 103-22, 103-25 through 103-32 (1976).

See HRS chapter 42 (Supp. 1981).

In 1991, the legislature repealed chapter 42 and replaced it with chapter 42D. 1991 Haw. Sess. Laws Act 335, §§ 1, 15 at 1047-55, 1060. Chapter 42D included new standards and procedures for the award of purchase of service contracts, which required that agencies identify and assess the need for services, submit a recommended budget to the legislature, and advertise for proposals upon appropriation of lump sum funds.[8] HRS §§ 42D-21 through 42D-24 (Supp. 1991). In addition, each agency was required to establish an appeals process to reconsider any recommendations for funding made by the agency. HRS § 42D-6 (Supp. 1991).

Chapter 42D was amended in 1992 to include a sunset date of July 1, 1996. 1992 Haw. Sess. Laws Act 194, §§ 20 at 425. The 1992 amendments also provided for, inter alia, the establishment of two councils: the Executive Coordinating Council, which made policy recommendations to the Governor, and the Advisory Council, which made recommendations to the Executive Coordinating Council. Id., codified at HRS §§ 42D-4, 42D-5 (Supp. 1992). With regard to the reconsideration process, the 1992 amendments provided that:

> Requesting organizations not recommended for funding

[8] The definition of "purchase of service" under chapter 42D did not include "services of a court-appointed attorney for an indigent, the professional services of individuals in private business or professions, and services subject to the competitive bidding requirements of chapter 103[.]" HRS § 42D-1 (Supp. 1991).

> or not satisfied with the recommended level of funding may submit a written request to the executive coordinating council for reconsideration within ten days of receipt of the agency's statement of findings and recommendations. The coordinating council shall respond in writing to the requesting organization within ten days of the receipt of the written request for reconsideration.

HRS § 42D-23(d) (Supp. 1992).

Chapter 42D did not otherwise provide for any form of review or appeals process.

In 1993, the legislature adopted Act 8, later codified as HRS chapter 103D, the Hawaiʻi Public Procurement Code. 1993 Haw. Special Sess. Laws Act 8, § 2 at 38-68. The purpose of Act 8 was to "promote economy, efficiency, and effectiveness in the procurement of goods and services[.]" H. Stand. Comm. Rep. No. S11-93, in 1993 Special Sess. House Journal, at 64. Noting that the procurement code was "vague, inconsistent, and inefficient," the legislature explicitly repealed "this piecemeal system" by deleting provisions in HRS chapter 103 that related to procurement, and establishing the Public Procurement Code under chapter 103D.[9] S. Stand. Comm. Rep. No. S8-93, in 1993 Special Sess. Senate Journal, at 39; 1993 Haw. Special Sess. Laws Act 8, §§ 25-47 at 79-80.

Nevertheless, the procurement of some purchase of

[9] In addition, the legislature amended the definition of "purchase of service" contained in HRS § 42D-1 to replace the reference to "chapter 103" with "chapter 103D." 1993 Haw. Special Sess. Laws Act 8, § 54 at 81; HRS § 42D-1 (1993). Accordingly, under the amendments, "the purchase of services of a court-appointed attorney for an indigent, the professional services of individuals in private business or professions, and services subject to the competitive bidding requirements of chapter 103D" were not subject to the requirements of chapter 42D. HRS § 42D-1.

service contracts continued to be governed by chapter 42D. See HRS § 42D-1 (1993). However, in 1996, the legislature determined that chapter 42D was no longer an effective procurement mechanism. S. Stand. Comm. Rep. No. 2075, in 1996 Senate Journal, at 1005 (noting "great consensus that the present purchase of service process under chapter 42D, HRS, is not working"). Accordingly, the legislature extended chapter 42D's sunset date to July 1, 1998, but began the process to transfer the entire purchase of service system to chapter 103D, "to provide for procurement of all services under one chapter."[10] 1996 Haw. Sess. Laws Act 310, §§ 2 and 3 at 973. Act 310 also directed the administrator of the State Procurement Office (SPO) to develop and implement a transition plan to replace the procedures previously provided under chapter 42D. Id. The SPO administrator was directed to submit a report to the legislature by December 31, 1996 regarding these new procedures, together with a draft of any proposed language necessary to implement the administrator's proposals. Id. § 4, at 974.

In its December 1996 Report to the Hawaii State Legislature, the SPO advised against the legislature's intent to include health and human services procurement in chapter 103D:

> To avoid confusion with the current State Procurement Code (Chapter 103D, HRS), we do not recommend that this new [purchase of service] law be

[10] Provisions regarding grants and subsidies were initially retained in HRS chapter 42D, and were later recodified as HRS chapter 42F. 1997 Haw. Sess. Laws Act 190, §§ 3, 7 at 359-62.

> placed under that chapter. The POS law should have its own stand-alone and designated chapter under the [HRS].

State Procurement Office, Purchase of Service (POS), Act 310, Session Laws of Hawaii 1996, Report to the Hawaii State Legislature (Dec. 1996) (hereinafter "SPO Report") at 33 (emphasis in original).

The SPO explained that its draft legislation "significantly strengthens the law yet also goes a long way to clarify, streamline, and modernize the entire process to procure health and human services." Id. at 34. The SPO noted that providers had complained that the existing purchase of service system contained "burdensome and sometimes duplicative bureaucratic requirements." Id. at 19. The SPO further noted that the existing system was

> marked by inconsistent and fragmented contract administration resulting in late contracts and delayed payments. According to providers, there have been instances in which contracts and payments have been delayed for up to six months. In one instance, there was an eleven-month delay.
>
> Such actions place an undue hardship on the providers[.]

Id.

The SPO also noted that various stakeholders expressed concern with regard to the reconsideration procedure, which was described as "a flawed and biased process" because the "'appeals' body consist[ed] of individuals responsible for making the original selection and funding recommendations." Id. at 15. Nevertheless, the SPO proposed a similar, agency-directed process

for protests under the new chapter:

> Chapter 42D included a Request for Reconsideration (RFR) or "appeal" process. This reconsideration process is for service providers who are not recommended for funding or not satisfied with their recommended level of funding.
>
> The new protest and reconsideration process, proposed in the draft legislation, will be clear and uncomplicated. Under the new process, any provider who is aggrieved in connection with the award of a contract may protest in writing within five working days to the head of the purchasing agency.
>
> The head of the purchasing agency or a designee may settle and resolve a protest of an aggrieved provider by, among other things, canceling the proposed award or re-doing the selection process in compliance with the law or rules. If the protest is not resolved by mutual agreement, a written decision must be issued by the purchasing agency. The decision must state the reasons for the actions taken and inform the protesting applicant of the protester's right to further review.
>
> Reconsideration of a decision of the head of the purchasing agency regarding an award may be requested by the protesting provider organization. The request for [re]consideration must be submitted to the chief procurement officer in writing within five working days after receipt of the initial decision. The basis for a request for reconsideration is limited to a fraudulent decision or non-compliance with statutes or rules in the solicitation or award of the contract.
>
> The chief procurement officer may uphold the previous decision of the head of the purchasing agency or reopen the protest as deemed appropriate. A decision of the chief procurement officer is final.

Id. at 48-49.

Accordingly, although the SPO's draft legislation was apparently modeled after provisions contained in chapter 103D, the SPO omitted those provisions of chapter 103D concerning judicial review. Compare id. at Appendix B with HRS chapter 103D.

In 1997, the legislature adopted the SPO's recommendation to create a separate chapter, chapter 103F, for the procurement of health and human services contracts. 1997

Haw. Sess. Laws Act 190, § 1 at 351. The legislature also adopted, with modifications, the SPO's proposed protest and reconsideration process. See id. Accordingly, the legislature did not import the judicial review provisions of chapter 103D into chapter 103F. Id.

The legislative history of chapter 103F indicates that the statute was intended to "promote greater fairness, efficiency, effectiveness, and accountability." H. Stand. Comm. Rep. No. 940, in 1997 House Journal, at 1461. The Senate Committee on Ways and Means stated:

> [T]he intent of providing a separate process for health and human services is to ensure fair and equitable treatment of all those who apply to and are paid to provide those services. Your Committee finds that this process will result in a simpler, standardized process for both state agencies and providers to use, and will optimize information-sharing, planning, and service delivery efforts.

S. Stand. Comm. Rep. No 1465, in 1997 Senate Journal, at 1448 (emphasis added).

Thus, the majority is correct that one of the purposes of chapter 103F was to promote fairness. Majority opinion at 36-37. However, in light of the history indicating that the legislature, at the SPO's recommendation, declined to incorporate provisions concerning appeal and judicial review into chapter 103F, it cannot be said that an intent to promote fairness is indicative of an intent to permit judicial review. Rather, for the foregoing reasons, chapter 103F clearly evidences the legislature's intent to preclude judicial review, and to rely

upon the administrative review procedures set forth in chapter 103F to provide a fair review process.

B. The protest procedures set forth in chapter 103F do not raise separation of powers concerns

ANK argues that, because chapter 103F does not provide for judicial review, it constitutes an unconstitutional delegation of judicial power to an executive agency in violation of article VI, section 1 of the Hawaiʻi Constitution and the separation of powers doctrine.

Article VI, section 1 provides:

> The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules.

Although this provision specifically vests the courts with "[t]he judicial power of the State[,]" it further recognizes that the legislature has the power to include or exclude cases from the courts' jurisdiction by deciding whether to provide for review "by law." Haw. Const. art. VI, § 1 (stating that the courts have "original and appellate jurisdiction as provided by law") (emphasis added). In addition, article III, section 1 vests the legislature with legislative power, which "is defined as the power to enact laws and to declare what the law shall be. Under this grant of authority, the legislature has the power to establish the subject matter jurisdiction of our state court system." Sherman v. Sawyer, 63 Haw. 55, 57, 621 P.2d 346, 348

(1980) (citation omitted). Accordingly, precluding judicial review of administrative decisions is not necessarily inconsistent with article VI, section 1.

Nevertheless, as illustrated in the cases cited by the majority, the delegation of adjudicative power to an agency may, in certain circumstances, violate the separation of powers doctrine. See majority opinion at 24-26. However, the cases cited by the majority establish that the question of whether the delegation of adjudicative power violates the separation of powers doctrine is highly fact-specific. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) (declining to adopt "formalistic and unbending rules" for the determination of whether the delegation of adjudicative power to an agency violated the separation of powers doctrine).

Notably, all of the federal cases cited by the majority relied heavily on the distinction between the adjudication of disputes involving private rights, and those involving public rights.[11] Majority opinion at 25-26; see Commodity Futures, 478 U.S. at 853 ("The counterclaim asserted in this litigation is a 'private' right for which state law provides the rule of

[11] The United States Supreme Court has explained that

> a matter of public rights must at a minimum arise between the government and others. In contrast, the liability of one individual to another under the law as defined, is a matter of private rights.

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (internal quotation marks, citations and footnote omitted).

decision. It is therefore a claim of the kind assumed to be at the 'core' of matters normally reserved to Article III courts."); Patlex Corp. v. Mossinghoff, 758 F.2d 594, 604 (Fed. Cir. 1985) ("At issue is a right that can only be conferred by the government. Thus we find no constitutional infirmity . . . in patent reexamination by the [Patent and Trademark Office].") (citation omitted); Northern Pipeline, 458 U.S. at 71-72 ("Northern's right to recover contract damages to augment its estate is 'one of private right, that is, of the liability of one individual to another under the law as defined.'") (citation omitted). This is significant because, as the Court has explained,

> only controversies in the [public rights] category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

Northern Pipeline, 458 U.S. at 70 (citations, internal quotation marks, and footnote omitted).

The Court further explained that one policy behind permitting delegation of public rights controversies is grounded in "the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued." Id. at 67 (citation omitted).

In the instant case, the procurement dispute did not arise between one individual and another, but rather between the government and an individual bidder. Northern Pipeline, 458 U.S.

at 70. Moreover, the right to protest a procurement decision is "a right that can only be conferred by the government." Patlex Corp., 758 F.2d at 604. Put another way, absent the protest procedures established in chapter 103F, a disappointed bidder would have no fundamental right to protest an agency's procurement decision. It would therefore appear that a procurement protest is not "of the kind assumed to be at the 'core' of matters normally reserved to [the] courts." Commodity Futures, 478 U.S. at 853.

In addition, in Commodity Futures, the Court noted that

> [t]he risk that Congress may improperly have encroached on the federal judiciary is obviously magnified when Congress withdraws from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty and which therefore has traditionally been tried in Article III courts, and allocates the decision of those matters to a non-Article III forum of its own creation. Accordingly, where private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching.

Id. at 854 (citations, internal quotation marks and brackets omitted).

There, the delegation to the agency involved a private right counterclaim, but was limited in scope, and the decision to proceed in the agency forum, rather than the court, was optional. Id. at 854-55. In those circumstances, the court concluded that the delegation of adjudicatory power did not violate the separation of powers doctrine. Id. at 857. Thus, although the Court in Commodity Futures acknowledged that the wholesale

delegation of "the entire business of Article III courts" to non-Article III tribunals would violate the separation of powers doctrine, id. at 855, it also recognized that a more narrow delegation was permissible.

In contrast, in Northern Pipeline, the Court held that the establishment of non-Article III Bankruptcy Courts was unconstitutional, where the Bankruptcy Court judges had "all of the 'powers of a court of equity, law, and admiralty,' except that they 'may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.'" 458 U.S. at 55, 76. Moreover, this delegation of power was held to be unconstitutional, even though the statute provided for review of the bankruptcy judge's decision in the federal courts. Id. at 55.

Respectfully, these cases do not support the majority's conclusion that separation of powers concerns arise where, as in the instant case, an administrative agency is vested with limited, but unreviewable, adjudicative power. See majority opinion at 28. Indeed, numerous statutes that vest an administrative agency with adjudicatory power have not been subjected to constitutional challenge on separation of powers grounds. See, e.g., Switchmen's Union of North America v. Nat'l Mediation Bd., 320 U.S. 297, 301, 303 (1943) ("All constitutional questions aside, it is for Congress to determine how the rights

which it creates shall be enforced. . . . And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved.") (citation omitted); Your Home Visiting Nurse Servs., Inc. v. Shalala, 525 U.S. 449, 456 (1999) (statute precluded judicial review of Medicare reimbursement determination); Fischer v. Resolution Trust Corp., 59 F.3d 1344, 1348 (D.C. Cir. 1995) (judicial review of agency determination was precluded by statute, where agency determined that accounting firm's contract bid was ineligible due to conflict of interest); Leistko v. Stone, 134 F.3d 817, 820 (6th Cir. 1998) (the Civil Service Reform Act and Backpay Act precluded judicial review of adverse personnel actions); Antonio-Cruz v. I.N.S., 147 F.3d 1129, 1131 (9th Cir. 1998) (judicial review precluded of Attorney General's discretionary decision to deny an alien the privilege of voluntary departure, where applicable statute precluded judicial review of discretionary decisions).

Nevertheless, even where judicial review is specifically precluded, the courts retain certain core functions, including the power to determine whether a statute under which an agency is operating is constitutional, or whether an agency is acting in excess of its statutorily granted authority.[12] See

[12] This power would appear to derive from the inherent powers of the courts. See State v. Moriwake, 65 Haw. 47, 55, 647 P.2d 705, 712 (1982) (citing HRS § 603-21.9 and noting that "the inherent power of the court is the power to protect itself; the power to administer justice whether any previous (continued...)

State v. Bani, 97 Hawaiʻi 285, 291 n.4, 36 P.3d 1255, 1261 n.4 (2001) ("[T]he question as to the constitutionality of a statute is not for legislative determination, but is vested in the judiciary[.]") (citation omitted); HOH Corp. v. Motor Vehicle Industry Licensing Bd., 69 Haw. 135, 143, 736 P.2d 1271, 1276 (1987) ("[C]onstitutionality or not in the particular circumstances is a legal question originally cognizable in the circuit court."); see also Johnson v. Robinson, 415 U.S. 361, 368 (1974) (noting, with regard to a statute precluding review of agency decisions on "question of law or fact," that "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies") (citations, internal quotations marks and parenthesis omitted); Briscoe v. Bell, 432 U.S. 404, 408 (1977) (noting that "even where the intent of Congress was to preclude judicial review, a limited jurisdiction exists in the court to review actions which on their face are plainly in excess of statutory

[12](...continued)
form of remedy has been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists") (citations and some quotation marks omitted). Accordingly, I agree with the majority that a court's inherent powers extend beyond controlling the litigation process. Majority opinion at 53.

However, contrary to ANK's assertion, and with limited exceptions described herein, a court's inherent powers cannot confer jurisdiction in the absence of a basis for that jurisdiction in law. Haw. Const. art. VI, § 1 (stating that the courts have "original and appellate jurisdiction as provided by law"). Similarly, although this court may have a "policy favoring judicial review of administrative actions[,]" majority opinion at 32 (quoting Matter of Hawaii Gov't Emps.' Ass'n, Local 152, AFSCME, AFL-CIO, 63 Haw. 85, 87, 621 P.2d 361, 363 (1980) (holding that failure to designate an agency as an appellee is not a cause for dismissal)), such a policy cannot provide a basis for review where review specifically has been precluded.

authority") (internal quotation marks and citation omitted); Leedom v. Kyne, 358 U.S. 184, 188 (1958) (permitting review of alleged unlawful action "made in excess of [the Board's] delegated powers and contrary to a specific prohibition in the Act"); 5 Jacob A. Stein, Glenn A. Mitchell, & Basil J. Mezines Administrative Law § 44.02 at 44-30 to 44-33 (2011) ("[T]he Supreme Court held that even when a statute cuts off judicial review, review will be afforded if the agency exceeds its statutory authority. The Court has also held that review may not be dispensed with, despite a specific statutory provision, when what is being challenged is the constitutionality of a statute under which the agency is acting.").

In this regard, New York City Department of Environmental Protection v. New York City Civil Service Commission, 579 N.E.2d 1385 (N.Y. 1991), cited by the majority, is instructive. See majority opinion at 38-39. There, the New York Court of Appeals concluded that the merits of a determination by the Civil Service Commission in an employee disciplinary proceeding were "not reviewable in the courts" based on the plain language of the applicable statute. Id. at 1386. However, the court further noted that:

> however explicit the statutory langauge, judicial review cannot be completely precluded. First, if a constitutional right is implicated, some sort of judicial review must be afforded the aggrieved party. . . . Second, judicial review is mandated when the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction.

Id. at 1387.

However, the court noted that the scope of available review was "extremely narrow": "Once courts have determined that an agency has not acted in excess of its authority or in violation of the Constitution or the laws of this State, judicial review is completed." Id. at 1388. The court determined that, in the case before it, there was "no showing that [the Commission's action] was unconstitutional, illegal, or outside the Commission's jurisdiction[,]" and that "the substance of the Commission's determination . . . is unreviewable in the courts." Id.

Here, ANK's protest did not assert that the DOE's actions in awarding the contract were unconstitutional, or that the DOE was acting outside of its statutory authority. Rather, ANK protested the award of the contract on three grounds: (1) the Proposal Evaluators "ignor[ed] or fail[ed] to consider express language in the Proposal and the RFP"; (2) the RFP did not "establish criteria for justifying a multiple contract award" as allegedly required under the applicable statute and administrative rules; and (3) the DOE did not provide ANK "reasonable discovery" following ANK's initial notice of protest. The first of these grounds alleged that "[t]he Evaluators [f]ailed to follow evaluation criteria established by the RFP because they ignored or failed to consider express language in the RFP and express language in the Proposal that addresses the

Evaluator's stated concerns." This allegation does not involve a constitutional question, nor does it assert that the DOE was acting outside of its statutory authority. Rather, it involves only the consideration of the RFP and ANK's proposal.

The second of ANK's asserted grounds alleged that the RFP "did not conform to [HRS §] 103F-411 and HAR [§] 3-143-206(d)." However, ANK abandoned this claim in the circuit court.

Finally, ANK's third asserted ground alleged that the DOE violated HAR § 3-148-502 by withholding discoverable information after ANK filed its notice of protest. Assuming arguendo that this ground was properly raised in ANK's protest, see HRS § 103F-504 ("The procedures and remedies provided for in this part, and the rules adopted by the policy board, shall be the exclusive means available for persons aggrieved in connection with the award of a contract to resolve their concerns.") (emphasis added), it does not raise constitutional questions or allegations that the DOE was acting outside of its statutory authority. Accordingly, none of the limited exceptions to unreviewability are applicable here. See New York City Dep't of Envtl. Prot., 579 N.E.2d at 1387-88.

In sum, the cases cited by the majority do not establish that the DOE's unreviewable authority to determine ANK's chapter 103F protest violates the separation of powers doctrine. Rather, the Hawaiʻi Constitution provides the legislature with the authority to determine the jurisdiction of

the courts, subject to the limitations described above. Haw. Const. art. VI, § 1. The legislature permissibly exercised that power in precluding judicial review of this protest under chapter 103F.

C. Relief is not available under the declaratory judgment statute

The declaratory judgment statute, HRS § 632-1,[13]

[13] In its entirety, HRS § 632-1 (1993) provides:

> In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for; provided that declaratory relief may not be obtained in any district court, or in any controversy with respect to taxes, or in any case where a divorce or annulment of marriage is sought. Controversies involving the interpretation of deeds, wills, other instruments of writing, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.
>
> Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by

(continued...)

provides that, "[w]here . . . a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed[.]" Accordingly, although HRS § 632-1 "generally endorses declaratory relief in civil cases, it nonetheless disallows such relief where a statute provides a special form of remedy for a specific type of case." Travelers Ins. Co. v. Hawaii Roofing, Inc., 64 Haw. 380, 386, 641 P.2d 1333, 1337 (1982) (internal quotation marks, ellipsis, brackets, and footnote omitted). "[W]here such a statutory remedy exists, declaratory judgment does not lie." Punohu v. Sun, 66 Haw. 485, 486, 666 P.2d 1133, 1134 (1983).

Here, chapter 103F provides a "special form of remedy" for persons "aggrieved in connection with the award of a contract to resolve their concerns[,]" see HRS § 103F-504, specifically, the protest and reconsideration procedures set forth in HRS §§ 103F-501 and 103F-502. Moreover, the legislature provided that these protest and reconsideration procedures are the "exclusive means" for such aggrieved persons to resolve their concerns. HRS § 103F-504. Accordingly, ANK cannot maintain a declaratory judgment action to challenge the DOE's denial of its chapter 103F protest.

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[13](...continued)
> statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment in any case where the other essentials to such relief are present.

(Emphasis added).

Nevertheless, the majority concludes that ANK may bring suit under the declaratory judgment statute because chapter 103F provides a private right of action. See majority opinion at 48-50. This court has stated that, under the declaratory judgment statute, "there must be some 'right' at issue in order for the court to issue relief." Rees v. Carlisle, 113 Hawaiʻi 446, 458, 153 P.3d 1131, 1143 (2007). To determine whether a statute provides a "right upon which a plaintiff may seek relief[,]" this court considers (1) whether "the plaintiff is one of the class for whose especial benefit the statute was enacted"; (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one"; and (3) whether a private right of action is "consistent with the underlying purposes of the legislative scheme[.]" Id. (citation, internal quotation marks, emphasis and brackets omitted). Of these three factors, "legislative intent appears to be the determinative factor." Id. (citation omitted).

Here, as noted supra in Part II(A), chapter 103F clearly evidences the legislature's intent to preclude judicial review. Based on the legislature's intent to deny such a remedy, it is clear that the legislature did not intend to create a private right of action for disappointed bidders under chapter 103F. Accordingly, I respectfully disagree with the majority's conclusion that the legislature's intent to provide for a "fair and equitable" procurement process is sufficient to demonstrate

the legislature's intent to create a private right of action under chapter 103F. Majority opinion at 49-50 (quoting 1997 Haw. Sess. Laws Act 190, § 1 at 351).

Respectfully, permitting an original action under the declaratory judgment statute in these circumstances would undercut the limitations on judicial review set out in HRS § 91-14.[14] HRS § 91-14 governs judicial review of agency decisions following a contested case hearing, and is the primary vehicle for judicial review of agency action. However, HRS § 91-14 does not "prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law." HRS § 91-14(a) (emphasis added). Thus, for example, judicial review of the decision of a DCCA hearings officer is available under HRS § 103D-710, even though the decision was not subject to the contested case requirements of chapter 91. See HRS § 103D-704 ("The contested case proceedings set out in chapter 91 shall not apply to protested solicitations and awards, debarments or suspensions, or the resolution of contract controversies.").

The majority concludes that the declaratory judgment statute similarly provides for judicial review. Majority opinion

[14] HRS § 91-14(a) (1993) provides in relevant part:

> Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter[.]

at 48-50. Respectfully, however, the declaratory judgment statute differs markedly from a statute such as HRS § 103D-701, in that it does not specifically address judicial review of agency decisions, but rather applies to, inter alia, "civil cases where an actual controversy exists between contending parties[.]" HRS § 632-1. In addition, the declaratory judgment statute does not provide procedures for seeking judicial review of agency action, nor does it address the standard of review for these decisions.

Moreover, the conclusion that review is available pursuant to HRS § 632-1 is contrary to our prior caselaw, which has denied judicial review of agency action where there is no provision for such review in our statutes. For example, in Koʻolau Agricultural Co., Ltd. v. Commission on Water Resource Management, 83 Hawaiʻi 484, 493, 927 P.2d 1367, 1376 (1996), this court specifically rejected the argument that declaratory relief was available, where the statute evidenced the legislature's intent to provide for an appeal of the agency decision, but did not specifically provide procedures or jurisdiction for an appeal. There, an agricultural company sought to preserve its purported rights in an aquifer by challenging the Commission on Water Resource Management's designation of the aquifer as a ground water management area (WMA). Id. at 487, 927 P.3d 1370. The company brought its challenge by way of three separate proceedings: a declaratory judgment action, an untimely direct

appeal to this court, and an untimely administrative appeal to the circuit court. Id. Both the direct and administrative appeals were dismissed, leaving only the declaratory judgment action. Id. The circuit court then dismissed the declaratory judgment action for lack of jurisdiction. Id. at 487-88, 927 P.2d at 1370-71.

On appeal, this court noted that, "where a statutory avenue for appeal of an agency decision is available, an original action for declaratory judgment does not lie." Id. at 493, 927 P.2d at 1376. There, the statute at issue provided that the agency decision "shall be final unless judicially appealed." Id. at 492, 927 P.2d at 1375 (quoting HRS § 174C-46). This court noted that, although this language indicated that "the legislature intended an appeal as the exclusive means of obtaining judicial review of the Commission's decision . . . , we can ascertain no provision in the Code that describes the mechanics of such an appeal or that confers jurisdiction on any court." Id. at 493, 927 P.2d at 1376. This court concluded that, "if the legislature intended to provide for an appeal of a WMA designation, as we believe it did, it will have to amend the Code to specify the procedures and provide jurisdiction for an appeal." Id. However, even absent a specific statutory remedy, this court concluded that declaratory judgment was nonetheless unavailable, because the statute required the legislature to "specifically provide" for an appeal. Id. Absent such a

provision, this court concluded that "a WMA designation is not judicially reviewable." Id. at 493-94, 927 P.2d at 1376-77 ("[I]f an appeal is available, it is the exclusive avenue for judicial review of a WMA designation; if no appeal is actually provided, the Commission has exclusive jurisdiction and a WMA designation is not judicially reviewable.").

In addition, in Bush v. Hawaiian Homes Commission, 76 Hawaiʻi 128, 131, 870 P.2d 1272, 1275 (1994), this court concluded that the circuit court did not have jurisdiction to review an agency appeal because a contested case hearing did not precede the appeal, as required under HRS § 91-14. There, native Hawaiian beneficiaries of the Hawaiian Homes Commission Act (HHCA) contested the validity of third party agreements that allowed non-Hawaiian farmers to use HHCA land that was leased to native Hawaiian lessees. Id. at 132, 870 P.2d at 1276. The beneficiaries requested a contested case hearing on the issue, but the Commission denied the request and approved the third party agreements. Id. at 132-33, 870 P.2d at 1276-77. The beneficiaries appealed to the circuit court, which dismissed for lack of jurisdiction. Id. at 133, 870 P.2d at 1277.

On further appeal, this court considered whether the beneficiaries "were entitled to obtain judicial review of the Commission's determinations[,]" and concluded that judicial review was not available because a contested case hearing did not occur and, in any event, a contested case hearing was not

required by law. Id. at 133-36, 870 P.2d at 1277-78. Accordingly, this court determined that review of the denial of the beneficiaries' request for a contested case hearing was "unattainable due to a lack of subject matter jurisdiction." Id. at 136, 870 P.2d at 1280. Although this court noted that HRS § 91-14 did not preclude "resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law," it did not fashion a new remedy for the beneficiaries under the declaratory judgment statute. Id. at 137, 870 P.2d at 1281 (emphasis in original). Rather, this court affirmed the circuit court's dismissal of the beneficiaries' appeal. Id.

Similarly, in Aha Hui Malama O Kaniakapupu v. Land Use Commission (Kaniakapupu), 111 Hawaiʻi 124, 139 P.3d 712 (2006), this court again determined that the circuit court did not have jurisdiction to review an agency appeal because no contested case hearing occurred. There, a hui formed to care for Kaniakapupu (the historical ruins of the royal summer cottage of Kamehameha III) sought an order to show cause from the Land Use Commission (LUC) as to why adjoining land should not be reverted from its current classification as an urban district to its prior classification as a conservation district. Id. at 126-28, 139 P.3d at 714-16. The hui argued that the classification should be reverted because an owner of the adjoining land violated a condition that was imposed by the LUC when the land was initially

converted to an urban district. Id. at 127, 139 P.3d at 715. The LUC held a hearing on the motion, but the motion was denied. Id. at 128, 139 P.3d at 716. The circuit court dismissed the appeal on the ground that the hearing was not a contested case hearing, and accordingly the circuit court lacked jurisdiction. Id. at 129-31, 139 P.3d at 717-19.

This court agreed and, as in Bush, affirmed the dismissal of the appeal. Id. at 134, 139 P.3d at 722. This court acknowledged the hui's argument that, absent judicial review of the decision to deny a contested case hearing, "any agency could arbitrarily and capriciously deny anyone a hearing at any time, regardless of whether such hearing were required by law, and the aggrieved party could never obtain judicial review of such denial." Id. at 137, 139 P.3d at 725. However, rather than creating a new remedy to address this concern under the declaratory judgment statute, this court noted that there was no procedural vehicle for a party to request a contested case hearing on an order to show cause and, accordingly, the hui's assertion was without merit. Id.; cf. Kaleikini v. Thielen, 124 Hawaiʻi 1, 16, 237 P.3d 1067, 1082 (2010) (permitting judicial review of the denial of a contested case hearing where, inter alia, there was a "procedural vehicle" to obtain a contested case hearing and the party requested such a hearing).

However, in contrast to these cases, the majority opinion would appear to allow for judicial review under the

declaratory judgment statute of any final agency action, even where the legislature has not provided for review of that action in an administrative forum or the courts. See majority opinion at 44. In so doing, the majority opinion appears to erode the principles established in our caselaw concerning HRS § 91-14, which indicate that judicial review is available only following contested case hearings, or where, as in chapter 103D, judicial review is otherwise "provided by law." See Koʻolau Agricultural, 83 Hawaiʻi at 493, 927 P.2d at 1376; Bush, 76 Hawaiʻi at 133-37, 870 P.2d at 1277-81; Kaniakapupu, 111 Hawaiʻi at 137, 139 P.3d at 725.

In addition, review of administrative decisions is generally subject to strict time limitations. See HRS § 103D-712(b) ("Requests for judicial review . . . shall be filed . . . within ten calendar days after the issuance of a written decision by the hearings officer[.]"); see also HRS § 91-14(b) ("Except as otherwise provided herein, proceedings for review shall be instituted . . . within thirty days after service of the certified copy of the final decision and order of the agency[.]"). However, HRS § 632-1 does not impose any time limitations on declaratory judgment actions. It would appear that a declaratory judgment action challenging an agency's reconsideration decision on a procurement protest would be subject to the general statutes of limitations set forth in HRS

chapter 657, which may be as long as six years.[15] See HRS § 657-1(4) (1993) (providing a six year statute of limitations for "[p]ersonal actions" not otherwise covered by the laws of the State). In the circumstances presented here, permitting review of a protest decision under the declaratory judgment statute is contrary to the legislature's intent to promote efficiency in the procurement process. See H. Stand. Comm. Rep. No. 940, in 1997 House Journal, at 1461 (noting that the public procurement policy later codified in 103F would "promote greater fairness, efficiency, effectiveness, and accountability") (emphasis added); CARL Corp. v. State of Hawaiʻi, Dep't of Educ., 85 Hawaiʻi 431, 447, 946 P.2d 1, 17 (1997) (recognizing "the obvious need for expeditious review of public contracting decisions" under 103D).

The majority's reliance on the declaratory judgment statute to provide judicial review of procurement protests will open up numerous administrative decisions to judicial review, including decisions such as those in Koʻolau Agricultural, Bush, and Kaniakapupu, without a statute specifically providing jurisdiction, procedures, or standards of review. Accordingly, I respectfully dissent.

III. Conclusion

The Hawaiʻi constitution vests the courts with the

[15] Respectfully, I do not believe that the potential for mootness is a sufficient incentive to ensure the prompt filing of challenges, particularly with regard to long-term contracts for purchase of services. Majority opinion at 45 n.46.

judicial power of the state, but recognizes that the legislature has the authority to determine the courts' jurisdiction. Under that framework, the legislature has the power to provide for the administrative resolution of certain disputes between the government and an individual. However, that authority is subject to limits. Most notably, the courts retain the authority to determine the constitutionality of statutes, or whether an administrative agency has acted in excess of its statutory authority.

The legislature exercised its authority under this framework and determined that disappointed bidders for health and human services contracts would be entitled to administrative, but not judicial, review of the procurement decisions of the contracting agency. HRS §§ 103F-501, 103F-502 and 103F-504. In the legislature's view, such a process best provided for the fair and efficient award of these important contracts. In reaching that conclusion, the legislature respected the limitations placed upon it by our constitution and the principle of separation of powers. Moreover, the dispute at issue here does not involve a determination of the constitutionality of the governing statute, or a claim that the agency was acting in excess of its statutory powers. Thus, ANK is not entitled to judicial review of the administrative denial of its request for reconsideration.

Respectfully, the result reached by the majority undermines well-settled Hawaiʻi precedent governing when

administrative determinations are subject to judicial review, including the decisions in Koʻolau Agricultural, Bush and Kaniakapupu. Additionally, it will introduce uncertainty into the procurement of health and human services contracts. In order to promote the prompt and final resolution of disputes involving the procurement of those contracts, chapter 103F provides that a protest must be filed within five working days, and a request for reconsideration must be filed within five working days of the written protest decision. HRS §§ 103F-501 and 103F-502. However, under the majority's approach, procurement decisions will now be subject to challenge much later under the more generous statutes of limitations applicable to declaratory judgment actions.

Accordingly, I respectfully dissent from the court's holdings on those issues.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama