*** * * NOT FOR PUBLICATION * * ***

NO. 24771

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

NOS. 24771 & 25193
GMP ASSOCIATES, INC., Petitioner-Appellant-Appellant,

vs.

BOARD OF WATER SUPPLY, CITY AND COUNTY OF HONOLULU,
Respondent-Appellee-Appellee,

and

OCEANIT LABORATORIES, INC.,
Intervenor/Respondent-Appellee-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 01-1-2126)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

In this consolidated appeal, petitioner-appellant-appellant GMP Associates, Inc. (GMP) appeals from: (1) the January 4, 2002 final judgment entered in favor of respondent-appellee-appellee Board of Water Supply (BWS), City and County of Honolulu and intervenor-respondent-appellee-appellee Oceanit Laboratories, Inc. (Oceanit); (2) the December 17, 2001 order affirming the final order granting Oceanit’s motion to dismiss, or in the alternative, for summary judgment, filed on June 18, 2001 in the Office of Administrative Hearings (OAH), Department of Commerce and Consumer Affairs; and (3) the June 17, 2002 final

order denying GMP's motion for relief from the December 17, 2001 order and January 4, 2002 judgment.

On appeal, GMP contends that the circuit court clearly erred in concluding that: (1) Hawai'i Revised Statutes (HRS) § 103-304 (Supp. 2000) [hereinafter, the amended statute[1]] (a) applies only to the process of selecting a service provider and (b) cannot be applied retroactively to nullify the contract between the BWS and Oceanit because the substantive provision of the amended statute was not in effect until after Oceanit had been selected by the BWS on May 22, 2000; (2) there was no "pre-selection" of Oceanit, in violation of HRS § 103D-405(d) (1993); and (3) the stay provisions of HRS § 103D-701(f) (Supp. 2000) provide no relief to GMP because the award or contract issued was not in "violation of law" under HRS § 103D-707 (Supp. 1999). GMP also contends that: (1) the hearings officer's decision was made upon an unlawful procedure because Oceanit was not yet a party to the action at the time it filed its motions to intervene and to dismiss, or, in the alternative, for summary judgment; and (2) the circuit court erred by denying GMP's April 22, 2002 motion for relief from the December 17, 2001 order and the January 4, 2002 judgment, filed June 17, 2002.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we

[1] On May 30, 2000, Act 141, which amended HRS § 103D-304 (Supp. 1997), took effect. See S.L.H. 2000, c. 141.

resolve the issues raised on appeal as follows. First, we hold that the circuit court did not err in concluding that the amended statute is not retroactive and, therefore, inapplicable to the BWS's May 22, 2000 selection of Oceanit as the consultant for the desalination plant project because: (1) the changes created by Act 141 to the process of selecting a consultant are substantive in nature because they establish new obligations and impose additional duties with respect to past transactions; (2) Act 141 took effect on May 30, 2000, after the selection of Oceanit; and (3) nothing in Act 141 indicates the legislature intended that it to be applied retroactively. See State v. Poohina, 97 Hawai'i 505, 512 n.2, 40 P.3d 907 n.2, 914 (2002) (stating that, in the absence of clearly expressed legislative intent that an amendment to a statute be applied retroactively, "the general rule in most jurisdictions is that statutes or regulations . . . are not applied to prior claims or events if such a construction will impair existing rights, create new obligations, or impose additional duties with respect to past transactions") (citation omitted); see HRS § 1-3 (1993) (stating that "no law has any retrospective operation, unless otherwise expressed or obviously intended.") Furthermore, because the amended statute was not yet in effect on May 22, 2000 when the BWS selected Oceanit in accordance with the predecessor statute, the BWS's subsequent compliance with the amended statute's post-award notification procedure was not an inconsistent position for purposes of

estoppel. We, therefore, hold that BWS is not estoped from arguing that the amended statute does not apply to the selection and award of the contract.

Second, because the desalination plant project was divided into several distinct phases and because Oceanit had not been paid for any services as none were performed with respect to the BWS's February 22, 2000 selection of Oceanit for the final scope of the design work of the desalination plant project (Phase I), we hold that the preclusion requirement under HRS § 103D-405(d) is inapplicable. Accordingly, we agree with the circuit court's determination that Oceanit was not "pre-selected" and, therefore, not precluded from being selected as the consultant for Phases II & III of the desalination plant project on May 22, 2000.

Third, we agree that the BWS violated the stay provision under HRS § 103D-701(f) by awarding the contract to the BWS during the pendency of GMP's protest. However, unlike In re Carl Corp. v. State, Dep't of Educ., 85 Hawai'i 431, 946 P.2d 1 (1997), wherein this court concluded that the chief procurement officer had recklessly disregarded specific instructions, executed the contract in bad faith, and, consequently, prejudiced Carl Corporation: (1) there is no evidence in the record that the BWS acted in bad faith or committed fraud; and (2) the BWS stopped performance of the contract pending the outcome of the appeal before the Hearings Officer. Moreover, GMP has failed to

demonstrate that it suffered any prejudice. See Hawai‘i Administrative Rules (HAR) § 3-126-36(c) (1995) (determining whether a solicitation or award is a violation of law requires that "[s]pecific findings showing reckless disregard of clearly applicable laws or rules must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or rules"); Southern Foods Group, L.P. v. State, Dept. of Educ., 89 Hawai‘i 443, 453, 974 P.2d 1033, 1043 (1999) (stating that in order to reverse or modify an agency decision, the appellate court must conclude that an appellant's substantial rights were prejudiced by the agency). We, therefore, hold that the BWS's violation of HRS § 103D-701(f) was harmless, and the circuit court did not err in concluding that the stay provisions of HRS § 103D-701(f) provide no relief to GMP because the award or contract issued was not "in violation of law" under HRS § 103D-707.

Fourth, GMP cites to no legal authority and nothing in the administrative rules or relevant statutes supports GMP's contention that Oceanit must be a party prior to filing its pleadings with the Hearings Officer. See HRS § 91-1(3) (1993) (defining "party" to mean "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding.) We conclude that Oceanit's motions to intervene and to dismiss were properly filed and that the Hearings Officer correctly

determined that Oceanit had a substantial property interest in the dispute to be admitted as a party. We, therefore, hold that the circuit court did not err in upholding the Hearings Officer's grant of Oceanit's motions.

Finally, this court has previously stated that relief from a judgment or order may be granted pursuant to HRCP Rule 60(b)(2) provided the evidence meets the following requirements: "(1) it must be previously undiscovered even though due diligence was exercised; (2) it must be admissible and credible; (3) it must be of such a material and controlling nature as will probably change the outcome and not merely cumulative or tending only to impeach or contradict a witness." Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 259, 948 P.2d 1055, 1100 (1997) (quoting Orso v. City and County of Honolulu, 56 Haw. 241, 250, 534 P.2d 489, 494 (1975)). This court has also stated that,

> [b]ecause a movant must satisfy all three requirements of the Orso standard, even "[a]ssuming, arguendo, the [newly discovered] evidence is material to the issue in question," a circuit court will deny a motion for a new trial when "the [movant] has failed to demonstrate due diligence in the discovery of the evidence." Orso, 56 Haw. at 250, 534 P.2d at 495).

Kawamata Farms, 86 Hawai'i 259-60, 948 P.2d 1100-01 (some brackets added; some citations omitted)). Because the evidence in the record does not support a finding of due diligence on the part of GMP in the discovery of the alleged "new evidence," GMP has failed to satisfy the first requirement of the Orso standard for purposes of relief from a judgment pursuant to HRCP Rule

60(b)(2). Therefore, we hold that the circuit court did not err in denying GMP's April 22, 2002 motion for relief from the December 17, 2001 order and the January 4, 2002 judgment. Accordingly,

IT IS HEREBY ORDERED that the circuit court's January 4, 2002 final judgment, December 17, 2001 order, and June 17, 2002 final order from which this appeal is taken are affirmed.

DATED: Honolulu, Hawai'i, September 16, 2003.

On the briefs:

Richard C. Sutton, Jr. and Jason M. Tani (of Rush Moore Craven Sutton Morry & Beh), for petitioner-appellant-appellant

Reid M. Yamashiro, Deputy Corporation Counsel, for respondent-appellee-appellee

Robert G. Klein and Philip W. Miyoshi (of McCorriston Miller Mukai MacKinnon LLP), for intervenor/respondent-appellee-appellee