



DEPARTMENT OF COMMERCE  
AND CONSUMER AFFAIRS

Dec 26 11 57 AM '01

HEARINGS OFFICE

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

In the Matter of	)	PCH-2001-9
	)	
KD CONSTRUCTION, INC.,	)	HEARINGS OFFICER'S FINDINGS
	)	OF FACT, CONCLUSIONS OF LAW
Petitioner,	)	AND DECISION; APPENDICES "A"
	)	THROUGH "G"
vs.	)	
	)	
CAROLL ANN S. TAKAHASHI, as	)	
Director of Department of Budget and	)	
Fiscal Services, City and County of	)	
Honolulu, and CITY AND COUNTY	)	
OF HONOLULU	)	
	)	
Respondents.	)	
	)	
and	)	
	)	
ROBISON CONSTRUCTION, INC.,	)	
	)	
Intervenor.	)	
	)	

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

I. INTRODUCTION

On November 9, 2001, KD Construction, Inc. ("Petitioner") filed its request for administrative hearing to contest Carroll Ann Takahashi, Director of Budget and Fiscal Services, City and County of Honolulu, and City and County of Honolulu's ("Respondents") decision to deny Petitioner's protest and award Contract No. F-99412, Laie Wastewater Collection System Expansion, Phase I, Job No. W9-00 to Robison Construction, Inc. The

matter was set for hearing, and the Notice of Hearing and Prehearing Conference was duly served on the parties. On November 20, 2001, Robison Construction, Inc. filed a Motion to Intervene as a Respondent.

At the prehearing conference held on November 20, 2001, and attended by Petitioner's attorney Eric H. Tsugawa, Esq., Petitioner's in-house counsel Charles K. Djou, Esq., Respondents' attorney, Amy R. Kondo, Esq. and Robison Construction, Inc.'s attorney Reese R. Nakamura, Esq., the parties agreed to allow Robison Construction, Inc. to intervene and on November 28, 2001, the parties filed a Stipulation Allowing Robison Construction, Inc. to Intervene and Order. The parties also agreed to file all motions on or before November 23, 2001, and all responses to the motions on or before November 27, 2001.

On November 23, 2001, Robison Construction, Inc. ("Intervenor") filed a Motion to Dismiss, and Petitioner filed a Motion for Summary Judgment. On November 26, 2001, Respondents filed its Memorandum in Opposition to Petitioner's Motion for Summary Judgment. On November 27, 2001, Petitioner filed its Memorandum in Opposition to Intervenor's Motion to Dismiss, Respondents filed a Joinder in Intervenor's Motion to Dismiss, and Intervenor filed its Memorandum in Opposition to Petitioner's Motion for Summary Judgment, and a Notice of Withdrawal of its Motion to Intervene.

On November 28, 2001, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by Mr. Tsugawa and Mr. Djou. Respondents were represented by Ms. Kondo. Intervenor was represented by Mr. Nakamura and Robert G. Klein, Esq.

At the outset, Petitioner's counsel stated that Intervenor's Exhibits 1 through 17, as listed in its Exhibit List filed on November 23, 2001, Respondents' Exhibits 1 through 12, and 14, as listed on its Exhibit List filed on November 20, 2001, and Petitioner's Exhibits 1 through 16 as listed on its Exhibit List filed on November 20, 2001 were stipulated into evidence. Petitioner's counsel further stated that the parties were able to stipulate to the facts contained in paragraphs 1 through 4, 8, 13, 19, 25, 35, 36, 40, 41, and 44 through 50 of Petitioner's Request for Hearing.

Thereafter, the parties presented arguments on the Motion to Dismiss and the Motion for Summary Judgment. The matters were taken under advisement, and the Hearings Officer announced that a short recess would be taken, during which she would decide

whether a ruling would be made on the motions, or whether the matters would remain under advisement and the parties would proceed to the hearing on the merits. Intervenor then moved that the matter be continued to the next date the parties would be available for hearing (December 5, 2001) so that the Hearings Officer would have more time to consider the motions. Intervenor also argued that the parties need not go through the time and expense of the hearing if either motion is granted, and that even if the hearing commenced that day, it would not finish, and the hearing would have to be continued to December 5, 2001. Petitioner opposed the continuance because Petitioner was ready to go forward with its case and did not want a delay which might impact on Respondents' decision to award the contract. Petitioner also opposed the continuance because one subpoenaed witness would not be able to return on December 5, 2001<sup>1</sup>, and other subpoenaed witnesses would be inconvenienced by having to return on another day. After considering the arguments presented, Intervenor's motion was granted, and the hearing was continued to December 5, 2001.

By letter dated December 3, 2001, the Hearings Officer informed the parties that the hearing on December 5, 2001 was not necessary because the Hearings Officer had determined that the motions heard on November 28, 2001 were dispositive, and a decision could be made without further hearing.

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

Findings of Fact numbers 1 through 19 are facts recited in Petitioner's Request for Hearing and have been stipulated to by the parties.

1. Petitioner is a Hawaii Corporation with its principal place of business in the City and County of Honolulu, State of Hawaii.

2. Respondent Carol Ann S. Takahashi is the Director of Budget and Fiscal Services of the City and County of Honolulu, State of Hawaii.

---

<sup>1</sup> Petitioner made an offer of proof as to the testimony from this witness, and based on the offer of proof, Intervenor and Respondents stipulated to the witness' testimony.

3. Respondent City and County of Honolulu is a municipal corporation of the State of Hawaii.

4. The Respondents, through the Division of Wastewater Design and Engineering, Department of Design and Construction, issued a solicitation for the Laie Wastewater Collection System Expansion, Phase I, Laie, Oahu, Hawaii, Job W9-00 ("Project"). The solicitation required that all bidders possess an "A" general engineering contracting license.

5. Contractors holding A and B licenses also automatically hold licenses for certain specialty classifications pursuant to Hawaii Administrative Rules ("HAR") § 16-77-32.

6. Petitioner timely submitted its proposal for the Project, including the Joint Contractor/Subcontractor Listing.

7. Intervenor also submitted a proposal for the Project.

8. Bids that do not comply with the joint contractor and/or subcontractor listing requirement may be accepted if 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.

9. The bids submitted to Respondents, including the bids submitted by Petitioner and Intervenor, were opened on August 30, 2001.

10. The bid submitted by Intervenor was the lowest (\$5,876,540.00) and the bid submitted by Petitioner was the next lowest (\$6,007,465.00).

11. Petitioner timely filed a protest letter with the Respondents on September 4, 2001, a true and correct copy of which is attached as Appendix "A" and incorporated herein.

12. The protest by Petitioner was submitted prior to any award of the contract.

13. In response to questions from Respondents, Petitioner submitted a letter dated September 6, 2001 to the Respondents regarding the difference between a C-37e specialty contracting license and the C-37a and C-43 licenses, a true and correct copy of which is attached hereto as Appendix "B" and incorporated herein.

14. Petitioner further supplemented its bid protest to Respondents in a letter dated September 7, 2001, a true and correct copy of which is attached hereto as Appendix "C" and incorporated herein.

15. Petitioner received a letter from Respondents dated September 17, 2001 indicating that the Respondents would be referring this matter to the State of Hawaii, Department of Commerce and Consumer Affairs Contractors License Board for determination as to whether the C-37 or C-37e license is required.

16. Petitioner received on October 3, 2001, a letter dated October 1, 2001 from Respondents denying the protest by Petitioner.

17. Petitioner then timely filed a letter to Respondents dated October 5, 2001, requesting reconsideration of its bid protest, a true and correct copy of which is attached hereto as Appendix "D" and incorporated herein.

18. Petitioner received on November 5, 2001 a letter dated November 5, 2001 from Respondents denying the request for reconsideration.

19. By letter dated November 6, 2001, Petitioner notified Respondents of its intention to request an administrative hearing, a true and correct copy of which is attached hereto as Appendix "E" and incorporated herein.

20. At its meeting on September 21, 2001, the Contractors License Board ("Board") discussed Respondents' September 17, 2001 letter which asked whether (1) a general engineering contractor with an "A" contractors license could perform work for a project consisting of wastewater treatment and facilities construction without a subcontractor with a C-37 or C-37e specialty contractors licenses, and (2) if a C-37 or C-37e subcontractor was required, which work on the plans must be performed with the C-37 or C-37e licenses. A copy of the plans and specifications for the Project was submitted with this letter.

21. The minutes of the September 21, 2001 meeting indicate that Petitioner's in-house counsel was present at the meeting and appeared before the Board requesting clarification as to whether a general "A" license can perform work on the project without a C-37 or C-37e classification. Petitioner's counsel informed the Board that the Plumber's Union indicated that a C-37 license was necessary. The Board minutes states in part:

Mr. Isemoto explained that the "A" classification includes sewage and wastewater plants, including related piping work, and that "A" licensees have been doing such wastewater treatment plant work for years. The specialty classifications are for contractors who want to perform a particular trade.

After lengthy discussion on the different types of license specialties that may be necessary for this project, and based on a cursory review of the plans provided, it was moved by Mr. Isemoto, seconded by Mr. Bello and unanimously carried that the Laie Wastewater Collection System Expansion project falls under the scope of an "A" General Engineering contractor. Therefore, the piping systems in connection with wastewater treatment may be performed by the "A" contractor without a C-37 or C-37e subcontractor. However, it was noted that a bathroom facility is included in the project. Therefore, a C-37 subcontractor is required on the project.

According to the minutes of the Board's meeting, there were no representatives from Respondents or Intervenor present at the meeting.

22. By a letter dated September 26, 2001, the Board informed Respondents that the Project fell under the scope of an "A" General Engineering contractor, so the piping systems in connection with wastewater treatment may be performed by the "A" contractor without a C-37 or C-37e subcontractor. However, the Board noted that because a bathroom facility was included in the Project, a C-37 subcontractor was required for the Project. The Board also informed Respondents that pursuant to HAR § 16-201-90, the Board's interpretation was for informational and explanatory purposes only, and that it was not an official opinion or decision, and thus not binding on the Board.

23. By a letter dated October 2, 2001, Intervenor notified Respondents that it intended to use a C-37 subcontractor to do the plumbing work on the Project. This letter states in part:

RCI intends to negotiate with the plumbing subcontractor after the award. We expect the value of the subcontract to be somewhere between RCI's estimate (\$9,000.00) and the subcontractor's estimate (\$19,000.00). In any case, the value of the plumbing work will be substantially less than 1% of the total bid amount.

This letter also has the notation, "Approved: pursuant to HRS 103D-302" and signed by Respondent Carroll Takahashi, Director of Budget and Fiscal Services. A copy of this letter is attached as Appendix "F" and incorporated herein.

24. On October 19, 2001, by facsimile, Intervenor transmitted to Respondents a copy of the Confirmation Bid they received on August 30, 2001 at 11:28 a.m. from Oahu Plumbing and Sheetmetal, Ltd. ("Oahu Plumbing"). With respect to the plumbing portion of the Project, Oahu Plumbing submitted a bid of \$19,379.00. A copy of the Confirmation Bid is attached as Appendix "G" and incorporated herein.

25. Respondents' November 5, 2001 letter to Petitioner denying Petitioner's request for reconsideration of the denial of its bid protest states in part:

As we previously indicated, the City has determined that pursuant to Okada Trucking Co., Ltd. v. Board of Water Supply, et al. (No. 22956) (March 20, 2001), Robison Construction, Inc. ("RCI") was not required to list a C-37 subcontractor in its bid to be considered a responsible and responsive bidder.

RCI has notified the City of its intent to utilize a C-37 subcontractor to install the bathroom facility, as recommended by the Contractors License Board in its September 26, 2001 letter. We find the value of the work to be performed by the subcontractor to be less than one percent of the total bid amount. Since we also find that it is in the best interest of the City to accept RCI's bid as the lowest bid, KD Construction's request for reconsideration is denied pursuant to Section 103D-302 of the Hawaii Revised Statutes ("HRS") and Section 3-122-31(c)(3) of the Hawaii Administrative Rules. See also, the Contract Document, General Instructions to Bidders, Section 1.18 and Section 2.5 and General Conditions, Section 4.26.

You also contend that the Contractors License Board erred in finding that a C-37e license is not necessary for the project. We have taken into consideration the advisory information provided in the Board's letter dated September 26, 2001. However, we will not determine the correctness of their interpretation.

26. Petitioner is licensed as an "A" general engineering, and a "B" general building contractor. In addition, Petitioner is licensed as a C-37 plumbing specialty contractor.

27. Intervenor is licensed as an “A” general engineering and a “B” general building contractor. Intervenor does not have any specialty contractor licenses that are not already included in their “A” or “B” licenses. Intervenor does not have any employees who possess a C-37 plumbing specialty contractor’s license.

28. A C-37 plumbing specialty contractors license is not one of the specialty contractor licenses that “A” and “B” contractors automatically receive with their “A” and “B” contractors licenses.

29. Intervenor’s bid for the work on the pump station, sewage system and water system is \$5,623,090.00. Intervenor’s total bid is \$5,847,560.00.

### III. CONCLUSIONS OF LAW

A motion for dismissal or other summary disposition may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the motion is viewed in the light most favorable to the non-moving party. *Brewer Environmental Industries v. County of Kauai*, PCH-96-9 (Hearings Officer’s Final Order November 20, 1996).

Intervenor’s Motion to Dismiss is based on its assertions that (1) under the Hawaii Intermediate Court of Appeals decision in *Okada Trucking Co., Ltd., v. Board of Water Supply*, No. 22956 (March 20, 2001), Intervenor was not required to list a C-37 plumbing subcontractor; (2) even if Intervenor was required to list a C-37 plumbing subcontractor, pursuant to Hawaii Revised Statutes (“HRS”) § 103D-302, the listing requirement can be waived if the value of the work to be performed by that subcontractor is equal to or less than one percent and acceptance of the bid would be in the best interest of the Respondents, and (3) Petitioner should not have a second bite at the apple where its claims have already been rejected in part by the Contractors License Board. Petitioner’s Motion for Summary Judgment is based on its assertion that Intervenor is not a responsive and responsible bidder because Intervenor failed to list a joint contractor or subcontractor with a C-37 or C-37e license and Intervenor is not properly licensed to do the work.

In the *Okada Trucking* case, the issue was whether the bidder, who held both an “A” general engineering and a “B” general building contractors licenses was required to list a subcontractor with a C-37 plumbing specialty license. The Hawaii Intermediate Court



of Appeals (“ICA”) held that the lowest bidder, Inter Island, was not required to list a plumbing subcontractor because pursuant to its “A” and “B” licenses, Inter Island “was authorized to undertake the Project with its own staff; provided, of course, that where certain work required performance by individuals with particular licenses, Inter Island utilized employees who were appropriately licensed to perform such work.” *Id.*, at 43-44. In the case at bar, it is not disputed that a C-37 plumbing specialty contractor is required to perform work on the bathroom facility portion of the Project, and that Intervenor does not have a C-37 plumbing specialty contractor’s license. Additionally, at the hearing on the Motions, it was determined that Intervenor does not have employees who are appropriately licensed to perform plumbing work. Accordingly, the Hearings Officer finds that Intervenor cannot rely on the *Okada Trucking* case to support its contention that it was not required to list a C-37 plumbing specialty contractor, and therefore, concludes that Intervenor was not a responsive bidder.

Although Intervenor’s bid was not responsive because it did not include the name of its plumbing subcontractor, HRS § 103D-302 provides that Intervenor’s bid may still 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.”

Petitioner contends that the value of the work to be performed by the plumbing subcontractor is more than one percent because the plumbing subcontractor is not only required for the construction of the bathroom facility, but must be utilized for the construction of the pump station, sewage and water systems. Respondents and Intervenor have relied on the *Okada Trucking* case and the Board’s informal opinion to support their contention that a plumbing subcontractor is only required for the bathroom facility, which, at most, will cost \$19,379.00, less than one percent of Intervenor’s total bid of \$5,847,560.00.

In the *Okada Trucking* case, the ICA held that the lowest bidder, who possessed an “A” general engineering and “B” general building contractors license was not required to list a C-37 plumbing specialty contractor as a subcontractor for a construction project which included work involving specialized engineering skill and knowledge in water power, water supply, pipelines, and other utility plants and installations in two or more unrelated building trades or crafts. The ICA recognized that holders of “A” and “B” licenses

have quite broad contracting authority, and noted that an “A” contractor is “authorized generally to undertake all contracts to construct fixed works requiring specialized engineering knowledge and skill in a wide range of subject areas[.]” Id., at 43.

Hawaii Revised Statutes § 444-7(b) and (c) define general engineering and general building contractors as:

**§ 444-7 Classification.**

(b) A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works requiring specialized engineering knowledge and skill, including the following divisions or subjects: irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, docks and wharves, shipyards and ports, dams and hydroelectric projects, levees, river control and reclamation works, railroads, highways, streets and roads, tunnels, airports and airways, sewers and sewage disposal plant and systems, waste reduction plants, bridges, overpasses, underpasses and other similar works, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, parks, playgrounds and other recreational works, refineries, chemical plants and similar industrial plants requiring specialized engineering knowledge and skill, powerhouses, power plants and other utility plants and installations, mines and metallurgical plants, land leveling and earth-moving projects, excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above fixed works.

(c) A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

As a holder of an “A” license, Intervenor has specialized knowledge and engineering skill in, among other things, sewers and sewage disposal plants and systems, and waste reduction plants. The Hearings Officer would also note that the Board, upon review of the plans and hearing argument from Petitioner, also found that an “A” license was sufficient for the majority of the work to be done on the project, and that a C-37 plumbing specialty license

was only required for the bathroom facility.<sup>2</sup> Accordingly, the Hearings Officer finds that a C-37 and/or a C-37e plumbing specialty contractor is not required for the construction of the pump station, sewage and water systems, only the bathroom facility, and therefore, concludes that the value of the work to be performed by the plumbing specialty contractor is less than one percent of the total bid amount.

Hawaii Revised Statutes § 103D-302 also requires that acceptance of the bid be in the “best interest of the State”. Respondents made that determination on October 2, 2001 based on the fact that Intervenor, as the lowest bidder, notified Respondents that it had received a bid from Oahu Plumbing prior to bid opening, and that it intended to use Oahu Plumbing for the bathroom facility.

In determining whether acceptance of Intervenor’s bid is in the best interest of Respondent, the fact that Intervenor is the lowest bidder cannot be ignored. However, it should not be the only factor in determining whether it is in Respondent’s best interest to accept Intervenor’s bid, as even the lowest bid should not be accepted if it would be contrary to the expressed purposes and principles of the Procurement Code. Consequently, in the *Okada Trucking* case, the Hearings Officer concluded that it was not in the best interest of the Board of Water Supply to award the contract to the lowest bidder because such an award failed to: (1) ensure the fair and equitable treatment of all persons dealing with the procurement system, (2) promote the maintenance of a procurement system of quality and integrity and (3) increase the public confidence in the public procurement procedures being followed. *Id.*, at 46. While the ICA found it unnecessary to rule on the correctness of the Hearings Officer’s conclusion, the factors listed are applicable to this case.

In the case at bar, although Intervenor received a bid from Oahu Plumbing before bid opening, Intervenor did not list Oahu Plumbing in its bid and has disputed the bid amount (\$19,379.00), stating that it will “negotiate with the plumbing subcontractor after the award.” See, Finding of Fact No. 23. This is troublesome, as it constitutes “post-award bid shopping”, described in the *Okada Trucking* case’s discussion of bid shopping and bid peddling as follows:

---

<sup>2</sup> The Hearings Officer recognizes that pursuant to HAR § 16-201-90 the board’s interpretation “is for informational and explanatory purposes only and is not an official opinion or decision, and that it therefore is not to be viewed as binding on the board, commission, or department.”

In the case of post-award shopping, ...the detrimental effects are more persuasive. Here, the negotiations take place in a market completely controlled by the general who has been awarded the prime contract; post-award bid shopping is therefore much less like free competition. Moreover, any reduction in the sub-bid will be to the detriment of both the subcontractor and the awarding authority. The price on the overall contract having already been set, the general's purpose here is simply to drive down his [or her] own cost, increasing his [or her] profit at the expense of the subcontractor.

Id. at 37. Thus, if Intervenor is allowed to negotiate with Oahu Plumbing after bid award, the Hearings Officer concludes that it would not be in Respondents' best interest to accept Intervenor's bid, as the ICA, in the *Okada Trucking* case, agreed that the subcontractor listing requirement of HRS § 103D-302(b) is intended to guard against bid shopping by a contractor or bid peddling by subcontractors who were not listed in the contractor's bid. Id. at 39. However, if prior to award, Respondents receive a commitment from Intervenor that it will honor Oahu Plumbing's bid of \$19,379.00, there would be no post-award bid shopping, and accordingly, the Hearings Officer would conclude that it would be in the best interest of the Respondents to accept Intervenor's bid.<sup>3</sup> In the event Respondents are unable to secure a commitment from Intervenor to honor Oahu Plumbing's bid as is, then Intervenor's bid should be rejected and Petitioner's bid accepted if Petitioner is found to be a responsible and responsive bidder.

#### IV. DECISION

Based on the foregoing, Intervenor's Motion to Dismiss is granted and Petitioner's Motion for Summary Judgment is denied. This matter is remanded to Respondents for reevaluation of Intervenor's bid consistent with this decision.<sup>4</sup> The

---

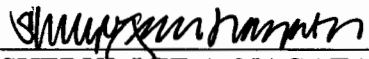
<sup>3</sup> On page 12 of its Memorandum in Support of its Motion to Dismiss, Intervenor makes the following statement: "The City has already advised KDC (Petitioner) that accepting RCI's (Intervenor) bid even with the \$19,000 estimated additional cost would be in the City's best interest." Emphasis added. The Hearings Officer would note that after bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the public or to fair competition shall be permitted. See, HRS § 103D-302. Accordingly, Intervenor cannot charge Respondent for any additional costs it may incur by using Oahu Plumbing for the work on the bathroom facility.

<sup>4</sup> Respondents' acceptance of Intervenor's bid without the requisite commitment could be the subject of a future protest.

Hearings Officer orders that the parties bear their own attorney's fees and costs incurred in this matter.

DEC 26 2001

DATED: Honolulu, Hawaii, \_\_\_\_\_.

  
\_\_\_\_\_  
SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs



**KD CONSTRUCTION, INC.**

1015 Paapu Street

Honolulu, Hawaii 96819

Phone: (808) 847-0229 Fax: (808) 851-7311 License No. ABC-14956

Web: www.kdconstruction.com

September 4, 2001

VIA FACSIMILE; ORIGINAL VIA U.S. MAIL

Chief Procurement Officer  
City and County of Honolulu  
Department of Budget and Fiscal Services, Division of Purchasing  
530 South King Street, Room 115  
Honolulu, Hawaii 96813  
Attn.: Ms. Carol Ann S. Takahashi, Director

Re: **BID PROTEST**  
**Laie Wastewater Collection System Expansion, Phase I**  
**Job No. W9-00**

Dear Director Takahashi:

KD Construction, Inc., a Hawaii corporation ("KD"), hereby formally protests in writing to the chief procurement officer of the City and County of Honolulu, the bid awarded to Robison Construction, Inc., a Washington corporation ("RCI"), on August 31, 2001, for the Laie Wastewater Collection System Expansion, Phase I, Job No. W9-00 (the "Project"). This bid protest is made pursuant to, and under the authority of, Rev. Ord. Hon. § 14-25.6 and Haw. Rev. Stat. § 103D-701.

The Project requires the winning contractor to perform certain licensed wastewater plumbing work. Any contractor on the Project must have a 37e specialty contracting license for wastewater treatment and facilities construction.<sup>1</sup> Records at the Hawaii Department of Commerce and Consumer Affairs reveal that RCI does not have a 37e specialty contracting license and thus lacks the proper certification to legally carry out the Project. Therefore, RCI is disqualified and incapable of legally working on the Project.

---

<sup>1</sup> Neither the "A" general engineering contracting license nor the "B" general building contractor license includes a 37e specialty contracting license. See Haw. Rev. Stat. § 444-7 and Haw. Admin. R. § 16-77-32.



Furthermore, Haw. Rev. Stat. § 103D-1004 states a reciprocal preference against out-of-state bidders may be applied to all non-Hawaii bidders. No such reciprocal preference was applied against RCI, a Washington corporation, on this Project. The failure to apply a reciprocal preference against RCI may be an error that no longer makes RCI the lowest bidder on the Project.

KD is the lowest legitimate bidder on the Project and deserves to be awarded the Project because RCI is disqualified.<sup>2</sup>

KD looks forward toward a prompt and satisfactory resolution to this bid protest. Please do not hesitate to contact me at 478-0006 if you have any questions, comments, or concern. Thank you for your time and consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charles K. Djou', is written over a horizontal line. The signature is fluid and cursive.

Charles K. Djou  
KD Construction, Inc.  
In-House Counsel

cc: Mr. Daniel G. Ching, President, KD Construction, Inc. (via Email)

---

<sup>2</sup> KD holds a 37 specialty contracting license. Pursuant to Haw. Admin. R. § 16-77-32(d), KD is qualified and legally licensed to perform the required 37e licensed work on the Project.



**KD CONSTRUCTION, INC.**

1015 Paapu Street

Honolulu, Hawaii 96819

Phone: (808) 847-0229 Fax: (808) 851-7311 License No. ABC-14956

Web: www.kdconstruction.com

September 6, 2001

VIA FACSIMILE NO. 523-4771; ORIGINAL VIA U.S. MAIL

City and County of Honolulu  
Department of Budget and Fiscal Services, Division of Purchasing  
530 South King Street, Room 115  
Honolulu, Hawaii 96813  
Attn.: Mr. Michael Hiu

**Re: Bid Protest on Laie Wastewater Collection System  
Expansion, Phase I, Job No. W9-00 - A C-37e Specialty  
Contracting License Is Required For This Project**

Dear Mr. Hiu:

Thank you for contacting me yesterday regarding KD Construction, Inc.'s ("KD") bid protest (the "Bid Protest") on the Laie Wastewater Collection System Expansion, Phase I, Job No. W9-00 (the "Project"). This letter responds to your question regarding the difference between a C-37e specialty contracting license and the C-37a and C-43 licenses. In brief, only a C-37e specialty contracting license can fully and legally perform the work called for in the Project.<sup>1</sup>

**1. A C-37e License is Needed for the Project**

A C-37e specialty contracting license is needed to complete this Project. The C-37e license is defined to allow the license holder to build water treatment, water distribution, and water pumping facilities. This is the exact sort of work called for by the Project. Consequently only a contractor with a

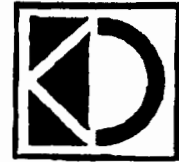
---

<sup>1</sup> The "A" general engineering contractor license includes specialty classifications for C-43 and C-37a, but not for C-37e. Robison Construction, Inc. ("RCI"), the nominal low bidder on the Project, holds only the "A" general engineering contractor license. RCI lacks the C-37e specialty license and is unqualified to perform the needed wastewater construction work on the Project. KD, the lowest responsible bidder on the Project, holds the "A" general engineering contractor license and is also licensed to perform C-37e license work.

**EXHIBIT B**  
"Equal Opportunity Employer"

**APPENDIX "B"**





C-37e specialty contracting license, such as KD, is qualified to work on the Project.<sup>2</sup>

**2. A C-37a License is Completely Unrelated to the Project**

The C-37a license allows the license holder to construct the connection between a residential home and a sewer system. A C-37a license lacks even a remote relation to the construction of wastewater treatment facilities called for in the Project. Thus, holding a C-37a license is grossly inadequate for performing the work called for by the Project.

**3. A C-43 License is Narrowly Limited to Specific Sewer Systems**

The C-43 license only permits the license holder to construct four very specific types of sewer systems (and the appurtenances to such sewer systems): (1) concrete and masonry sewers, (2) packaged sewer disposal plants, (3) sewage lift stations, and (4) septic tanks. The Project does not call for the construction of any of these four specific type of sewer systems. The Project instead clearly requires the C-37e specialty contracting license to perform wastewater facility construction. Therefore, holding a C-43 license is simply too narrow and fails to allow for the broad scope of work demanded by the Project.

**4. The Law Requires a C-37e Contractor for the Project**

Haw. Rev. Stat. Ch. 444 clearly establishes different and distinct types of contracting licenses. Title 16, Chapter 77, of the Hawaii Administrative Rules further explains the distinction and differences between the various contractor license classifications. It is illegal for any contractor to perform work in an area for which they are unlicensed. See Haw. Rev. Stat. § 444-9; Haw. Admin. R. § 16-77-4. The administrative rules further specifically state that a contractor who holds a general contracting license may not even act, assume to act, or advertise as a specialty contractor except in the specialty classifications that contractor holds. See Haw. Admin. R. § 16-77-33. Any attempt to blur the distinction between a C-37e and a C-37a or C-43 license will completely ignore the entire intent of Haw. Rev. Stat. Ch. 444 and the Hawaii Administrative Rules regarding the classification of contractors to protect the public's health, safety,

---

<sup>2</sup> KD holds a C-37 specialty contracting license. Pursuant to Haw. Admin. R. § 16-77-32(d), a licensee who holds a specialty contracting license automatically holds all sub-classifications in the same specialty. Thus, by holding a C-37 specialty license, KD automatically holds a C-37e license.



and general welfare. See Haw. Rev. Stat. § 444-4; Haw. Admin. R. § 16-77-2 (explaining the objectives of the contractor classification system). It is impossible to allow a contractor who only holds a C-37a and/or C-43 contractor's license to perform work, such as the Project, reserved to a C-37e licensed contractor without violating both the Hawaii Revised Statutes and the Hawaii Administrative Rules.

**5. Referral to the DCCA**

KD understands that this Bid Protest will be referred to the Department of Commerce and Consumer Affairs's contractor licensing board for clarification on the difference between a C-37a, C-43 and C-37e contracting license. KD is confident that any reasonable examination of Project will show that only a C-37e specialty contractor can legally complete the Project. A contractor with merely a C-37a and/or C-43 contracting license, such as RCI, is unfit and unqualified to legally complete the Project.

**6. Conclusion**

To legally complete the Project, a contractor must hold a valid C-37e specialty contracting license. Because RCI lacks such a license, KD believes it should be awarded the Project as the lowest responsible bidder.

Please do not hesitate to contact KD if we can be of any assistance to you or the DCCA in the resolution of this Bid Protest. KD looks forward to hearing from you soon. Thank you.

Sincerely,

Charles K. Djou  
KD Construction, Inc.  
In-House Counsel

cc: Mr. Daniel G. Ching, President, KD Construction, Inc. (via Email)  
Mr. Wesley Ikeda, counsel, Journeyman Plumbers & Pipefitters  
Association, Local 675, AFL-CIO (via fax)  
Ms. Verna Oda, Executive Director, Department of Commerce and  
Consumer Affairs - Division of Professional and Vocational Licensing,  
Contractor Licensing Board (via fax, copy via U.S. mail)



**KD CONSTRUCTION, INC.**

1015 Pāpū Street

Honolulu, Hawaii 96819

Phone: (808) 847-0229 Fax: (808) 851-7311 License No. ABC-14956

Web: [www.kdconstruction.com](http://www.kdconstruction.com)

September 7, 2001

VIA FACSIMILE NO. 523-4771; ORIGINAL VIA U.S. MAIL

City and County of Honolulu  
Department of Budget and Fiscal Services, Division of Purchasing  
530 South King Street, Room 115  
Honolulu, Hawaii 96813  
Attn.: Mr. Michael Hiu

**Re: Supplement to Bid Protest on Laie Wastewater Collection  
System Expansion, Phase I, Job No. W9-00**

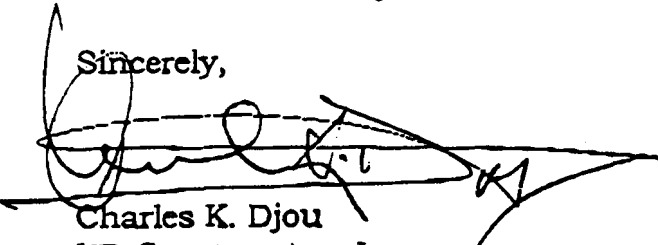
Dear Mr. Hiu:

This letter supplements the bid protest filed, filed September 4, 2001 (the "Bid Protest"), by KD Construction, Inc. ("KD"), regarding that certain Laie Wastewater Collection System Expansion, Phase I, Job No. W9-00 (the "Project").

In addition to the objections raised by KD in its original Bid Protest, KD also objects to the Project being awarded to Robison Contracting, Inc. ("RCI") on the alternative grounds that RCI lacks a C-37 specialty contracting license. A C-37 license for plumbing is specifically needed to complete this Project. Due to RCI's lack of a C-37 license, they are unfit and unable to qualify as a responsible bidder on the Project. Therefore, the Project should be awarded to KD, the lowest responsible bidder with both the "A" general engineering contractor license and a C-37 license.

Please do not hesitate to contact me if you have any questions or comments. Thank you.

Sincerely,

  
Charles K. Djou  
KD Construction, Inc.  
In-House Counsel

**EXHIBIT C**

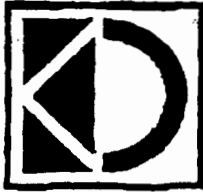
*"Equal Opportunity Employer"*

**APPENDIX "C"**

*Mr. Michael Hiu  
City and County of Honolulu  
Re: Laie Wastewater System, Job No. W9-00  
September 7, 2001  
Page 2*



cc: Mr. Daniel G. Ching, President, KD Construction, Inc. (via Email)  
Mr. Wesley Ikeda, counsel, Journeyman Plumbers & Pipefitters  
Association, Local 675, AFL-CIO (via fax)  
Ms. Verna Oda, Executive Director, Department of Commerce and  
Consumer Affairs – Division of Professional and Vocational Licensing,  
Contractor Licensing Board (via fax, copy via U.S. mail)



**KD CONSTRUCTION, INC.**

1015 Paapu Street

Honolulu, Hawaii 96819

Phone: (808) 847-0229 Fax: (808) 851-7311 License No. ABC-14956

Web: www.kdconstruction.com

---

October 5, 2001

VIA FACSIMILE; ORIGINAL VIA CERTIFIED MAIL

---

Chief Procurement Officer  
City and County of Honolulu  
Division of Purchasing  
530 South King Street  
Honolulu, Hawaii 96813  
Attn.: Mr. Michael Hiu

Re: **Reconsideration of Bid Protest Decision  
Laie Wastewater Collection System Expansion, Phase I  
Job No. W9-00, Contract No. F-99412**

Dear Mr. Hiu,

KD Construction, Inc., a Hawaii corporation ("KD"), hereby requests that the City and County of Honolulu (the "City") reconsider its decision to deny KD's bid protest regarding the Laie Wastewater Collection System Expansion, Phase I, Job No. W9-00, Contract No. F-99412 (the "Project"). KD received a fax copy of the City's denial of its bid protest on Tuesday, October 2, 2001.

KD believes the City erred in denying KD's bid protest for the following reasons:

1. **The Contractors Licensing Board Erred** – The contractors licensing board incorrectly ruled a C-37e contractors license for treatment facility contracting was not necessary for the Project. The board did not base its advisory opinion on any legal precedent whatsoever. Instead the board made its decision on mere industry custom without any legal reference. A plain reading of the Hawaii Administrative Rules, that define the application of the Hawaii Revised Statutes, clearly shows that a wastewater project, like the Project in question, requires a C-37e contractors license. Because the contractors licensing board misinterpreted the law, the City should find that KD is the lowest responsible bidder on the Project. Consequently, based on the law, the City must reconsider its denial of KD's bid protest.

2. **A Plumbing Contractor is Essential to the Project** – Even if the contractors licensing board ruled correctly, the City should still award the Project to KD. The City should follow the recommendation of the contractors licensing board and find

**EXHIBIT D**

**APPENDIX "D"**



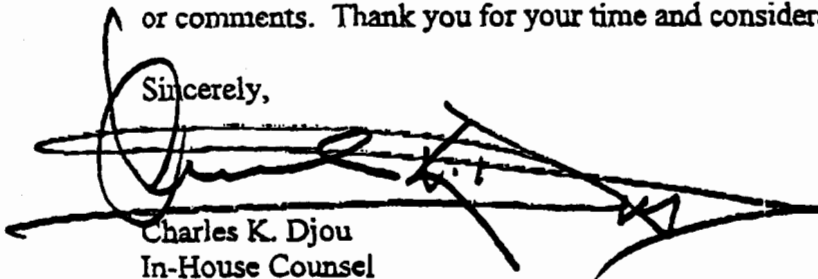
RCI a non-responsive bidder because RCI lacks a valid C-37 license. RCI has not applied and the City has not given a waiver to RCI for failure to hold a valid C-37 license. The City therefore improperly ignored the recommendation of the contractors licensing board and incorrectly chose to jeopardize the quality of the Project by selecting an unqualified bidder without a C-37 license. The City should reconsider its decision to deny KD's bid protest.

3. Okada Trucking is On Appeal – The City based its entire decision on the Intermediate Court of Appeals decision, Okada Trucking Co., Ltd. v. Board of Water Supply et al. (No. 22956, March 20, 2001). This decision is currently on appeal to the Hawaii State Supreme Court. The Hawaii Supreme Court's decision in Okada Trucking on this matter may settle the legal standard for this bid protest by KD. Thus, even if the City chooses to ignore both the plain language of the Hawaii Administrative Rules and contractors licensing board recommendation, the City should at least postpone the award of the Project pending the Hawaii Supreme Court's decision.

For all of these reasons, KD respectfully requests that the City reconsider its decision to deny KD's bid protest on the Project.

Please do not hesitate to contact me at (808) 478-0006 if you have any questions or comments. Thank you for your time and consideration.

Sincerely,



Charles K. Djou  
In-House Counsel  
KD Construction, Inc.

cc: Mr. Daniel G. Ching, President, KD Construction, Inc.  
Wesley Ikeda, counsel, Plumbers' Union



**KD CONSTRUCTION, INC.**

1015 Paapu Street

Honolulu, Hawaii 96819

Phone: (808) 847-0229 Fax: (808) 851-7311 License No. ABC-14956

Web: www.kdconstruction.com

November 6, 2001

VIA FACSIMILE; ORIGINAL VIA U.S. MAIL

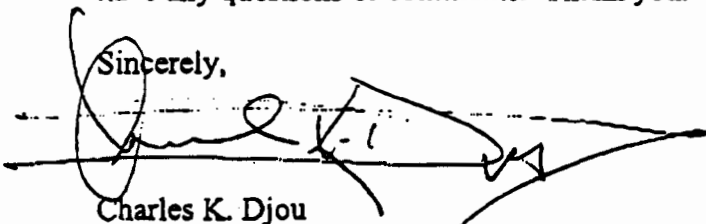
Chief Procurement Officer  
City and County of Honolulu  
Division of Purchasing  
530 South King Street  
Honolulu, Hawaii 96813  
Attn.: Ms. Carol Takahashi

Re: **Request for Administrative Hearing on Bid Protest Decision  
Laie Wastewater Collection System Expansion, Phase I  
Job No. W9-00, Contract No. F-99412**

Dear Ms. Takahashi,

KD Construction, Inc., a Hawaii corporation ("KD"), is in receipt of your letter dated November 5, 2001, denying KD's reconsideration of its pending bid protest. This letter hereby notifies you that KD intends to file a request for administrative hearing on this matter later this week. Please do not hesitate to contact me at (808) 478-0006 if you have any questions or comments. Thank you.

Sincerely,



Charles K. Djou  
General Counsel  
KD Construction, Inc.

cc: Mr. Daniel G. Ching, President, KD Construction, Inc. (via email)  
Wesley Ikeda, counsel, Plumbers' Union  
Mr. Michael Hiu, City Purchasing Division  
Ms. Amy Kondo, Deputy Corporation Counsel  
Mr. Eric H. Tsugawa  
Mr. Stephen M. Teves

**EXHIBIT E**

**APPENDIX "E"**



**RCI CONSTRUCTION GROUP**

PACIFIC DIVISION

General Contractors & Engineers

PURCHASING DIV  
BUDGET & FINANCE SVCS  
C&C OF HONOLULU

October 2, 2001

'01 OCT -3 A9:57

Via Facsimile: (808) 523-4847

Mr. Mike Hiu  
Division of Purchasing  
City and County of Honolulu  
530 South King Street, Room 115  
Honolulu, HI 96813

Re: *Laie Wastewater Collection System Expansion, Phase I*  
*Job No. W9-00, Contract No. F-99412*

Dear Mr. Hiu:

Confirming our telephone conversation of September 28, 2001, RCI intends to utilize a C-37 subcontractor to do the plumbing work on the subject project.

At the time of the bid, RCI received only one proposal for the plumbing work, which was impossible to analyze because the plumbing price was combined with other elements of the project (such as the fuel oil piping work). Additionally, the subcontractor's proposal amount for the plumbing work was \$10,000.00 more than the fair market value of the plumbing work.

RCI intends to negotiate with the plumbing subcontractor after the award. We expect the value of the subcontract to be somewhere between RCI's estimate (\$9,000.00) and the subcontractor's estimate (\$19,000.00). In any case, the value of the plumbing work will be substantially less than 1% of the total bid amount.

If you have any questions, please give me a call.

Sincerely,

Ralph E. Raymond  
RCI Construction Group/Pacific

Approved: pursuant to HRS 103D-302

Director of Budget and Fiscal Services *2/24*  
*du*

**APPENDIX "F"**



# CONFIRMATION BID PLUMBING, MECHANICAL AND SHEET METAL

Firm: VARIOUS GENERALS Date: 08/30/2001  
LAJE WASTEWATER COLLECTION SYSTEM EXPANSION  
Project: PHASE I, OAHU, JOB NO. W9-00 1-2141

This bid complies with the requirements of the plans and specifications of the above named job, including all known alternates and addenda Nos. 1, subject to the standard conditions below which will be included by reference in any subcontract; and is complete per

SECTION	DESCRIPTION	PRICE
13413	ABOVE GROUND STORAGE TANK	\$72,898.00
15400	PLUMBING	\$19,379.00

**FAXED**  
**AUG 30 2001**  
From Hawaii Office

### SEPARATE QUOTE

1.	EMERGENCY GENERATOR RADIATOR PIPING (PIPING TO BE HARD DRAWN TYPE L COPPER PIPE, NO INSULATION)	\$5,014.00
2.	EMERGENCY GENERATOR EXHAUST PIPING	\$53,929.00
<b>TOTAL</b>		<b>\$151,220.00</b>

STANDARD NORMAL EXCLUSIONS APPLY

## APPENDIX "G"

The following "normal exclusion items" are excluded from the foregoing section bid:

- |  |   |
|--|---|
| (a) Excavation, Backfill, and dewatering (or Shoring if required).   | (g) Painting.   |
| (b) Concrete Work of Any Description including but Not limited to pads, Reaction Blocks, Curbs, Equipment Bases Etc. | (h) Power Wiring, including final connection to mechanical equipment. |
| (c) Manholes, Frames, Covers, Catch Basins, and Gratings.  | (i) Cesspools, Septic Tanks, Crawlspaces, and Drywells.               |
| (d) Cutting, Patching, Grouting, and Concrete Coring.  | (j) Formed Openings in Structural Walls and Slabs.                    |
| (e) Hoisting.  | (k) Board of Water Supply Pro-Rata Charge of Water Development Cost.  |
| (f) Asbestos Removal.  | (l) Fire Stopping.  |

NOTE: ALL BOARDS OF WATER SUPPLY FEES AND CHARGES ARE NOT INCLUDED.  
NOTE: SEWER ASSESSMENT COST IS NOT INCLUDED.

PLEASE DIRECT ALL INQUIRES REGARDING THE ABOVE

This bid is good for only 60 days.

TO: TYRUS KAGAWA 348-6128

OWNER OR GENERAL CONTRACTOR

SHEET METAL OR MECHANICAL CONTRACTOR  
OAHU PLUMBING & SHEET METAL, LTD.  
P.O. BOX 17010 - 938 KOHOU STREET  
HONOLULU, OAHU, HAWAII 96817  
LICENSE NO. BC5325

(COMPANY NAME)

PAGE 1 OF 1

By: \_\_\_\_\_ (TITLE)

By: George T. Kyan  
GEORGE T. KYAN, SENIOR VICE PRESIDENT

Accepted Date: \_\_\_\_\_

### STANDARD CONDITIONS

a. The Subcontractor shall submit to the general contractor applications for payment at such reasonable times as to enable the general contractor to apply for and obtain payment from the owner. Payment for materials and/or installation shall be made with same retainages as on main contract between owner and general contractor and shall be paid, for work to date of last progress billing date, as approved by architect, within five days after general contractor has received his payment for such progress billing. Final payment shall be made within five days after general contractor has received his final or complete payment involving Subcontractor's portion of work, notwithstanding any delay of other trades; but in any event such final payment shall be made by the general contractor to the Subcontractor no later than the day preceding the expiration of the lien period. If the contract between owner and general contractor permits payment for materials delivered to the jobsite, or to satisfactory storage facilities, Subcontractor may invoice for materials as delivered and receive payment therefore as outlined above. In the event that a payment is not made on or before the day that is due, the general contractor agrees to pay interest on the unpaid balance at the rate of 18% per annum from the due date