

NO. 23264

IN THE SUPREME COURT OF THE STATE OF HAWAII

CERTIFIED COATINGS OF CALIFORNIA, Appellant-Appellee

vs.

NELSON BEFITEL,¹ in his official capacity
as Director of the DEPARTMENT OF LABOR AND
INDUSTRIAL RELATIONS, Appellee-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 99-2518)

SUMMARY DISPOSITION ORDER

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

Appellee-Appellant the Department of Labor and Industrial Relations (DLIR) appeals the February 4, 2000 Findings of Fact (findings) and Conclusions of Law (conclusions), and the March 13, 2000 final judgment of the Circuit Court of the First Circuit (the court)² reversing the June 2, 1999 decision and order of the DLIR. We vacate the court's findings, conclusions, and final judgment and reinstate the DLIR's June 2, 1999 decision and order for the reasons stated herein.

In June 1996, the Hawai'i State Department of Transportation awarded Appellant-Appellee Certified Coatings of

¹ Pursuant to Hawai'i Rules of Appellate Procedure Rule 43(c)(1), Nelson Befitel, the current Director of the Department of Labor and Industrial Relations, has been substituted for Lorraine H. Akiba, the director at the time this case was decided by the first circuit court.

² The Honorable Allene R. Suemori presided.

California (Certified Coatings) a state contract (the contract) for the removal and disposal of lead based paint, as well as the repainting of two bridges.³ Section 695 of the contract required that Certified Coatings remove "lead-containing/lead-based paint from the bridge[s]" and section 696 provided for the "cleaning and painting of the steel bridge surfaces" Section 107.02 of the contract, entitled "Wages and Hours Requirements," stated that "[t]he Contractor shall at all times observe and comply with all provisions of" Hawai'i Revised Statutes (HRS) chapter 104.⁴ HRS chapter 104 governs the wages and rates of employees on public works construction projects.⁵

³ This project, denoted as Department of Transportation Federal Aid Project No. BR-019-2(40), involved work on two bridges on the Island of Hawai'i.

⁴ HRS § 104-2(b) (1993) states in relevant part:

(b) The minimum wages shall be not less than the wages that the director of labor and industrial relations, under the rules, shall have determined to be the prevailing wages for corresponding classes of laborers and mechanics on projects of similar character in the State. The prevailing wages shall be not less than the wages payable under federal law to corresponding classes of laborers and mechanics employed on public works in the State that are prosecuted under contract or agreement with the government of the United States. Notwithstanding the provisions of the original contract, if the director determines that the prevailing wage has increased, the rate of pay of laborers and mechanics on a public work project shall be raised accordingly.

(Emphases added.)

⁵ HRS § 104-2(a) (1993) states:

(a) Except as otherwise provided, the specifications of every contract in excess of \$2,000 to which a governmental contracting agency is a party, for construction of any public work, shall state the minimum wages that shall be paid to the various classes of laborers and mechanics engaged in the performance of the contract on the job site

(Emphasis added.) In turn, "public work" is defined in HRS § 104-2(a) to mean "any project . . . and development, construction, renovation, and maintenance (continued...)"

On or about March 19, 1997, the DLIR Labor Law specialist, Ms. Lori Hamada (Hamada), received a complaint from an employee on this project. Hamada determined that Certified Coatings incorrectly classified and paid twenty-seven employees as laborers instead of painters. Certified Coatings appealed the DLIR's determination. On May 11, 1998, a hearing was conducted, and on June 2, 1999, the DLIR issued a final decision in the matter, adopting in part the hearing officer's findings. Ultimately, the DLIR determined that Certified Coatings underpaid twenty-seven laborers the aggregate amount of \$13,976.35 by paying them laborers' wages rather than painters' wages. Certified Coatings appealed to the court. The court reversed, concluding that the contract was not a "construction" contract subject to HRS chapter 104, but a "service" contract subject to HRS § 103-55, and that HRS chapter 104 applied only to the painting portion of the contract. The court held that the DLIR decision, based on the application of HRS chapter 104 to the contract in its entirety, "was contrary to law, arbitrary, and not supported by reliable and probative evidence." On March 14, 2000, the DLIR appealed to this court.

On appeal, the DLIR argues that (1) the removal of the lead-based paint falls clearly within the definitions of "construction" and "construction of a public work" of HRS chapter

⁵(...continued)
related to refurbishment of any real or personal property, where the funds or resources required to undertake the project are . . . from public revenues"

104, (2) the contract was not for the performance of services under HRS chapters 103 or 103D, and (3) the plain, unambiguous, and explicit terms of the contract subjects the contract to the requirements of HRS chapter 104.

"Absent an ambiguity, contract terms should be interpreted according to their plain, ordinary, and accepted sense in common speech." Sierra Club v. Hawai'i Tourism Auth. ex. rel. Bd. of Dirs., 100 Hawai'i 242, 253, 59 P.3d 877, 888 (2002) (citation and internal quotation marks omitted). The contract was entitled "Hawai'i Belt Road, Clean and Paint Steel Members Nanue and Wailuku Bridges," and explicitly stated that "[t]he project includes lead paint removal, disposal and repainting Nanue and Wailuku Bridges." (Emphasis added.)

Contrary to the court's conclusions, the lead paint removal, disposal, and repainting of the bridges were interdependent obligations and not separable; the contract required the completion of all three tasks for performance of the contract. The contract terms required the lead-based paint to be removed and the bridge to subsequently be repainted to prevent rusting.⁶ Both Sections 695 and 696 of the contract noted that the price

⁶ In a letter dated November 13, 1997 by Stanley Tamura, the Acting Hawai'i District Engineer for the State of Hawai'i Department of Transportation, it was stated that "the steel must be painted immediately to prevent rusting." Thus, it is clear that the bridge had to be repainted after the lead-based paint was removed. Also, Mr. Tamura indicated that lead-based paint had been used in the past, but that the Environmental Protection Agency (EPA) regulations required that past practices be changed.

paid covered the removal and disposal of the lead-based paint as well as the repainting of the bridges.

The DLIR's determination that the contract was subject to HRS chapter 104 is supported by the relevant statutory provisions. HRS § 104-1 (Supp. 2003) defines "construction" to include "alteration, repair, painting and decorating." (Emphasis added.)⁷ The process of removing lead-based paint from the bridges alters the bridges by making them different, i.e., the bridges are no longer coated in lead paint, without changing the bridges into something else. Also, if lead-based paint is viewed by the EPA and the State as a health risk, then removal of lead-based paint is a form of repair. See supra note 6. The work under the contract thus falls within the definition of "alteration," "repair," as well as "painting."⁸ As a result, such work is "construction" as defined in HRS chapter 104. Additionally, under HRS chapter 103D, the removal and disposal of lead-based paint and repainting can be defined as "construction" as well. HRS § 103D-104 (Supp. 2003) provides that "'construction' means the process of building, altering,

⁷ These terms are not defined in the statutes; however, "[r]esort to legal or other well accepted dictionaries is one way to determine the ordinary meaning of certain terms." Sierra Club, 100 Hawai'i at 253, 59 P.3d at 888 (citation and internal quotation marks omitted).

⁸ "Alteration" is defined as "the act or process of altering." Webster's Seventh New Collegiate Dictionary 25 (7th ed. 1965) [hereinafter "Webster's"]. To alter means "to make different without changing into something else." Webster's at 25. "Repair" means "to restore by replacing a part or putting together what is torn or broken; to restore to a sound or healthy state; to make good." Webster's at 726.

repairing, improving,⁹ or demolishing any public structure or building, or other public improvements of any kind to any public real property. As indicated previously, the contract work would come within the definition of altering or repairing a public structure. The removal of lead-based paint for compliance with the EPA's regulations and the application of fresh paint presumably enhanced the "quality" of the bridge. Manifestly, stripping the existing paint and repainting the existing bridges is "upkeeping" the bridges for continuance in service. Thus the contract work also fell within the definition of "construction" in HRS § 103D-104. The removal and disposal of the lead-based paint, then, would constitute "construction" under both HRS §§ 104-1 and 103D-104.

On the other hand, in contradistinction to "construction," HRS § 103D-104 defines "services" to mean "the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance." Insofar as HRS § 103D-104 may be read broadly, its scope in this case is circumscribed by the more specific definition of "construction" found in HRS § 103D-104. See State v. Batson, 99 Hawai'i 118, 120, 53 P.3d 257, 259 (2002) (stating that "laws in pari materia, or upon the same subject matter, shall be construed with reference to each other"). Therefore, the DLIR decision was

⁹ "Improve" means "to enhance in value or quality: make better . . . to increase the value (of land or property) by betterment Webster's at 421.

not "contrary to law, [nor] arbitrary[,]” as the court held, for the DLIR correctly determined that the contract was for construction and not services. Therefore,

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that the first circuit court's findings of fact and conclusions of law filed on February 4, 2000, and its final judgment filed on March 13, 2000, from which the appeal is taken, are vacated, and the case remanded with instructions to enter judgment affirming the DLIR's June 2, 1999 decision and order.

DATED: Honolulu, Hawai'i, February 4, 2004.

On the briefs:

Frances E.H. Lum, Nelson T.
Higa, & Bruce W. Rudeen,
Deputy Attorneys General,
State of Hawaii, for
appellee-appellant.

Terry E. Thomason, Joanne L.
Grimes, & Jonathan A. Swanson
(Carlsmith Ball) for appellant-
appellee.