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KEITH T. HAYASHI, in his capacity as
the Interim Superintendent of the
DEPARTMENT OF EDUCATION,
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

OHANA CONTROL SYSTEMS, INC.,

Plaintiff,

vs.

KEITH T. HAYASHI in his capacity as the
Interim Superintendent of the DEPARTMENT
OF EDUCATION, STATE OF HAWAII; JOHN
DOES 1-10, JANE DOES 1-10, DOE
PARTNERSHIPS 1-10, DOE CORPORATIONS
1-10, DOE ENTITIES 1-10, and DOE
GOVERNMENTAL UNITS 1-10,

Defendants.

CIVIL NO. 1CCV-22-000013 (KTM)
(Contract)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW;
ORDER

Hearing:

Date: May 18, 2023

Time: 9:00 a.m.

Judge: Honorable Kevin T. Morikone

Trial Date: August 7, 2023

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Keith T. Hayashi, in his capacity as the Interim Superintendent of the DEPARTMENT OF EDUCATION, STATE OF HAWAII (“DOE”), by and through his undersigned counsel, submits his Findings of Fact and Conclusions of Law (“FOF and COL”) following the Court’s Minute Order, entered on June 14, 2023 (Dkt. 196), concerning the DOE’s Motion for Summary Judgment or in the Alternative, to Bifurcate Trial, filed on April 14, 2023 (Dkt. 116) (“MSJ”), pursuant to Rule 52 of the Hawaii Rules of Civil Procedure and Rule 21 of the Rules of the Circuit Court for the State of Hawaii.

FINDINGS OF FACT

Any finding of fact that should more properly be deemed a conclusion of law and any conclusion of law that should more properly be deemed a finding of fact shall be so construed.

Unless otherwise indicated, the following Findings of Fact have been proven to be more probably true than not true.

1. OHANA CONTROL SYSTEMS, INC. (“Plaintiff”) is a Hawaii for profit corporation with its principal place of business in the City & County of Honolulu, State of Hawaii. (Complaint, filed January 5, 2022 (Dkt. 1) at ¶1.)

2. The Complaint was filed against Defendant in his capacity as the (then) Interim Superintendent of the Hawaii State Department of Education (DOE). Official-capacity lawsuits against a state official are suits against the state entity of which the official is an agent (the state or the state agency). *See Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985) (citations omitted). Therefore, the instant lawsuit is against the DOE.

3. The DOE is a department within the Executive Branch of the State of Hawaii. (Answer to Complaint, filed February 9, 2022 (Dkt. 24) at ¶ 3).

4. Between May 2012 and November 2013, Plaintiff and the DOE entered into eight (8) contracts for the Plaintiff to upgrade or install fire alarm systems in the eight (8) public schools listed below:

- a. Benjamin Parker Elementary School (“BPES Contract”);
- b. Dole Middle School (“DMS Contract”);
- c. Mililani Middle School (“MMS Contract”);
- d. Puuhale Elementary School (“PES Contract”);
- e. Waiiau Elementary School (“Waiiau Contract”);
- f. Waihee Elementary School (“Waihee Contract”);
- g. Momilani Elementary School (“Momilani Contract”); and
- h. Mokulele Elementary School (“Mokulele Contract”).¹

(See Exs. “1” – “8” to DOE’s MSJ (Dkt. 116).)

5. The primary purpose of the Subject Contracts was for Plaintiff to install fully functioning and code compliant fire alarm systems. (*Id.*)

6. The Subject Contracts required Plaintiff to obtain a performance bond with a surety to protect the DOE in the event Plaintiff defaulted on its contracts. (*See* Exs. “1” – “8” to DOE’s MSJ (Dkt. 116).)

7. Plaintiff obtained a performance bond for each contract from Philadelphia Indemnity Insurance Company (“Surety”). (Dkt. 116 at Ex. “1” at DOE85-88, Ex. “2” at DOE610-613; Ex. 3 at DOE839-842, Ex. “4” at DOE1466-1470, Ex. “5” at DOE4067-4070, Ex. “6” at DOE4479-4480, Ex. “7” at DOE3173-3176, and Ex. “8” at DOE2673-2675.)

8. The Subject Contracts also incorporated by reference the terms and conditions of the General Conditions of the Department of the Attorney General (“GC”) and the Interim General Conditions, 1999 Edition (“IGC”). (Dkt. 116 at Ex. “1” at DOE94-95, Ex. “2” at

¹ The eight (8) contracts are hereinafter collectively referred to as the “Subject Contracts.”

DOE621, Ex. “3” at DOE851-852, Ex. “4” at DOE1473, Ex. “5” at DOE4079-4080, Ex. “6” at DOE4490, Ex. “7” at DOE3184, and Ex. “8” at DOE2683.)

9. The section entitled “**7.25 DISPUTES AND CLAIMS §3-126-31 HAR**” of the IGC, in relevant parts, provides:

7.25.1 Required Notification – As a condition precedent for any claim, the Contractor must give notice in writing to the Engineer^[2] in the manner and within the time periods stated in Section 4.2 CHANGES^[3] for claims for extra compensation, damages, or an extension of time due for one or more of the following reasons:

7.25.1.5 For any other type of claim, the Contractor shall give notice within the time periods set forth in contract provisions pertaining to that event. If no specific contract provisions pertain to the claim, then the written notice of claim must be submitted within fifteen (15) days of the event giving rise to the claim.

7.25.10 Decision on Claim / Appeal – The decision of the Engineer on the claim shall be final and conclusive, unless fraudulent, or unless the Contractor delivers to the Comptroller a written appeal of the Engineer’s decision. Said appeal shall be delivered to the Comptroller no later than thirty (30) days after the date of the Engineer’s decision.

² “Engineer” means “[t]he Public Works Administrator, or the authorized person to act in the Administrator’s behalf.” (IGC § 1.28 (Ex. “23” to DOE’s MSJ at 2).)

³ Section 4.2 of the IGC provides for time periods of: five days for the Contractor to provide written notice to the Engineer that Contractor intends to treat an oral order as a change directive (*see* § 4.2.2.1); thirty days after delivery of the notice pursuant to § 4.2.2.1 for the Contractor to file a written protest with the Engineer if the Contractor objects to the failure to issue a Field Order (*see* § 4.2.2.2); thirty calendar days for the Contractor to file a notice of intent to claim if a Field Order is issued and the Contractor does not agree with any of the terms or conditions or in the adjustment/non-adjustment to the contract time and/or price (*see* § 4.2.3); and thirty calendar days for the Contractor to file a notice of intent to claim after receipt of the written Change Order if the Contractor does not agree with any of the terms or conditions or in the adjustment/non-adjustment to the contract time and/or price (*see* § 4.2.4.3). (*See* Ex.“23” to DOE’s MSJ at 11-12.)

7.25.10.1 In that event, the decision of the Comptroller shall be final and conclusive, unless fraudulent or unless the Contractor brings an action seeking judicial review of the Comptroller's decision in an appropriate circuit court of this State within six (6) months from the date of the Comptroller's decision.

(See Ex. "23" to MSJ at 31-32. (Emphases added).)

10. The section entitled "**8.9 CLAIMS ARISING OUT OF PAYMENT FOR REQUIRED WORK**" of the IGC further provides, in relevant part, that:

If the Contractor disputes any determination made by the Engineer regarding the amount of work satisfactorily completed, or the value thereof, or the manner in which payment therefore is made or calculated, it shall notify the Engineer in writing of the specific facts supporting the Contractor's position. Such notice shall be delivered to the Engineer no later than thirty (30) days after the Contractor has been tendered payment for the subject work, or, if no payment has been tendered, not later than fifty (50) days after it has submitted the Monthly Payment Application required under Section 8.4 PROGRESS AND/OR PARTIAL PAYMENTS herein to the Engineer for the work that is the subject of the dispute. The delivery of the written notice cannot be waived and shall be a condition precedent to the filing of the claim. . . .

(See Ex. "23" to MSJ at 42. (Emphases added).)

11. The following six (6) contracts were terminated for cause on the dates specified below:

- a. Benjamin Parker Elementary School (October 21, 2016);
- b. Dole Middle School (October 18, 2016);
- c. Mililani Middle School (July 29, 2016);
- d. Puuhale Elementary School (May 9, 2016);
- e. Waiiau Elementary School (January 13, 2015); and
- f. Waihee Elementary School (June 2, 2015).

(See Dkt. 116 at Ex. "10," Ex. "12," Ex. "14," Ex. "16," Ex. "18," and Ex. "20".)

12. On April 2, 2015, the Mokulele Contract was terminated for convenience. (See Dkt. 116 at Ex. "21".)

13. On May 20, 2015, the Momilani Contract was completed. (See Dkt. 116 at Ex. “22”.)

14. The Plaintiff did not submit any claim, pursuant to the IGC, within thirty (30) days after the aforementioned contracts were terminated.

15. The DOE made claims to the Surety on the Plaintiff’s performance bonds for the BPES Contract, the DMS Contract and the MMS Contract. (See Dkt. 1 at ¶¶ 48, 122, 195.)

16. The Court takes judicial notice that on August 29, 2017, the Surety filed suit against Plaintiff in the U.S. District Court for the District of Hawaii, alleging that: (1) “the [DOE] had made claims on the performance bonds and that [Plaintiff is] therefore liable to [Surety] under the General Indemnity Agreement”; and (2) Plaintiff failed to deposit collateral at Surety’s request in violation of the General Indemnity Agreement. See *Philadelphia Indemnity Insurance Company v. Ohana Control Systems, Inc., et al.*, 289 F. Supp. 3d 1141, 1144 (D. Haw. 2018).

17. The Court further takes judicial notice that on March 31, 2020, judgment was entered in favor of the Surety. See *Philadelphia Indemnity Insurance Company v. Ohana Control Systems, Inc., et al.*, 450 F. Supp. 3d 1043, 1057 (D. Haw. 2020).

18. On or about July of 2019, the DOE increased the amount demanded on its initial bond claim for the BPES Contract, the DMS Contract and the MMS Contract. (See Dkt. 1 at ¶¶ 49, 123, 196.)

19. On February 19, 2021, Plaintiff gave notice of a grievance with the DOE’s Procurement Officer pursuant to Haw. Rev. Stat. (“HRS”) § 103D-703(c) regarding the Subject Contracts. (See Plaintiff’s Memorandum in Opposition to DOE’s MSJ, filed May 10, 2023 (“MSJ Opp’n”) (Dkt. 168) at 2; and Ex. B to MSJ Opp’n.)

20. This notice of grievance was filed:
- a. 4 years, 3 months, 29 days after the BPES Contract was terminated;
 - b. 4 years, 4 months, 1 day after the DMS Contract was terminated;
 - c. 4 years, 6 months, 21 days after the MMS Contract was terminated;
 - d. 4 years, 9 months, 10 days after the PES Contract was terminated;
 - e. 6 years, 1 months, 6 days after the Waiau Contract was terminated;
 - f. 5 years, 8 months, 17 days after the Waihee Contract was terminated;
 - g. 5 years, 10 months, 17 days after the Mokulele Contract was terminated;
 - h. 5 years, 8 months, 30 days after the Momilani Contract was completed.

See MSJ Opp’n at 2; and Ex. B to MSJ Opp’n; *compare with* MSJ at Ex. “10,” Ex. “12,” Ex. “14,” Ex. “16,” Ex. “18,” and Exs. “20” – “22.”)

21. On July 6, 2021, the DOE’s Procurement Officer submitted a denial letter, finding that Plaintiff did not provide evidence that it: (1) followed all contract requirements (i.e., Plans, Specifications and General Requirements); (2) completed all contractual obligations for the above referenced schools; and (3) did not stop all work on all of the above referenced projects. (*See* MSJ Opp’n at 2; Ex. C to MSJ Opp’n.)

22. On January 5, 2022, Plaintiff filed the instant lawsuit against Defendant. (*See* Dkt. 1 at 1.)

23. The Court takes judicial notice that the Surety is not a party to the Complaint.

CONCLUSIONS OF LAW

After reviewing the parties’ briefs, the relevant law, and after hearing oral arguments, the Court reaches the following conclusions of law.

A. Standard of Review

1. Summary judgment is appropriate if there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Querubin v. Thronas*, 107 Hawaii 48, 56, 109 P.3d 689, 697 (2005).

2. “When a motion for summary judgment is made and supported as provided in HRCP Rule 56(e), an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” *See Nakano v. Matayoshi*, 68 Haw. 140, 140, 706 P.2d 814, 815 (1985).

3. An opposing party who cannot show that countervailing evidence will be available at the trial is not entitled to denial of the motion for summary judgment “on the basis of a hope that such evidence will develop at trial.” *State v. Midkiff*, 49 Haw. 456, 459, 421 P.2d 550, 554 (1966).

4. Inadmissible evidence shall not be considered in deciding a motion for summary judgment. *See Haw. R. Civ. P. 56(e); Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw 522, 539, 543 P.2d 1356, 1367 (1975).

B. Law in Dispute

5. “[O]ne who assents to a contract is bound by it and cannot complain that he has not read it or did not know what it contained.” *See Courbat v. Dahana Ranch, Inc.*, 111 Hawaii 254, 264, 141 P.3d 427, 437 (2006) (citations omitted).

6. The Procurement Code was enacted to provide fair and equitable treatment of all persons dealing with the government procurement system by creating a body of laws to govern and promote economy, efficiency, and effectiveness in the procurement process. *See Communications-Pacific, Inc. v. City and County of Honolulu*, 121 Hawaii 527, 532, 221 P.3d 505, 510 (2009).

7. Only parties to the contract aggrieved by a decision issued by a state procurement officer or a designee pursuant to section 103D-703, Hawaii Revised Statutes, may initiate an action under section 661-1, Hawaii Revised Statutes. *See* HRS § 103D-711(a).

8. The contractor “shall comply with any decision of the procurement officer and proceed diligently with performance of this contract pending final resolution by a circuit court of this State[.]” *See* Hawaii Administrative Rules (“HAR”) § 3-126-31(3).

9. Complaints to initiate judicial actions under section 103D-711, Hawaii Revised Statutes, shall be filed in the circuit court within six months of the issuance of a written determination under section 103D-703, Hawaii Revised Statutes. *See* HRS § 103D-712(c).

10. Every claim against the State, cognizable under Part 1 of Chapter 661, Hawaii Revised Statutes⁴ shall be forever barred unless the action is commenced within two years after the claim first accrues; provided that the claims of persons under legal disability shall not be barred if the action is commenced within one year after the disability has ceased. *See* HRS § 661-5.

11. A tort claim against the State shall be forever barred unless action is begun within two years after the claim accrues. *See* HRS § 662-4.

12. A plaintiff’s cause of action accrues when he or she “knew, or reasonably should have known, that an actionable wrong ha[s] been committed[.]” *See Vail v. Employee Retirement System of State*, 75 Haw. 42, 55, 856 P.2d 1227, 1235 (1993).

⁴ Claims against the State founded upon any contract are within Part I of Chapter 661, Actions by and Against the State. *See* HRS § 661-1(1).

13. “[T]he time bar imposed by the legislature is jurisdictional; it is not subject to waiver by, or equitable tolling based upon the conduct of, the executive branch.” *See Okutsu v. State*, No. CAAP-17-0000731, 2023 WL 2908620, at *1 (Haw. Ct. App. Apr. 12, 2023).

C. Law of Statutory Construction

14. “[T]he intention of the legislature is to be obtained primarily from the language contained in the statute itself.” *See In re Appeal of Hawaiian Tel. Co.*, 61 Haw. 572, 577, 608 P.2d 383, 387 (Haw. 1980) (citations omitted).

15. The legislature is presumed to know the law when it enacts statutes, including court decisions, and agency interpretations. *See Peer News LLC v. City & Cnty. of Honolulu*, 138 Hawaii 53, 69, 376 P.3d 1, 17 (2016).

16. If the statute is “unambiguous and its literal application is neither inconsistent with the policies of the statute . . . nor produces an absurd or unjust result, courts enforce [the statute’s] plain meaning.” *See McLaren v. Paradise Inn Haw., LLC*, 132 Haw. 320, 328, 321 P.3d 671, 679 (Haw. 2014) (citations omitted).

17. It is well recognized by Hawaii courts “that an interpreting court should not fashion a construction of statutory text that effectively renders the statute a nullity or creates an absurd or unjust result.” *See Dines v. Pacific Insurance Company, Ltd.*, 78 Hawaii 325, 337, 893 P.2d 176, 188 (1995) (citation omitted).

18. “[W]here the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored.” (*Richardson v. City & Cty. Of Honolulu*, 76 Haw. 46, 55, 868 P.2d 1193, 1202 (Haw. 1994))

D. Counts I, VII, XIII, XIX, XXI, XXIII, XXIV, and XXV of the Complaint (Breach of Contract) are Barred by the Statute of Limitations Pursuant to HRS § 661-5

19. Under the above standard, the Court concludes as a matter of law that the DOE is entitled to summary judgment as to Counts I, VII, XIII, XIX, XXI, XXIII, XXIV, and XXV as those claims are time-barred by the statute of limitations mandated by HRS § 661-5.

20. The Court finds that Plaintiff's breach of contract claims, as alleged in Counts I, VII, XIII, XIX, XXI, XXIII, XXIV, and XXV, began to accrue when the Subject Contracts were terminated by the DOE in 2015 or 2016, and that Plaintiff filed suit on January 5, 2022.

21. While Plaintiff contends that HRS § 103D-712(c) controls when a claimant must bring suit for breach under the Procurement Code (i.e., within six months of the issuance of a written determination under section 103D-703), the Court finds that the grievance process set forth therein was no longer available once the Subject Contracts were terminated, pursuant to the Subject Contracts' express terms and by operation of HAR § 3-126-31.

22. Even if HRS § 103D-712(c) was applicable after the termination of the Subject Contracts, the Court nevertheless finds that based upon the plain meaning of HRS § 661-5, HRS § 661-5 controls the timing upon which Plaintiff was required to file suit for its contract-based claims. *See McLaren v. Paradise Inn Haw., LLC*, 132 Haw. 320, 328, 321 P.3d 671, 679 (Haw. 2014) (citations omitted)

23. The Court finds that HRS § 661-5 and HRS § 103D-712(c), overlap in their application, requiring contractors, such as Plaintiff, to give timely notice of a grievance pursuant to the terms of the contract at issue, or to file suit within the two-year statute of limitations mandated by HRS § 661-5. *See Richardson v. City & Cty. Of Honolulu*, 76 Haw. 46, 55, 868 P.2d 1193, 1202 (Haw. 1994)

24. The Court finds that Plaintiff's interpretation of HRS §103D-712(c) will result in absurd and unjust results, by allowing contractors, such as Plaintiff, the ability to initiate contract claims against the State without limitation, so long as the initial grievance was filed with the procurement officer and the lawsuit is filed within six months after the procurement officer renders a decision. *See Dines v. Pacific Insurance Company, Ltd.*, 78 Hawaii 325, 337, 893 P.2d 176, 188 (1995) (citation omitted). This interpretation repeals by implication HRS § 661-5 and undermines the recognized purpose of the Procurement Code – to promote economy, efficiency, and effectiveness in the procurement process. *See Richardson v. City & Cty. Of Honolulu*, 76 Haw. 46, 55, 868 P.2d 1193, 1202 (Haw. 1994); *see also Communications-Pacific, Inc. v. City and County of Honolulu*, 121 Hawaii 527, 532, 221 P.3d 505, 510 (2009).

25. While Plaintiff claims that the DOE's participation in the grievance process waives its right to invoke HRS § 661-5, the Court finds that the statute of limitations provided by HRS § 661-5 is jurisdictional, and therefore not subject to waiver. *See Okutsu v. State*, No. CAAP-17-0000731, 2023 WL 2908620, at *1 (Haw. Ct. App. Apr. 12, 2023)

26. Because Plaintiff's claims, as set forth in Counts I, VII, XIII, XIX, XXI, XXIII, XXIV, and XXV, accrued in or before 2016, Plaintiff's filing of the present lawsuit on January 5, 2022, was beyond the two-year statute of limitations and therefore time barred. *See* HRS § 661-5.

27. Therefore, the Court finds that no genuine issue of material fact exists and awards the DOE summary judgment as to Counts I, VII, XIII, XIX, XXI, XXIII, XXIV, and XXV as a matter of law.

E. Counts V, XI, and XVII of the Complaint (Breach of Contract – Bond Claims and Amended Bond Claims) are Barred by the Statute of Limitations Pursuant to HRS § 661-5

28. Under the above standard, the Court concludes as a matter of law that the DOE is entitled to summary judgment as to Counts V, XI, and XVII, as those claims are time-barred by the statute of limitations mandated by HRS § 661-5.

29. The Court finds that Plaintiff's breach of contract claims concerning the DOE's bond claims to the Surety, as alleged in Counts V, XI, and XVII, accrued no later than when the Surety filed suit against Plaintiff on August 29, 2017.

30. While the Plaintiff claims that the DOE separately breached its bond by subsequently amending that bond claim it originally initiated with the Surety, the Court finds that the DOE did not submit an amended bond claim and that the DOE merely increased the amount it was asking the Surety to pay to complete the work left unfinished by Plaintiff. Thus, there is no basis for Plaintiff's separate cause of action.

31. Even if the Court were to find that Plaintiff's amended bond claims, as alleged in Counts V, XI, and XVII, were separate causes of action, such claims accrued in July 2019, and that Plaintiff's January 5, 2022 lawsuit was filed beyond the expiration of the statute of limitations.

32. Because Counts V, XI, and XVII of the Complaint accrued by at least July 2019, and because Plaintiff filed suit on January 5, 2022, the Court finds that no genuine issue of material fact exists and that Counts V, XI, and XVII of the Complaint are time-barred by the statute of limitations pursuant to HRS § 661-5.

33. Therefore, the Court awards the DOE summary judgment as to Counts V, XI, and XVII as a matter of law.

F. Counts II, VIII, XIV, XX, and XXII (Breach of Duty of Good Faith and Fair Dealing – Contract) and in Counts VI, XII, and XVIII (Breach of Duty of Good Faith and Fair Dealing – Bond) of the Complaint are Barred by the Statute of Limitations Pursuant to HRS § 661-5

34. Under the above standard, the Court concludes as a matter of law that the DOE is entitled to summary judgment as to Counts II, VIII, XIV, XX, and XXII (Breach of Duty of Good Faith and Fair Dealing – Contract) and Counts VI, XII, and XVIII (Breach of Duty of Good Faith and Fair Dealing – Bond) as those claims are time-barred by the statute of limitations mandated by HRS § 661-5.

35. The Court interprets these claims as claims for the breach of the covenant of good faith and fair dealing implied in every contract.

36. The Court finds that the Plaintiff's claims for the breach of the covenant of good faith and fair dealing, concerning the Subject Contracts, as alleged respectively in Counts II, VIII, XIV, XX, and XXII, accrued in 2015 or 2016 when these contracts were terminated.

37. The Court further finds that Plaintiff's claims for the breach of the covenant of good faith and fair dealing, concerning the DOE's bond claims to the Surety and the DOE's subsequent amendments to its initial bond claims, as alleged in Counts VI, XII, and XVIII, accrued on either August 29, 2017 (the date the Surety filed suit against Plaintiff in federal court) or in July 2019 (the period the DOE allegedly amended its initial bond claims).

38. Because Plaintiff's claims, as set forth in Counts II, VIII, XIV, XX, and XXII, accrued in 2015 or 2016, and because Plaintiff filed suit on January 5, 2022, the Court finds that no genuine issue of material fact exists that Counts II, VIII, XIV, XX, and XXII are time-barred by the statute of limitations pursuant to HRS § 661-5.

39. Because Plaintiff's claims, as set forth in Counts VI, XII, and XVIII, accrued on either August 29, 2017, or in July 2019, and because Plaintiff filed suit on January 5, 2022, the

Court finds that no genuine issue of material fact exists that Counts VI, XII, and XVIII are time-barred by the statute of limitations pursuant to HRS § 661-5.

40. Therefore, the Court awards the DOE summary judgment as to Counts II, VIII, XIV, XX, and XXII, and as to Counts VI, XII, and XVIII, as a matter of law.

G. Counts IV, X, and XVI of Plaintiff's Complaint (Constructive Fraud) are Without Merit

41. Under the above standard, the Court concludes that the DOE is entitled to summary judgment as to Counts IV, X, and XVI as a matter of law.

42. Based upon the allegations set forth in the Complaint, the Court interprets Counts IV, X, and XVI as claims for insurance fraud pursuant to HRS § 431:2-408.

43. The Court finds that Plaintiff lacks legal standing to bring a private right of action against the DOE pursuant to HRS § 431:2-408 because no genuine issue of material fact exists that Plaintiff was not an “insurer,” nor was Plaintiff a “licensee” as defined by HRS § 431:2-401.

44. Plaintiff later alleged for the first time in its Opposition to the MSJ that the DOE is liable for common law constructive fraud, contending that Plaintiff enjoyed a fiduciary or confidential relationship with the DOE, an essential element. The Court finds that Plaintiff's attempt to amend its claims, without the Court's leave, is unduly prejudicial to the defense, and improper.

45. Even if the Court were to grant Plaintiff leave to amend its Complaint, the Plaintiff did not offer any relevant evidence to establish that a genuine issue of material fact exists as to whether Plaintiff enjoyed a fiduciary or confidential relationships with the DOE.

46. Moreover, even if the Plaintiff offered evidence establishing the existence of such a relationship, the Court nevertheless finds that such claims are time-barred by the statute of limitations mandated by HRS § 662-4.

47. Plaintiff contends that Counts IV, X, and XVI concern the DOE's bond claims with the Surety, and the DOE's subsequent amendment to such claims. The Court finds that Plaintiff's "fraudulent" bond claims and amended bond claims began to accrue on August 29, 2017 (the date the Surety filed suit against Plaintiff in federal court) or in July 2019 (the period the DOE allegedly amended its initial bond claims), and that Plaintiff separately filed suit against the DOE on January 5, 2022.

48. Because Plaintiff's claims, as set forth in Counts IV, X, and XVI, began to accrue on or before July 2019, and because Plaintiff filed suit on January 5, 2022, the Court finds that no genuine issue of material fact exists that Counts IV, X, and XVI are time-barred by the statute of limitations pursuant to HRS § 662-4.

49. Therefore, the Court awards the DOE summary judgment as to Counts IV, X, and XVI as a matter of law.

H. Plaintiff Has No Right to Bring Counts III, IX, and XV of Plaintiff's Complaint (Declaratory Relief – Bond)

50. Under the above standard, the Court concludes that the DOE is entitled to summary judgment as to Counts III, IX, and XV as a matter of law.

51. The Court finds that the Surety was a necessary and indispensable party to these claims.

52. The Court further finds that the declaratory judgment requested by Plaintiff would not serve to terminate any uncertainty or controversy giving rise to this action because: (1) the Surety is the party responsible for guaranteeing the performance of the relevant Subject Contracts and; (2) Plaintiff is responsible for indemnifying the Surety on its performance bonds with the DOE.

I. The DOE's Request to Bifurcate the Trial is Moot

53. In the alternative to summary judgment, the DOE requested an order to bifurcate the trial on a project-by-project basis.

54. Since the Court granted the DOE's MSJ, the Court finds that the DOE's alternative request to bifurcate the trial is moot.

ORDER

1. Based upon and incorporating all the foregoing findings and conclusions, it is hereby **ORDERED and ADJUDGED** that **Summary Judgment is hereby GRANTED** in favor of Defendant Keith T. Hayashi, in his capacity as the Interim Superintendent of the DEPARTMENT OF EDUCATION, STATE OF HAWAII with respect to all claims asserted in Plaintiff's Complaint.

2. It is also hereby **ORDERED and ADJUDGED** that the **Bifurcation of Trial is DENIED**.

3. There are no further claims outstanding in this case.

DATED: Honolulu, Hawai'i, July 06, 2023.

/s/ Kevin T. Morikone



JUDGE OF THE ABOVE-ENTITLED COURT