

I respectfully dissent.

I. County's Appeal

A. Ruling on Bid Solicitation Documents

On appeal, the County challenges the circuit court's FOF 2 in its Order Granting CCI's Application for Judicial Review, which stated:

2. The Proposal and Specifications for the Project (the "Solicitation"), including the Special Notice to Bidders and the Listing of Responsible Entities, did not require the use or listing of a contractor, joint contractor, or subcontractor having a C-44 specialty contractor classification (the "C-44 License").

The County also challenges the circuit court's COL 1: "The Hearings Officer's finding that the Proposal or Solicitation required a C-44 specialty contractor license for the Project, is clearly erroneous[.]"

The Special Notice, attached to the Bid Proposal, contained specific information about specialty contractor classifications:

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.

[List of specialty contractor classifications and scope of work applicability]

SPECIAL INSTRUCTIONS TO BIDDERS REGARDING SPECIALTY CONTRACTOR CLASSIFICATIONS AND REGARDING JOINT CONTRACTORS & SUBCONTRACTORS:

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- 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 [sic] 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

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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 table above 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. [(Special Instruction Number Four).]

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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.

(Format altered.) The County suggests the Special Notice "clearly establishes" that possession of one of the specialty contractor licenses from the list was a requirement of the Bid Proposal.

In its May 8, 2014 FOF/COL, the OAH Hearings Officer concluded:

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 the hearing held June 13, 2014 in the circuit court, the court explained its conclusion to reverse the OAH Hearings Officer:

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."

I agree with the circuit court's interpretation of the Bid Proposal and Special Notice.

The "Special Instructions" in the Special Notice contain conflicting provisions, most notably Special Instruction Number Two and Special Instruction Number Four. However, the language of Special Instruction Number Two suggests that even if the specialty contractor license was "required" as stated in Special Instruction Number Four, this "requirement" could be bypassed by the process outlined in Special Instruction Number Two. Under Special Instruction Number Two, a bidder may determine that it did not need a specialty license by employing an alternate means or method and could circumvent the specialty contractor license requirement by clearly stating its intent to do so and by providing a detailed plan in its proposal. The Special Notice clearly contemplated the possibility that a bidder would not list any of the specialty contractor licenses in its bid.

I would affirm the circuit court's finding that "[t]he Hearing[s] Officer's finding that the [Bid] Proposal or Solicitation required a C-44 specialty contractor license for the Project, is clearly erroneous[.]" See HRS § 103D-710(e)(5); Southern Foods, 89 Hawai'i at 452, 974 P.2d at 1042 ("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." (citations omitted) (quoting Price v. Zoning Bd. of Appeals of

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City and Cty. of Honolulu, 77 Hawai'i 168, 172, 883 P.3d 629, 633 (1994)).

B. Timeliness of Bid Protest Submission

The County next challenges the circuit court's conclusion that "[t]he Hearings Officer erred in concluding that [CCI's] protest of the disqualification of its bid was required to be submitted ten calendar days prior to bid opening or no later than February 5, 2014[,] and its related conclusion that CCI's "protest of the disqualifaction of its bid was timely submitted on February 19, 2014[.]"

In the May 8, 2014 FOF/COL, the OAH Hearings Officer held:

Taken as a whole, the [OAH] finds that the Proposal required a C-44 specialty contractor license for the Project. Accordingly, . . . if [CCI] disagreed with [County's] assessment that a C-44 specialty contractor license was required and believed that the work could be done with its C-42 and C-44A specialty contractor licenses in lieu of the required C-44 license, it was incumbent upon them to file a written objection ten calendar days prior to bid opening or at the latest, by February 5, 2014, the day before bid opening. Since [CCI] did not protest until February 19, 2014, the [OAH Hearings Officer] concludes that its protest was untimely and [OAH] does not have jurisdiction to hear this matter.

The circuit court did not explain its reasoning reversing the OAH when in issued the Order Granting CCI's Application for Judicial Review.

The Procurement Code¹ applies "to all procurement contracts made by governmental bodies" HRS § 103D-102(a) (2012 Repl.). Under the Procurement Code,

[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. Except as provided in sections 103D-303 and 103D-304, a protest shall be submitted in writing within five working

¹ The purpose of the Procurement Code "is to revise, strengthen, and clarify Hawaii's laws governing procurement of goods and services and construction of public works." CARL Corp. v. State, Dep't of Educ., 85 Hawai'i 431, 455, 946 P.2d 1, 25 (1997) ("CARL I") (quoting S. Stand. Comm. Rep. No. S8-93, in 1993 Senate Journal, at 39). The Procurement Code was established to: "(1) Provide for fair and equitable treatment of all persons dealing with the government procurement system; (2) Foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and (3) Increase public confidence in the integrity of the system." CARL I, 85 Hawai'i at 26, 946 P.2d at 456 (quoting S. Stand. Comm. Rep. No. S8-93, in 1993 Senate Journal, at 39).

days after the aggrieved person knows or should have known of the facts giving rise thereto . . . provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.

HRS § 103D-701(a).

HRS § 103D-701(a) contemplates two types of protests: a protest based on the content of a solicitation and a protest not based on the content of a solicitation. Under the final provision of § 103D-701(a), a protest based on the content of a solicitation must be submitted in writing before the due date for bid offers. A protest concerning the rejection of a proposal rather than the contents of a proposal, however, does not need to be submitted prior to the date set for the receipt of offers. See Bombardier Transp. (Holdings) USA Inc. v. Dir., Dep't of Budget and Fiscal Servs., City and Cnty. of Honolulu, 128 Hawai'i 413, 418, 289 P.3d 1049, 1054 (App. 2012) (involving a protest challenging the City's failure to engage in meaningful discussions resulting in the alleged wrongful rejection of a best and final offer).

The County distinguishes Bombardier by arguing that CCI "protested the contents of the [Bid Proposal], not the circumstances resulting in the disqualification of its bid." CCI's protest, however, does not seek any revision in the solicitation terms, as was the case in Bombardier. Instead, the Protest Letter explicitly targeted to the "disqualification of CCI and rejection of CCI's bid . . . as described in the Department's letter of February 14, 2014[.]"

The majority opinion suggests that the protest was based on the content of the solicitation because "embedded and a necessary part of CCI's bid protest, is its clear effort to erase the mandate in Special Instruction #2 requiring that CCI explain, in its proposal, how it would accomplish the work if it did not utilize a C-44 licensed sheet metal contractor." Thus, the majority concludes that the protest sought revision of the solicitation terms, distinguishing this case from the protest in Bombardier. Bombardier, however, involved a protest of the City's rejection of Bombardier's bid as non-responsive, and we construed the protest of a rejection as a protest based not on

the content of a solicitation. Bombardier, 128 Hawai'i at 418, 289 P.3d at 1054. Like the protest in Bombardier, CCI's protest letter challenged the rejection and disqualification of its bid as non-responsive.

Consistent with Bombardier, I would hold that CCI's bid was a protest not based on the content of the solicitation. The circuit court therefore did not err in its conclusion that CCI's protest was not required to be submitted by February 5, 2014, the due date for bid proposals.

I next address to the circuit court's conclusion that CCI's "protest of the disqualification of its bid was timely submitted on February 19, 2014." Protests under HRS § 103D-701(a) that do not challenge the content of the solicitation are required to be "submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto[.]" HRS § 103D-701(a). The County informed CCI in writing on February 14, 2014 that CCI's bid was disqualified. CCI submitted its written protest on February 19, 2014, within the five day requirement under HRS § 103D-701(a). Therefore, I would affirm the circuit court's conclusion that CCI's Protest Letter was timely submitted on February 19, 2014.

II. CCI's Appeal

A. July 30, 2014 FOF/COL

1. Jurisdiction

CCI and the County were asked to 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 contends the OAH Hearings Officer erroneously concluded, as did the circuit court in affirming the OAH's conclusion, 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 explains, "CCI 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." CCI argues, "[u]nder the OAH's view, no protesting bidder could ever utilize an oral or written opinion from the CLB regarding a scope of specialty license dispute because . . . such [an] opinion takes a minimum of 30 days to obtain."

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, hearings officers 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) (2012 Repl.).

The 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) (2012 Repl.): "The 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) (2012 Repl.). "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 [(2012 Repl.)²] shall apply." HRS

² HRS § 91-10 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

(continued...)

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§ 103D-709(c) (2012 Repl.).

The OAH Hearings Officer prevented CCI from introducing the CLB's Response Letter as documentary evidence. The CLB Response Letter stated:

At its March 21, 2014 meeting, the [CLB] discussed your March 11, 2014 letter and inquiry regarding whether the reroofing for fire maintenance show & fire dispatch/warehouse project work may be performed under a C-42 Roofing or C-44a Gutters contractor and that a C-44 Sheet metal contractor license is not required.

(Emphasis added.) The OAH Hearings Officer concluded:

[T]he 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)] 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

²(...continued)

- 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. 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.

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] dated April 8, 2014.

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

CCI is correct in its assertion that the CLB Response Letter was merely evidence in support of its contention that the sheet metal work could be performed under the licenses CCI had already secured. CCI's Protest Letter addressed specifically whether the sheet metal work required by the project could be performed under the C-42 and C-44A licenses. Under HRS § 103D-709(c), CCI was entitled to present this documentary evidence to the OAH in support of its protest. The CLB Response Letter did not divest the OAH of jurisdiction to consider the content of the letter. 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] dated April 8, 2014" was incorrect, and the circuit court erred in affirming the OAH decision.

Because I conclude that the OAH had jurisdiction over CCI's protest in the Protest Letter dated February 19, 2014 and was required to let CCI introduce the CLB Response Letter as documentary evidence, I do not consider the issue of the doctrine of futility, discussed at length in the July 30, 2014 FOF/COL.

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

in section 3 below, I would affirm the OAH Hearings Officer's decision that the County did not agree to defer to decision by the CLB.

2. CLB's Opinion on Gooseneck Hood Ventilator Issue

CCI argues that the OAH Hearings Officer erred in concluding that the CLB Response Letter was not determinative of the "gooseneck hood ventilator issue."³

The OAH Hearings Officer concluded:⁴

The [CLB's] opinion is informal in nature and does not even bind the [CLB] to honor its own opinion. A formal opinion can only be obtained through the use of a declaratory relief petition that would provide for notice to the County and an opportunity for the County to be heard by the [CLB]. That did not happen in this case, so the [CLB's] opinion must be considered solely as evidence of the [CLB's] inclinations--the [CLB] uses this type of opinion as a quick mechanism to provide some guidance to the parties so that they might take this informal opinion into account on an expedited basis not available if a declaratory relief petition were involved.

CCI challenges the OAH Hearings Officer's conclusion that the CLB Response Letter was informal in nature. CCI argues:

Although the CLB oral decision of March 21, 2014 and [CLB Response Letter] were issued as part of an informal proceeding rather than a lengthy declaratory relief action, the decisions are nonetheless relevant evidence, and the only evidence in this entire case from an expert body that is dedicated and statutorily authorized to determine the scope of specialty contractors licenses. Indeed, if the OAH Final Decision were correct in its assertion that informal opinions from the CLB should not be considered in license scope disputes, then there would be no reason to even allow the CLB to issue informal opinions and the entire subchapter regarding such opinions would be eviscerated.

(Emphasis omitted.)

Title 16 of HAR Chapter 201, Subchapter 5, guides the CLB in its informal proceedings and interpretations. HAR §§ 16-

³ The "gooseneck hood ventilator issue" refers to the second question directed to the parties at the July 17, 2014 evidentiary hearing: "Are the gooseneck hood ventilators shown in the project drawings non-motorized prefabricated roof vents?"

⁴ Although the OAH Hearings Officer erroneously concluded that it did not have jurisdiction to consider issues relating to the CLB Response Letter, the OAH issued its decision on the substance of CCI's claim, stating, "Again, while there is no jurisdiction to consider this issue, out of an abundance of caution the Hearings Officer sets forth the following conclusions on the issue." Since I have concluded that the OAH did have jurisdiction to consider the issues related to the CLB Response Letter, I address the merits of the CCI's appeal as if the OAH Hearings Officer had determined the OAH had jurisdiction.

201-85 et seq.

§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.

HAR § 16-201-85(a) (effective 1990); see also HRS § 444-4(9) (2013 Repl.).⁵

CCI in support of its position cites to HAR § 16-201-88(b) (effective 1990), which provides:

§16-201-88 Form of requests for informal interpretations.

. . . .

(b) 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 these 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.

While CCI is correct in its assertion that "the [CLB's] decisions are . . . relevant evidence," 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, I would not hold that the OAH Hearings Officer's conclusion was in violation of constitutional or statutory provisions, was in excess of its statutory authority or

⁵ HRS § 444-4(a) mandates that the CLB shall "[i]ssue informal nonbinding interpretations or declaratory rulings[.]"

jurisdiction, or was affected by other error of law. See HRS § 103D-710(e).

3. County's Agreement to Defer to CLB's Ruling

CCI disputes the OAH Hearings Officer's FOF 41:

"[Imanaka] did not state in [his conversation with Kevin Simpkins, President of CCI (**Simpkins**)] that the County would wait for a ruling from the [CLB] and/or defer to a ruling of the [CLB] on this particular project."

In support of its argument, CCI cites only to the February 18, 2014 email from Imanaka to 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 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, which bore the burden of proof as well as the

burden of persuasion under HRS § 103D-709(c),⁶ has not provided enough evidence to establish by a preponderance of the evidence that the County agreed to defer to the CLB's decision.

The OAH Hearings Officer's FOF 41 was not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. See HRS § 103D-710(e).

4. CCI Admits Installation of Gooseneck Hood Ventilators Was Not Within Scope of C-42 License

On appeal, CCI challenges the OAH Hearings Officer's conclusion:

Any assertion by [CCI] that the installation of the ventilators was incidental and supplemental to its roofing work is an admission that installation of the ventilators was not covered by [CCI's] C-42 license. It is an admission that the County was correct with respect to the ventilators and that a C-42 license was not sufficient to allow [CCI] to legally install the ventilators (unless there was some exception). [CCI] relies on the "incidental and supplemental" exception.

(Emphasis omitted.) 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 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 July 30, 2014 FOF/COL, the OAH Hearings Officer

⁶ 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.

did not cite to any authority supporting its conclusion that CCI's statement was 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 merely reciting the issue under protest to the County, and was not a definitive assertion that the roofing work was "incidental and supplemental"⁷ to the scope of work under the C-42 license.

CCI does not identify a particular holding the OAH Hearings Officer made that was supported by this erroneous conclusion. The conclusion CCI challenges is merely dicta. Although the OAH Hearings Officer's conclusion that CCI admitted its license did not cover the roofing work was 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.").

Therefore, I would affirm the following, entered in the Circuit Court of the Third Circuit:

(1) the June 16, 2014 "Order Granting Petitioner-Appellant Certified Construction, Inc.'s Application for Judicial Review of the Hearing Officer's Findings of Fact, Conclusions of Law and Decision and Exhibit 'A', filed May 8, 2014 in PDH-2014-006, Filed May 16, 2014";

(2) the September 19, 2014 "Order Denying Petitioner-Appellant Certified Construction, Inc.'s Notice of Appeal/Application for Judicial Review of the Hearings Officer's (1) Findings of Fact, Conclusions of Law and Decision and Exhibit 'A', filed July 30, 2014 and (2) Order on Motions Pending After Remand, filed July 14, 2014, in PDH-2014-006";

(3) the oral order denying Certified Construction, Inc.'s "Notice of Appeal/Application for Judicial Review of the Hearing Officer's (1) Findings of Fact, Conclusions of Law and Decision and Exhibit 'A', filed July 30, 2014 and (2) Order on

⁷ HAR § 16-77-34 (effective 2004) 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."

Motions Pending After Remand, filed July 14, 2014, in PDH-2014-006"; and

(4) "the deemed denial on September 8, 2014" of Certified Construction, Inc.'s "Notice of Appeal/Application for Judicial Review of the Hearing Officer's (1) Findings of Fact, Conclusions of Law and Decision and Exhibit 'A', filed July 30, 2014 and (2) Order on Motions Pending After Remand, filed July 14, 2014, in PDH-2014-006."

Camel R. Foley