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

In the Matter of	PCH-99-6
HAWAIIAN DREDGING CONSTRUCTION COMPANY,	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND DENYING INTERVENOR'S MOTION FOR SUMMARY JUDGMENT
Petitioner,	
vs.	
DEPARTMENT OF BUDGET AND FISCAL SERVICES, CITY AND COUNTY OF HONOLULU,	
Respondent,	
and	
OCEANIC COMPANIES, INC.,	
Intervenor.	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT, AND DENYING INTERVENOR'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On or about April 21, 1999, Hawaiian Dredging Construction Company ("Petitioner"), filed a Notice of Filing of Administrative Appeal and Request for Hearing with the Department of Budget and Fiscal Services, City and County of Honolulu ("Respondent "), to contest Respondent's denial of Petitioner's protest in conjunction with an

invitation for bids designated as Sand Island Wastewater Treatment Plant Refurbish Flotator-Clarifier Nos. 1, 2, 5, & 6; Honolulu, Oahu, Hawaii, Job No. W3-98.

On April 23, 1999, Petitioner's request was received and filed with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs. The matter was thereafter set for hearing and a notice of hearing and pre-hearing conference was duly served on the parties.

The parties subsequently agreed to continue the hearing to June 23, 1999. On May 11, 1999, the parties stipulated to advance the hearing date to May 14, 1999, for the limited purpose of returning a number of subpoenas duces tecum that had been requested by Petitioner. Accordingly, on May 14, 1999, the hearing was commenced for the sole purpose of returning the subpoenas. Carina Y. Enhada, Esq. appeared for Petitioner; and Maile R. Chun, Esq. appeared for Respondent. Further hearing on Petitioner's appeal was scheduled for June 23, 1999.

On June 3, 1999, the parties filed a Stipulation for Oceanic Companies, Inc.'s Intervention as an additional Respondent. On June 4, 1999, a second pre-hearing conference was held. At the conference, the parties agreed to submit this matter to the Hearings Officer for disposition by way of a motion for summary judgment. Each of the parties also agreed to waive oral argument.

On June 18, 1999, both Petitioner and Oceanic Companies, Inc. ("Intervenor"), moved for summary judgment. On June 25, 1999, Respondent filed a memorandum in opposition to Petitioner's motion and a Joinder in Intervenor's motion; Petitioner filed a memorandum in opposition to Intervenor's motion; and Intervenor filed a memorandum in opposition to Petitioner's motion. On July 2, 1999, reply memoranda were filed by Petitioner and Intervenor, respectively.

Having reviewed and considered the evidence and arguments presented by the respective parties, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. On July 27, 1998, Respondent issued an Invitation for Sealed Bids ("IFB"), in connection with a project known as Sand Island Wastewater Treatment Plant, Refurbish Flotator-Clarifier Nos. 1, 2,5, & 6, Honolulu, Oahu, Hawaii, Job No. W3-98 ("Project").

2. The IFB included a set of General Instructions to Bidders ("General Instructions"), as well as various Special Provisions respecting the requirements for the Project.

3. Section 1.18 of the General Instructions stated:

> **Joint contractor; subcontractor**. (a) The bidders shall comply with HRS 103D-302, relating to the listing of joint contractors or subcontractors. Bids which are not in compliance may be accepted if the Contracting Officer or, for informal bids, the Officer-in-Charge concludes that acceptance is in the best interest of the public 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.

4. Section 500, Part 1.07 of the Special Provisions provided:

> The Contractor shall have a minimum of five (5) years experience in applying 100% solids polyurethane coating systems to steel and concrete surfaces for wastewater applications.

5. The bid opening date for the Project was October 15, 1998.

6. In response to the IFB, several contractors submitted sealed bids including Petitioner and Intervenor. The bids for Petitioner and Intervenor included the following:

Oceanic	Base Bid	$2,318,480
	Additive	$ 264,156
Hawaiian Dredging	Base Bid	$2,351,000
	Additive	$ 104,000

7. The Additive bid item related to the furnishing and installing of a Peripheral Baffle System. Respondent subsequently decided to exclude the Additive bid item.

8. Included in both Petitioner's and Intervenor's bids was a list of the subcontractors to be engaged by the bidder in the performance of the contract and the nature and scope of the work to be performed by each of the listed subcontractors.

9. In its bid, Intervenor listed "Giordano's Painting" ("Giordano"), as a subcontractor and indicated as its scope of work, "C-33". "C-33" refers to the specialty contractor's license required to perform painting and protective coating. Intervenor did not list any other subcontractor in this classification.

10. The protective coating and painting aspect of the work constituted about 40% of the total work required for the Project.

11. On or about November 4, 1998, Petitioner received notice that Respondent was deleting the Additive bid item. Petitioner called James Honke of the Department of Design and Construction, City & County of Honolulu ("DDC"), to inform Honke that Giordano may not have the 5 years experience required by the IFB. Respondent subsequently requested that Intervenor submit information regarding Giordano's experience in applying the type of coating required by the IFB.

12. On or about November 13, 1998, Intervenor provided Respondent with the information it had requested regarding Giordano's experience qualifications.

13. By letter dated December 2, 1998, Petitioner informed the DDC that it was Petitioner's understanding that the "City & County intends to award this contract [for the Project] for the base bid amount and has elected not to accept the proposed additive. In this case the low bidder would be Oceanic Construction." Petitioner also informed the DDC of its position that Giordano did not meet the experience requirement set forth in the IFB and that Petitioner would protest in the event the contract was awarded to Intervenor.

14. On December 7, 1998, Petitioner submitted its Notice of Protest to Roy Amemiya, the Director of Budget and Fiscal Services ("Amemiya"), to protest Respondent's intention to award the contract to Intervenor. On the same date, the DDC verbally informed Intervenor that Giordano did not meet the experience qualification of the IFB.

15. On December 9, 1998, a memorandum was sent from the Director of the DDC to Respondent. The memorandum stated in pertinent part:

> We are rejecting Oceanic Companies, Inc.'s painting subcontractor, Giordano's Painting. An allegation made to the Department of Design and Construction stated that Giordano's Painting did not meet the specified contractor's coating application experience requirement for the subject project. It was required in the contract documents that the "Contractor shall have a minimum of five (5) years experience in applying 100% solids polyurethane coating systems to steel and concrete surfaces for wastewater applications." Information was then submitted by Oceanic Companies, Inc. to verify that their painting subcontractor met the experience requirement. Upon review of the information submitted and our project records it was found that 100 % solids polyurethane was not applied to steel on any of the jobs listed by Giordano's Painting. Additionally, only one project listed actually involved applying 100% polyurethane coating . . . .

16. On or about December 9, 1998, Intervenor submitted a request to Respondent for authorization to substitute Giordano with Honolulu Painting, another subcontractor who apparently possessed the requisite experience. In its request, Intervenor confirmed that its bid price would remain "unchanged."

17. On or about December 15, 1998, a memorandum was sent from the DDC to Respondent recommending award of the basic bid only.

18. By letter dated January 19, 1999, Respondent notified Petitioner of its decision to deny its protest, explaining that Intervenor had requested, and Respondent had granted, Intervenor permission "to replace its painting subcontractor in order to satisfy concerns regarding the qualification requirements."

19. By letter dated January 27, 1999, Petitioner submitted to Amemiya a Request for Reconsideration of his denial of the protest.

20. By letter dated April 8, 1999, Respondent denied Petitioner's January 27, 1999 Request for Reconsideration.

21. On April 19, 1999, Petitioner submitted its request for administrative hearing to appeal the decision denying its protest.

22. In late May 1999, following the filing of Petitioner's appeal, Giordano submitted additional information to Respondent regarding its experience qualification. By

letter dated June 4, 1999, Respondent notified Intervenor that Respondent had made a negative responsibility determination with respect to Giordano and that as a result, Respondent would permit Intervenor to substitute Giordano with a qualified subcontractor for the Project.

23. To date, Respondent has not awarded the contract to Intervenor.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

A. Jurisdiction

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review the determinations of the chief procurement officer, head of a purchasing agency, or a designee of either officer made pursuant to HRS §§103D-310, 103D-701 or 103D-702, *de novo.* In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. **Carl Corp. v. State Dept. of Educ., 85 Haw. 431 (1997).** And in reviewing the contracting officer's determinations, the Hearings Officer is charged with the task of deciding whether those determinations were in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation or contract. HRS §103D-709(f). In the instant case, the Hearings Officer must determine whether the replacement of Intervenor's subcontractor following bid opening and prior to the award of the contract is consistent with the Procurement Code set forth in HRS Chapter 103D ("Code"), and its implementing rules.

B. Responsibility vs. Responsiveness

The salient facts are not in dispute. Intervenor submitted the low bid for the Project. Its bid listed Giordano as its painting subcontractor. Following bid opening but prior to the awarding of the contract, Petitioner asserted and Respondent subsequently acknowledged that Giordano did not have the requisite five years experience in applying "100% solids polyurethane coating systems to steel and concrete surfaces for wastewater applications." However, rather than reject Intervenor's bid as nonresponsive to the IFB,

Respondent authorized Intervenor to substitute Giordano with a subcontractor who apparently had the required experience.

Petitioner contends that Intervenor was neither a responsible nor a responsive bidder by virtue of the fact that Intervenor's bid listed a subcontractor who did not have the experience required by the IFB. Thus, according to Petitioner, Intervenor's bid should have been rejected at bid opening and Intervenor should not have been allowed to replace the subcontractor it listed in its bid. Indeed, the rules implementing the Code require the rejection of bids where the bidder is deemed to be non-responsible or the bid is non-responsive. HAR §3-122-97(a).

On the other hand, Respondent and Intervenor argue that the 5-year experience requirement is a matter of bidder responsibility and therefore not fatal to consideration of Intervenor's bid. According to Respondent and Intervenor, because the matter is one of responsibility and the IFB does not expressly prohibit the substitution of subcontractors, there is nothing improper in replacing Giordano prior to the award of the contract.

In determining whether the experience requirement at issue is a matter of responsibility or responsiveness, the Hearings Officer first looks to the applicable provisions of the Code. A "responsive bidder" under HRS §103D-104 and HAR §3-120-2 is defined as "a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids or request for proposals." In contrast, a "responsible bidder" is "a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." HRS §103D-104.

Decisions considering similar definitions have held that responsiveness refers to the question of whether a bidder has promised to perform in the precise manner requested by the government. **Blount, Inc. v. U.S., 22 Cl.Ct. 221 (1990)**. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. **Bean Dredging Corp. v. U.S., 2 Cl. Ct. 519 (1991)**. Therefore, a bid that contains a material nonconformity must be rejected as nonresponsive. In this regard, material terms and conditions of a solicitation involve price, quality, quantity, and delivery. **Blount, supra**. "The rule is designed to prevent bidders from taking exception to material provisions of the contract in order to gain an unfair advantage over competitors

and to assure that the government evaluates bids on an equal basis." **Blount, supra, citing Cibinic and Nash, Formation of Government Contracts (2nd Ed., 1986), p. 394.**

Responsibility, on the other hand, involves an inquiry into the bidder's ability and will to perform the subject contract as promised. Responsibility concerns how a bidder will accomplish conformance with the material provisions of the contract; it addresses the performance capability of the bidder, and normally involves an inquiry into the potential contractor's financial resources, experience, management, past performance, place of performance, and integrity. **Blount, supra**. See also **Federal Elec. Corp. v. Fasi, 56 Haw. 54 (1974)**. "Responsibility . . . refers to a bidder's apparent ability and capacity to perform the contract requirements and is determined not at bid opening but at any time prior to award based on any information received by the agency up to that time." See **Peterson Accounting-CPA Practice, Comp Gen Decision No. 108,524 (1994).** See also **Blount, supra**.

Here, the experience requirement at issue is directly related to the responsibility of the subcontractor in applying the coating system called for in the IFB and consequently, the bidder's capability of performing the contract requirements. Hence, the Hearings Officer finds that the 5-year experience requirement was inserted in the IFB primarily to ensure that the successful bidder was a responsible contractor.

Notwithstanding this finding, the inquiry cannot end here. This is because a matter of responsibility can still render a bid nonresponsive if the bid varies materially from the IFB. See **Blount, supra**. Generally, a variance is material if it gives the bidder a substantial advantage over competitors. See **Suskokwim School v. Foundation Services, 909 P.2d 1383 (Alas. 1996)**.

In **Blount, supra**, the plaintiff, an unsuccessful bidder, sought to enjoin the Bureau of Prisons and the Department of Justice from awarding a contract to the apparent low bidder. The plaintiff's action in the U.S. Claims Court was taken after the contracting officer found that the plaintiff had taken exception to a solicitation requirement that the contractor perform 20 percent of the total work on the construction site with the contractor's own organization and as such, concluded that the plaintiff's bid was nonresponsive. The plaintiff's bid indicated an intent to perform only 10 percent of the total contract work.

Although the court found that the so-called "Performance of Work" clause was primarily to determine the responsibility of the bidder[1], it recognized past decisions which found that information intended to reflect on bidder responsibility could render a bid nonresponsive if the information indicated that the bidder did not intend to comply with the material requirements of the IFB. In applying this principle to the "Performance of Work" provision, the court found:

> The "Performance of Work" clause was clearly a term or condition of the IFB. In requiring the contractor to self-perform 20 percent of the work under the contract, the clause directly impacted bid price. The self-performance requirement limited the amount of work which could be subcontracted under the contract. A contractor can generally achieve considerable savings by subcontracting work to firms with lower cost structures who are capable of performing the project with less expense. As such, a contractor may gain a sizeable bid pricing advantage by subcontracting more work than its competitors (footnote omitted). **Since compliance with the "Performance of Work" clause invariably affected bid price, the "Performance of Work" clause constitutes a material term of the IFB.** (citation omitted). **Although the clause was designed to help ensure that award was made to a qualified bidder, the 20 percent self-performance requirement was nevertheless part of the IFB and, therefore, the contractor was expected to comply with this requirement like any other material provision of the contract.**
>
> [The plaintiff] completed and submitted the Business Management Questionnaire with its bid. Question 3 of the business questionnaire indicated that [the plaintiff] would self-perform "approximately 10%" of the total amount of work under the contract. By promising to self-perform only 10 percent of the contract work in the face of the 20 percent requirement imposed by the "Performance of Work" clause, [the plaintiff] took affirmative exception to a material provision of the IFB. [The plaintiff's] response to question 3 of the business questionnaire therefore constituted a

[1] The court noted that the purpose of the "Performance of Work" clause was to limit the award to bona fide contractors and to preclude award to those firms whose chief purpose in bidding was to acquire a valuable asset, which in effect may be "peddled" to others interested in performing the work called for.

> material deviation from the IFB which rendered its bid nonresponsive at bid opening (footnote omitted). [The plaintiff] could not thereafter, correct its response to the questionnaire or attempt to explain why its bid was in fact responsive to the IFB (citation omitted).

(Emphasis added).

The **Blount** decision is instructive. In this case, although the 5-year coating experience requirement was intended to test bidder responsibility, it nevertheless had a direct impact on bid price. A contractor can obtain a considerable saving by utilizing subcontractors with less experience. As a result, a contractor may gain a substantial bid pricing advantage over other bidders whose bids were based upon prices from more experienced subcontractors. Accordingly, the Hearings Officer must conclude that Intervenor's listing of a subcontractor who lacked the required experience afforded Intervenor a substantial advantage with respect to bid pricing, constituted a material deviation from the terms of the IFB, and as a result, rendered its bid nonreponsive.

C. Substitution of Subcontractor

In arriving at this conclusion, the Hearings Officer is also mindful of the requirements of HRS §103D-302(b) and its underlying purpose. That section states:

> 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 the chief procurement officer or rules of the policy office conclude that acceptance is in the best interest of the public and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one percent of the total bid amount.

(Emphasis added).

One of the primary purposes of the listing requirement is to prevent bid shopping and bid peddling:

> Bid shopping is the use of the low bid already received by the general contractor to pressure other subcontractors into submitting even lower bids. Bid peddling, conversely, is an attempt by a subcontractor to undercut known bids already submitted to the general contractor in order to procure the job.

See, **Dynacon, Inc. v. D & S Contracting, Inc., 899 P.2d 613 (N.M. 1995).**

Thus, the listing requirement of HRS §103D-302(b) was, in part, based upon the recognition that a low bidder who is allowed to replace a subcontractor after bid opening would generally have greater leverage in its bargaining with other, potential subcontractors.[2] By forcing the contractor to commit, when it submits its bid, to utilize a specified subcontractor, the Code seeks to guard against bid shopping and bid peddling. Thus, with one narrow exception, the failure to list a subcontractor in a bid for construction work renders a bid nonresponsive under HRS §103D-302(b). See also, **William C. Logan & Associates v. Leatherman, 351 S.E.2d 146 (S.C.1986).** It therefore stands to reason that HRS §103D-302(b) also precludes the substitution of a listed subcontractor after bid opening, at least in cases where the antibid shopping purpose of the listing requirement may be undermined.[3] Any other conclusion would nullify the underlying intent of the listing requirement.[4]

---

[2] For this reason, Intervenor's argument that it bears the risk of having to cover the difference between Giordano's price and another subcontractor's higher price is unpersuasive.

[3] As where the substitution of a subcontractor is necessitated solely by the bidder's own actions or omissions. In the present case, both Intervenor and Respondent point out that there was no evidence of bid shopping. Notwithstanding that, the need to substitute arose as a direct result of Intervenor's own failure to list a subcontractor who met the experience requirement set forth in the IFB.

This should be contrasted with instances where, for example, the subcontractor listed in the bid fails or refuses to execute a written contract; becomes bankrupt or insolvent; or refuses to perform its subcontract. In such cases where substitution is required for reasons beyond the bidder's control, replacement of the subcontractor may be justifiable. Nevertheless, these circumstances are not before the Hearings Officer and therefore are not addressed in this decision.

[4] Interestingly, while the General Conditions to the IFB provides for subcontractor substitutions, such substitutions appear to be limited to situations outside the bidder's control. Section 4.26 of the General Conditions provide in pertinent part:

> 4.26 **Joint Contractor, subcontractor**.
>
> * * * *
>
> (c) Changes. The Contracting Officer, upon recommendation by the Officer-in-Charge, or for informal bids, the Officer-in-Charge alone, may allow changes to the original listing of joint contractors and

In enacting HRS Chapter 103D, the Legislature sought to establish a comprehensive code that would:

> (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.

Standing Committee Report No. S8-93, 1993 Senate Journal, at 39.

These goals can only be accomplished when parties who are bidding against each other are placed on the same footing. Moreover, the realization of these goals is infinitely more in the public interest than obtaining a pecuniary advantage in an individual case by permitting practices that are inconsistent with the spirit, purpose and principles of the Code.

Based on these considerations, the Hearings Officer finds and concludes that the substitution of Giordano under the circumstances presented here would be contrary to the Code.

IV. DECISION

For the reasons set forth herein, it is hereby ordered that:

1. Intervenor's Motion for Summary Judgment is denied;
2. Petitioner's Motion for Summary Judgment is granted;

---

subcontractors only if justified by the Contractor for reasons such as the joint contractor or subcontractor:
(1) Files a petition in bankruptcy or is the subject of an involuntary petition in bankruptcy which is not dismissed within ten (10) days of filing;
(2) Is not performing in accordance with the subject contract;
(3) Is to perform additional work for which a joint contractor or subcontractor was not required to be listed in the bid proposal; or
(4)For any reason that the Contracting Officer or the Officer-in-Charge may consider justified.

3. Intervenor's bid shall be rejected as nonresponsive; and

4. Petitioner's bid shall be remanded to Respondent for the purpose of determining the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the IFB from the remaining bids; and awarding the contract accordingly.

Dated at Honolulu, Hawaii: AUG - 9 1999.

CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs