



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

|                               |   |                                |
|-------------------------------|---|--------------------------------|
| In the Matter of              | ) | PCH-2007-8                     |
|                               | ) |                                |
| MAUI MASTER BUILDERS, INC.,   | ) | HEARINGS OFFICER'S FINDINGS OF |
|                               | ) | FACT, CONCLUSIONS OF LAW AND   |
| Petitioner,                   | ) | DECISION                       |
|                               | ) |                                |
| vs.                           | ) |                                |
|                               | ) |                                |
| DEPARTMENT OF TRANSPORTATION, | ) |                                |
| STATE OF HAWAII,              | ) |                                |
|                               | ) |                                |
| Respondent,                   | ) |                                |
|                               | ) |                                |
| and                           | ) |                                |
|                               | ) |                                |
| BODELL CONSTRUCTION COMPANY,  | ) |                                |
|                               | ) |                                |
| Intervenor.                   | ) |                                |

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HEARINGS OFFICER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On November 9, 2007, Maui Master Builders, Inc. ("Petitioner") filed its request for administrative hearing to contest the Department of Transportation, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On November 19, 2007, Bodell Construction Company filed a Motion to Intervene.

At the pre-hearing conference held on November 19, 2007, the parties agreed to reschedule the hearing to December 19, 2007. Petitioner also agreed to inform the parties

and the Hearings Officer whether it will object to or otherwise oppose Bodell Construction Company's Motion to Intervene. The parties also agreed to either file stipulated facts by December 7, 2007 or inform the Hearings Officer that the parties were prepared to proceed to hearing. In the event the parties agreed to proceed on stipulated facts and waive the hearing, the December 19, 2007 hearing would be removed from the calendar, and Petitioner would file its opening brief by December 13, 2007. Respondent and Intervenor's responsive brief was due on December 20, 2007 and Petitioner's reply brief was due on December 27, 2007.

On November 29, 2007, the parties filed a stipulation that Bodell Construction Company's ("Intervenor") Motion to Intervene be granted.

On December 11, 2007, Petitioner filed the Stipulated Facts and Order and Exhibits "A" – "E". On December 14, 2007, Petitioner filed its Written Closing Brief. On December 20, 2007, Respondent and Intervenor filed their closing briefs. On December 27, 2007, Petitioner filed its written rebuttal argument.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

## II. FINDINGS OF FACT

As a preliminary matter, Findings of Fact numbers 1 to 19 have been stipulated to by the parties.

1. Respondent issued a Notice to Bidders soliciting bids for the construction of a project entitled OGG EDS Integration Improvements Phase II at Kahului, Maui Airport, Project No. AM1095-06 ("Project").

2. The bid package for the Project included the following work: Section 05120 – Structural Steel.

3. The Specialty Contractor Classifications set forth in Hawaii Administrative Rules, Title 16, Department of Commerce and Consumer Affairs, Chapter 77, Contractors, specifies that a C-48 structural steel specialty license is required for the structural steel work on the Project.

4. Petitioner submitted its bid of \$32,186,942.00 for the Project in advance of the bid opening. Petitioner possesses "A" (general engineering) and "B" (general building) contractor licenses in the State of Hawaii, and was originally licensed in 1991.

5. Intervenor submitted its bid of \$25,708,356.00 for the Project in advance of bid opening. Intervenor possesses "A" (general engineering) and "B" (general building) contractor licenses in the State of Hawaii and was originally licensed in 1973.

6. The bid opening for the Project took place on September 20, 2007.

7. Intervenor was the low bidder at bid opening.

8. With respect to line item 05120.1, Structural Steel, Intervenor submitted a lump sum bid of \$983,390.00. A C-48 (structural steel) Hawaii specialty contractor license is required to perform the structural steel work contemplated under this line item.

9. Intervenor listed subcontractors and identified their respective nature and scope of work in its bid, including what appeared to be "Creating Deo" for the steel scope of work on the Project.

10. Petitioner reviewed Intervenor's bid, and on September 23, 2007, Petitioner sent Respondent a letter raising issues concerning Intervenor's listed subcontractors, including what appeared to be "Creating Deo."

11. After learning that Intervenor meant to list Creative Development Corp., Ltd. instead of "Creating Deo," on September 25, 2007, Petitioner protested Intervenor's bid on the Project.

12. Neither "Creating Deo" nor "Creative Development" possesses a Hawaii contractor license.

13. After receiving Petitioner's bid protest, Respondent notified Intervenor of the protest and requested Intervenor's response to the matters raised in the protest.

14. On October 25, 2007, Intervenor sent a letter to Respondent in response to Petitioner's protest. In the October 25, 2007 letter, Intervenor stated, among other things:

As it specifically relates to structural steel, [Intervenor] listed Creative Development as our steel fabricator only. For the purpose of formulating our bid, we did not receive a steel erection bid at the time we submitted our bid and used an in-house estimate of the cost of that work which is important to note, constituted less than [sic] per cent (1%) of our total bid amount. We have subsequently received a bid from a duly licensed steel erection subcontractor

which was less than our in-house estimate. If awarded this contract, it is our intent to award a subcontract to Sure Steel (C-20963) in the amount of \$200,000 to perform this work, an amount clearly less than one percent of our total bid.

15. Sure Steel, Inc. possesses a C-48 (structural steel) specialty contractor license in the State of Hawaii, and is qualified to perform the work contemplated under line item 05120.1, Structural Steel of Intervenor's bid.

16. Respondent also received a breakdown of the items included in Intervenor's lump sum bid of \$983,390.00 for line item 05120.1, Structural Steel, from Intervenor. The breakdown is contained in Exhibit "D" of the Stipulated Facts and Order and is as follows:

|                           |           |
|---------------------------|-----------|
| Creative Development      | \$398,346 |
| Sure Steel                | \$200,000 |
| Crane/Hoist/Bodell layout | \$150,000 |
| General Conditions/OH&P   | \$203,608 |
| Insurance/Bond            | \$ 23,487 |
| Testing/Permits           | \$ 7,949  |
| Total                     | \$983,390 |

17. On November 2, 2007, Respondent, through its authorized designee, sent Petitioner a letter setting forth Respondent's final decision denying Petitioner's protest based on Intervenor's October 25, 2007 letter.

18. On November 9, 2007, Petitioner filed its request for hearing from the November 2, 2007 denial of its bid protest on this Project.

19. On November 9, 2007, Petitioner notified Respondent of its intent to file an administrative appeal from Respondent's November 2, 2007 final decision denying Petitioner's bid protest pursuant to Hawaii Administrative Rules § 3-126-7(c).

20. If the lowest bidder fails to list a subcontractor at bid opening, but later submits a quotation from a subcontractor that is equal to or below 1% of the total bid amount, even if that quotation contains only labor costs, the Respondent's past practice has been to make the determination whether acceptance of the bid is in the best interests of the State and if so, to waive the subcontractor listing requirement in accordance with Hawaii Revised Statutes ("HRS") § 103D-302(b).

### III. CONCLUSIONS OF LAW

Petitioner argued that Intervenor's bid should be rejected as non-responsive because it failed to list a C-48 structural steel subcontractor in its bid, and that Respondent may not waive Intervenor's failure to list the subcontractor. Petitioner has the burden of proving by a preponderance of the evidence that Respondent's determinations were not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation or contract.

Hawaii Revised Statutes § 103D-302(b) provides:

#### **§ 103D-302 Competitive sealed bidding.**

. . .

(b) An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. If the invitation for bids is for construction, it shall specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. Construction bids that do not comply with this requirement may be accepted if acceptance is in the best interest of the State and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one per cent of the total bid amount.

It is not disputed that Intervenor was required to list a C-48 structural steel contractor but failed to do so. Accordingly, as Petitioner correctly notes, Intervenor's bid is nonresponsive. However, HRS § 103D-302(b) specifically allows Respondent to waive the subcontractor listing requirement if acceptance of Intervenor's bid is in the best interest of the State and the value of the work to be performed is equal to or less than one percent of the total bid amount. The Hearings Officer reviewed Petitioner's arguments and the cases cited in support of its arguments as to why HRS § 103D-302(b) is inapplicable to this case and concludes that Petitioner's arguments are not persuasive as:

The teachings of *Okada II* dictate that a procuring agency maintains the discretion to waive a subcontractor listing even where the bidder intentionally fails to list a required subcontractor in its bid, opting instead to solicit bids from subcontractors after bid opening. So long as the value of the work to be performed by the subcontractor is equal to or less than one percent of the total

amount bid and the acceptance of the bid would be in the best interest of the State, the agency is authorized to waive violations of the subcontractor listing. *Okada II* makes clear that the agency need not weigh the economic advantage to the State in accepting the low bid against the “evils of bid shopping”. As the court in *Okada II* recognized, this narrow exception to the subcontractor listing requirement was the result of a ‘reasonable compromise that the legislature made between the State’s interest in preventing bid shopping and the competing interest of reducing the cost to government if the lowest bidder for a construction job cannot be accepted because of a failure by a general contractor to list a subcontractor whose work is valued at less than one percent of the entire contract.’

*See, Parsons RCI, Inc. v. Department of Transportation, State of Hawaii and Kiewit Pacific Co.*, PCH 2007-3 at pages 11 and 12 (July 13, 2007).

Petitioner also argued that the value of the work to be performed is not less than one percent of the total bid amount because the “value of the work” is \$983,390.00, the lump sum price for the structural steel scope of work, which is more than one percent of Intervenor’s total bid amount. Respondent and Intervenor argued that the one percent should be based on \$200,000.00, the value of the work to be performed by Sure Steel, the C-48 structural steel contractor. In *Ted’s Wiring Service, Ltd. v. Department of Transportation, State of Hawaii*, PCH 2007-5 (December 12, 2007) the hearings officer noted that the respondent’s position that “work” is synonymous with “labor” and therefore the one percent can consist of labor costs only, was consistent with the decision in *Okada Trucking Co., Ltd. v. Board of Water Supply, et al.*, PCH 99-11 (1999) (reversed on other grounds). Accordingly, the Hearings Officer concludes that the “value of the work to be performed” is \$200,000.00, the value of the work to be performed by Sure Steel, and that it is less than one percent of the total bid amount.

Petitioner’s argument that Sure Steel’s proposal is deficient and improper because it excludes the obligation to pay prevailing wage rates will not be considered as HRS § 103D-701 required Petitioner to submit a written protest regarding this issue to the chief procurement officer or its designee within five working days after Petitioner knew or should have known of the facts giving rise to the protest. Since a protest was not filed, the Hearings Officer concludes that Petitioner is precluded from raising this issue in this proceeding. *See,*

