

Reading

DEPARTMENT 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-2002-7
)	
FRANK COLUCCIO CONSTRUCTION)	HEARINGS OFFICER'S
COMPANY,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND DECISION
)	
vs.)	
)	
DEPARTMENT OF BUDGET AND)	
FISCAL SERVICES, CITY AND)	
COUNTY OF HONOLULU,)	
)	
Respondent.)	
)	
and)	
)	
WESTCON MICROTUNNELING, INC.,)	
)	
Intervenor/Respondent.)	
)	

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

I. INTRODUCTION

On April 29, 2002, Frank Coluccio Construction Company ("Petitioner"), filed a request for an administrative hearing to contest the City and County of Honolulu, Department of Budget & Fiscal Services' ("Respondent"), April 23, 2002 denial of Petitioner's protest dated February 12, 2002, in conjunction with an invitation for bids ("IFB") for Job W8-01 Kalaheo Avenue Reconstructed Sewer-Phase 1, Kailua, Oahu, Hawaii ("Project"). On April 30, 2002, a Notice of Hearing and Pre-Hearing Conference was issued

and duly served on the parties. On May 6, 2002, the parties filed a stipulation allowing Westcon Microtunneling, Inc. ("Westcon"), to intervene in this proceeding.

On May 10, 2002, Westcon, in two separate motions, requested summary judgment as to the following issues: (1) whether Westcon had an obligation to list second-tier subcontractors and (2) whether Petitioner's objection to the funding of the Project was timely. Both motions were heard on May 17, 2002 and denied by orders entered on May 22, 2002.

On May 29, 2002, the hearing commenced with Ken T. Kuniyuki, Esq. appearing on behalf of Petitioner; Amy R. Kondo, Esq. appearing for Respondent; and Charles W. Gall, Esq. and Nathan H. Yoshimoto, Esq. appearing for Westcon. The hearing reconvened on May 31, 2002 and was concluded on that date.

At the conclusion of the hearing, the parties requested and were granted leave to file written closing arguments. Additionally, the Hearings Officer directed the parties to submit proposed findings of fact and conclusions of law. Accordingly, on June 13, 2002, Petitioner filed its closing brief. On June 20, 2002, Respondent and Westcon filed their closing briefs and on June 25, 2002, Petitioner filed its reply brief. On July 2, 2002, the parties submitted proposed findings and conclusions.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision. The parties' proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority or were otherwise irrelevant.

II. FINDINGS OF FACT

1. On or about October 18, 2001, Respondent issued an IFB, seeking sealed bids for the Project. The Project involved the reconstruction of a sewer pipeline using a microtunneling method. The Project also called for sewer connector lines constructed by open-cut trenching, jet grouting and a number of other items of work.

2. The Project also required the relocation and chlorination of 12 watermains and the relocation of two traffic loop detectors. The watermains and traffic loop detectors had to be removed and relocated before work on the Project could be completed.

3. Under the IFB, the Project was divided into five sections including a Basic Bid section and four additive sections.

4. The IFB, at page 6 of the Special Notice to Bidders, paragraph 13, provided that:

The basis of the award will be on the comparison of two criteria: 1) the Basic bid price (only those bidders with a basic bid price below \$12 million, including any adjustments due to the Hawaii Products Preference, will qualify for further consideration); and 2) the TOTAL SUM bid for all items contained in the Proposal, which shall be considered to be the total sum of the actual or corrected amounts bid upon each item, as the case may be. The low bidder shall be considered the bidder that meets the aforementioned criteria No. 1 and the lowest TOTAL SUM bid for the entire project, (Basic Bid, Additive No. 1, Additive No. 2, Additive No. 3 and Additive No. 4). In the event, that all bidders exceed the Basic Bid of \$12 million, the City reserves the right to negotiate with the bidder who submits the lowest TOTAL SUM BID (including Basic Bid and Additive No. 1, 2, 3 & 4) for all the items contained in the Proposal. Additive work may be incorporated into the contract in the order listed in the Proposal, subject to the availability of additional funds, at the bid prices submitted.

5. According to the terms of the IFB, the low bidder would be determined by having a Basic Bid price below \$12 million and the lowest total sum bid for the Project, including the Basic Bid and the four additives. The IFB provided that the additive work may be incorporated into the contract subject to the availability of additional funds.

6. The IFB at P-90 also provided in relevant part:

Section 103D-302, HRS, provides that all bids shall 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 construction and the nature and scope of work to be performed by each joint contractor or subcontractor. Construction bids that do not comply with this requirement may be accepted if the Contracting Officer or the HAR 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 percent of the total bid amount. In all other cases, bids which do not comply with this requirement shall be rejected.

7. On December 5, 2001, representatives from Petitioner and Westcon attended a mandatory pre-bid conference held by Respondent's Department of Design & Construction. During the conference, Petitioner and Westcon were informed that only \$14 million in funding was presently available for the Project. At that time, Respondent estimated that the Project would cost approximately \$31,500,000.00.

8. On February 7, 2002, RHS Lee, Inc. ("RHS Lee"), submitted a bid proposal to Westcon concerning a portion of the work required on the Project. Westcon relied on RHS Lee's bid proposal in the amount of \$9,039,033.00 in preparing its bid in response to the IFB.

9. On February 7, 2002, bids in response to the IFB were submitted by Petitioner and Westcon, respectively. No other bids were received by Respondent.

10. Petitioner's bid consisted of the following amounts: Basic Bid - \$11,282,053.00; Additive No. 1 - \$2,489,280.00; Additive No. 2 - \$3,086,066.00; Additive No. 3 - \$14,308,831.00; Additive No. 4 - \$2,194,645.00. The total sum of Petitioner's bid was \$33,382,875.00.¹

¹ Petitioner's bid stated a basic bid price of \$11,282,053.00 and a total sum bid price of \$33,360,875.00. However, upon further evaluation of Petitioner's bid by Respondent, the corrected total sum bid was determined to be \$33,382,875.00.

11. Westcon's bid consisted of the following amounts: Basic Bid – \$11,950,341.00; Additive No. 1 – \$2,175,832.43; Additive No. 2 – \$2,728,606.00; Additive No. 3 – \$13,019,033.00; Additive No. 4 – \$2,196,525.00. The total sum of Westcon's bid was \$32,070,337.43.

12. On February 7, 2002, the designated bid opening date, Respondent opened the sealed bids, tabulated them and determined that the apparent low bid had been submitted by Westcon in the sum of \$32,070,337.43.

13. Petitioner was the second lowest bidder with its bid of \$33,382,875.00. The difference between the two bids is \$1,312,537.57.

14. In its bid, Westcon identified RHS Lee as one of its subcontractors and described the nature and scope of RHS Lee's work on the Project as, "[o]pen cut sewer/manholes Base 1, 2, 3".

15. Both Westcon and RHS Lee hold "A" general engineer contractor's licenses. Neither Westcon nor RHS Lee possesses a "C-13" electrical contractor's license or a "C-37d" chlorination contractor's license.

16. Westcon's bid did not list or otherwise identify in its bid an electrical subcontractor possessing a "C-13" specialty license or a chlorination subcontractor with a "C-37d" specialty license.

17. The relocation of the two traffic loop detectors involves electrical contracting activity for which a "C-13" specialty license is required.

18. The relocation of the watermains requires that the relocated watermain lines be chlorinated. A "C-37d" chlorination contractor is required to perform the chlorination work.

19. On February 12, 2002, Petitioner protested the contemplated award of the contract for the Project to Westcon.

20. On February 22, 2002, RHS Lee wrote to Westcon and indicated that both the electrical work and chlorination work required on the Project was included in its February 7, 2002 bid proposal to Westcon.

21. On March 5, 2002, RHS Lee wrote to Westcon and indicated that RHS Lee would use Hawaiian Chlorination, Inc. as its sub-subcontractor to do the chlorination work on the Project at a unit price of \$750.00 per section for a total cost of approximately \$6,300.00.

22. On March 13, 2002, RHS Lee wrote to Westcon indicating that RHS Lee would engage Commercial Electric as its sub-subcontractor to perform the necessary electrical work on the Project.

23. The bids from Hawaiian Chlorination, Inc. and Commercial Electric were solicited by RHS Lee following the filing of Petitioner's protest on February 12, 2002.

24. By letter dated April 23, 2002, Respondent denied Petitioner's protest. On April 29, 2002, Petitioner filed a Request for Administrative Review.

25. The proposed contract for the entire Project has not been awarded.

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.

Hawaii Revised Statutes ("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 this case, the Hearings Officer must determine whether the awarding of a partially-funded contract under the circumstances of this case violates HRS Chapter 103D or

its implementing rules (“Code”); and whether Westcon’s bid violates the subcontractor listing requirement set forth in HRS §103D-302 and is therefore nonresponsive to the IFB².

B. Awarding of Partially-Funded Contract

Petitioner’s protest was based in part on the allegation that the Code prohibits Respondent from entering into an “under-funded contract” with Westcon. Both Respondent and Westcon counter that this protest is untimely and that, in any event, the awarding of such a contract does not violate the Code.

1. Timeliness of Petitioner’s Protest.

According to Westcon and Respondent, Petitioner knew from the IFB that: (1) the contract would be awarded to the bidder who submitted a Basic Bid below \$12 million and the lowest total sum bid for the Project, and (2) the additive work would be incorporated into the contract subject to the availability of additional funds. Westcon and Respondent also assert that Petitioner had been informed at the December 5, 2001 pre-bid meeting that Respondent only had \$14 million in funds available at that time. Thus, Westcon and Respondent argue that by the time of the pre-bid meeting, Petitioner had sufficient information to protest the awarding of the contract contemplated for the Project. However, because Petitioner’s protest was not filed until February 12, 2002, more than five working days after the pre-bid meeting and following the deadline for the receipt of bids, Westcon and Respondent urge the Hearings Officer to conclude that the protest is untimely.

HRS §103D-701 provides in pertinent part:

§103D-701 Authority to resolve protested solicitations and awards. (a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. A protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working

² In its request for administrative review, Petitioner also charged that Respondent unlawfully considered changing the scope of work to allow night-time work. However, at the May 6, 2002 pre-hearing conference, Petitioner agreed to withdraw that claim.

days after the posting of award of the contract either under section 103D-302 or 103D-303, as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.

The foregoing section requires that protests be filed within five working days after the aggrieved person knew or should have known of the facts giving rise to the protest and prior to the date set for the receipt of bids if the protest is based upon the content of the solicitation. Westcon and Respondent are of the position that Petitioner knew or should have known of the basis for its protest on the under-funding issue following the December 5, 2001 pre-bid meeting when Petitioner was informed that only \$14 million was presently available for the Project. Indeed, if the evidence was sufficient to establish that Petitioner knew or should have known that Respondent *intended* to award the contract for the Project with only \$14 million in available funding, Petitioner would have been required to bring its protest within 5 working days thereof. The Hearings Officer, however, cannot conclude from the evidence presented that Petitioner knew or reasonably should have known, as of the December 5, 2001 pre-bid meeting, of Respondent's intention to award an under-funded contract. On the contrary, according to the evidence, Respondent's intent to award a partially-funded contract was anything but certain at the pre-bid meeting.

HRS §103D-309 requires Respondent, through its director of finance, to certify that there are sufficient funds to cover the contract before awarding the contract. Hawaii Administrative Rules ("HAR") §3-122-102 also requires a certification prior to the award of the contract where only a portion of the total funds required for the contract is available. No certification had been issued in this case prior to the pre-bid meeting.³ Absent a certification from the director of finance, the Hearings Officer cannot conclude that Petitioner had sufficient information to file its protest following the December 5, 2001 pre-bid meeting unless the evidence establishes that following the meeting, Petitioner knew or

³ According to the evidence, the Director of the Dept. of Budget and Fiscal Services' certification of available funding does not occur until just before the signing of the contract and that although a preliminary certification had been made in this case by a fiscal officer with Respondent's Department of Design & Construction, the fiscal officer would only certify that "there is a fund source and that some funds are available." (Testimony of Michael Hiu at Page 281).

had reason to know that there would be no additional funding for the contract prior to the awarding of the contract and that Respondent nevertheless intended to award the contract for the entire Project.⁴

Franco Coluccio, Petitioner's general manager, testified:

Q. Do you remember what occurred at that meeting in that regard?

A. Someone from the crowd asked what is the engineer's estimate to build the project. And the city's response or representative's response was only or about 31 and a half million dollars.

Q. Were there any questions about - - other questions about the funding?

A. Yes. 'Cause then obviously the next question that followed that was how much money do you folks have? *And the response was on or around 14 million dollars with intentions to get the balance soon. Whatever that meant.*

(Emphasis added). Testimony of Franco Coluccio at Pages 13-14.

Glen Okita, a project engineer, also alluded to the uncertainty surrounding the funding of the Project in his testimony:

Q. But you could control the timing?

A. Not really. We don't know when a protest is going to come out. We don't know how busy budget and fiscal service is as far as awarding contracts. *And we don't know how much funds we are going to get.*

(Emphasis added). (Testimony of Glen Okita at Page 245).

This uncertainty remained at least through the February 7, 2002 bid opening. Apparently as a result of the continuing uncertainty surrounding the funding of the contract, Petitioner, through its general manager, called Mr. Okita on February 8, 2002. Mr. Okita

⁴ Absent such information, it would not be unreasonable for Petitioner to believe, for instance, that there was a possibility that the balance of the funds necessary to cover the entire contract would be obtained prior to the awarding of the contract particularly since Respondent's certification of available funding does not occur until just before the execution of the contract (see footnote 3).

acknowledged that only \$14 million was available for the Project “but if you need it in writing you have to contact finance.” (Testimony of Franco Coluccio at Pages 123-124). As such, Petitioner wrote to Respondent to inquire as to “the total amount of funds presently available for the above project and exactly what work those funds are meant to cover.”⁵ Although the record is unclear as to whether a response to that letter was ever received by Petitioner⁶, there is no dispute among the parties that the protest was submitted on February 12, 2002, some 5 days after the bid opening.

Based on the evidence, the Hearings Officer cannot find that following the pre-bid meeting, Petitioner knew or should have known that there would be no additional funding for the contract prior to the awarding of the contract and that Respondent nevertheless intended to award a partially-funded contract. The Hearings Officer therefore concludes that Petitioner was not required to bring its protest within 5 days of the December 5, 2001 pre-bid meeting.

Nor was Petitioner required to protest prior to the date set for the receipt of the bids. HRS §103D-701 requires that a protest based on the *content of the solicitation*⁷ be submitted prior to the date set for the receipt of offers. This requirement presumes that the protestor will have sufficient knowledge of the contents of the bid documents soon after its issuance and provides governmental agencies with the opportunity to correct deficiencies in those documents early in the solicitation process in order to “minimize the disruption to procurements and contract performance.” *Clinical Laboratories of Hawaii v. City & County of Honolulu, PCH 2000-8 (October 17, 2000)*. Petitioner’s protest, however, was not limited to the contents of the bid documents. The protest was also based on information concerning the extent of funding that would actually be available for the Project – information that was

⁵ Mr. Coluccio testified that “Exhibit 7 is a letter I wrote to the city inquiring about what exactly was the amount of money that they had in hand or certified for this project at that time.” (Testimony of Franco Coluccio at Page 15).

⁶ There is no letter from Respondent among the exhibits admitted into evidence that responds directly to Petitioner’s February 8, 2002 letter prior to the filing of the protest.

⁷ HAR §3-120-2 defines “solicitation” as “an invitation for bids, a request for proposals, a request for quotations, or any other *document* issued by the State for the purpose of soliciting bids or proposals to perform a state contract.” (emphasis added).

not included in the bid documents. Thus, the proviso in HRS §103D-701(a) concerning protests based upon the contents of a solicitation is inapplicable to the case at hand.

2. Certification for Partial Funding.

Petitioner's protest charges that Respondent cannot award a contract that is only partially-funded unless Respondent can show, among other things, that the awarding of such a contract to Westcon for the entire Project will result in significantly more favorable contract terms and conditions to Respondent than the awarding of separate contracts for the various sections of the Project solicited as sufficient funds become available. HRS §103D-309(a) provides in relevant part that:

[c]ontracts awarded pursuant to section 103D-302, 103D-303, or 103D-306, shall neither be binding nor have any force and effect of law unless the comptroller, the director of finance of a county . . . endorses thereon a certificate that there is an appropriation or balance of an appropriation over and above all outstanding contracts, sufficient to cover the amount required by the contract . . .

HAR §3-122-102(c) provides that:

[n]otwithstanding the requirement for certification set forth above, certification of a portion of the total funds required for a contract may be permitted *when an immediate solicitation will result in significantly more favorable contract terms and conditions to the State than a solicitation made at a later date*; provided that certification for partial funding shall be permitted only if the respective chief financial officer, as the case may be, states in the certificate that the availability of funds in excess of the amount certified as available shall be contingent upon future appropriations or special fund revenues.

(Emphasis added).

In enacting the Code, the Legislature sought to establish a comprehensive code that would (1) provide for fair and equitable treatment of all persons dealing with the procurement system; (2) foster broad-based competition among vendors while ensuring accountability, fiscal responsibility, and efficiency in the procurement process; and (3) increase confidence in the integrity of the system. *Standing Committee Report No. S8-93*,

1993, Senate Journal at 39; HAR §3-120-1. The requirement in HRS §103D-309 that a procuring agency certify that sufficient funds are available to cover the contract prior to the awarding of the contract was presumably based upon these objectives. Requiring that adequate funding be available to cover the entire contract before a public agency is permitted to enter into the contract obviously promotes fiscal integrity. The requirement also fosters open, broad-based competition when it leads a procuring agency to subject each phase of a multi-phase project to the competitive bidding process.

Similarly, the exception in HAR §3-122-102(c) to the HRS §103D-309(a) certification requirement must also be read in light of these legislative objectives. In promulgating the narrow exception in HAR §3-122-102(c), the Procurement Policy Board presumably desired to avoid depriving the agency of the ability to award a partially-funded contract where such a contract *will* result in *significantly* more favorable contract terms and conditions to the agency than subsequent solicitations. Thus, in order to award the contract contemplated in this case, Respondent must show that the contract will be significantly more favorable than contracts obtained from subsequent solicitations.⁸ Mere speculation over the advantages of a partially-funded contract and disadvantages of subsequent solicitations is not enough.

Both Respondent and Westcon contend that the awarding of the partially-funded contract to Westcon for the entire Project would be significantly more favorable to Respondent than the soliciting and awarding of separate contracts in the future. In support of this contention, Respondent and Westcon point out that the Project is considered a high priority in view of the fact that the existing line is in poor condition and a section has already collapsed; that Respondent does not want to do the entire Project under three different contracts since three different contractors would have to mobilize the same pieces of equipment driving up the costs of the Project; that it would give the contractor already on site an unfair advantage over the other bidders because the contractor's equipment would already be mobilized, thus opening up a possible bid protest; that it would be impractical because

⁸ Where the protestor presents evidence sufficient to prove that the procuring agency intends to award a contract notwithstanding that the contract will only be partially funded, it is incumbent upon the agency to establish its authority to award such a contract under HAR §3-122-102(c).

there may be field changes on alignment and according to Respondent and Westcon, a field change in the first contract would lead to problems in the second and third contracts; and that it would be a nuisance to the neighborhood to have several contractors working on the Project at the same time.

There was little evidence, however, to establish that any additional mobilization costs that might result from the solicitation of separate, fully-funded contracts would result in a significant increase in costs to Respondent.⁹ Similarly, the possibility that separate solicitations would provide the initial contractor with an unfair advantage over subsequent bidders because the contractor's equipment would already be mobilized, was not established by the evidence.¹⁰ Equally speculative are the arguments that separate contracts would lead to the possibility of several contractors working on the Project at the same time creating a nuisance in the surrounding neighborhood, and that having different contractors working on separate sections of the Project would make addressing any alignment problems impractical. Moreover, it was not made clear from the evidence how the solicitation of separate, fully-funded contracts would delay the commencement of work on the Project, particularly since Respondent has sufficient funds to commence the work involved in the Basic Bid and first additive. Based on the circumstances presented here, the Hearings Officer concludes that the evidence is insufficient to establish that the partially-funded contract contemplated here for the entire Project would be significantly more favorable than separate, fully-funded contracts for the various sections of the Project.

C. Listing of Subcontractors.

1. Electrical/Chlorination Work Required on the Project.

Petitioner also alleges that Westcon's bid is nonresponsive because it failed to list an electrical subcontractor and a chlorination subcontractor. According to Petitioner, electrical and chlorination work are necessary parts of the Project.

⁹ Even if the overall mobilization costs increase as a result of separate solicitations, it does not necessarily follow that Respondent's costs to complete the Project would also increase since those costs would still be subject to the competitive bidding process.

¹⁰ This argument also ignores the obvious fact that the awarding of a partially-funded contract to one contractor would completely eliminate competitive bidding on the other sections of the Project.

The parties are in general agreement that 12 watermain lines must be relocated as part of the Project and that the relocated waterlines must be chlorinated by a licensed chlorination contractor. On the other hand, the parties disagree as to the extent of the electrical work required. Petitioner argues that the services of an electrical contractor is required to provide power to the contractors' field trailers, prepare electrical plans required by various utilities, install power drops and electric generators, provide temporary power to residences and businesses during power outages, relocate traffic detector loops, and repair and trouble-shoot electric pumps and other equipment. Aside from the relocation of two traffic loop detectors however, Westcon and Respondent contend that these items of work are speculative and will not be necessary because of the means and methods that will be employed by Westcon.¹¹ Upon due consideration of the evidence, the Hearings Officer must conclude that the relocation of two traffic loop detectors is the only electrical work required on the Project.

2. Listing of Second-Tier Subcontractors.

Westcon claims that it did not list an electrical and chlorination subcontractor because it did not intend to engage any of those subcontractors. Rather, Westcon contends that an electrical and a chlorination subcontractor will be retained by RHS Lee, one of the subcontractors Westcon listed in its bid¹², and that Westcon was not required to list second-tier subcontractors. HRS §103D-302(b) 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

¹¹ For instance, the evidence indicated that Westcon intends to rent existing office space in an adjacent shopping center rather than utilize a trailer as a field office.

¹² Generally, a listed subcontractor may further subcontract its work unless the solicitation provides otherwise. *Matter of: E.J. Murray Company, Inc.; W.M. Schlosser Company, Inc., 84-1 U.S. Comp. Gen. Proc. P3316.*

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).

The primary purposes of the listing requirement are to prevent bid shopping and bid peddling.¹³ Notwithstanding these purposes, a plain reading of HRS §103D-302(b) makes clear that there is no requirement that bidders list subcontractors below the first tier. Rather, the listing requirement in HRS §103D-302(b) is aimed entirely at preventing a *general contractor* from bid shopping following the awarding of the contract by requiring that the bid specify all of the subcontractors¹⁴ to be *engaged by the general contractor*. In other words, the requirement was written to encompass only those with whom the bidder on the general contract was in privity and adopted only to mitigate the practice of bid shopping by general contractors.¹⁵ These considerations lead the Hearings Officer to conclude that Westcon was not required to list those subcontractors its listed subcontractors intended to engage.¹⁶

Petitioner asserts that the Hawaii Supreme Court, in a recent opinion, held that specialty contractors must be specifically identified on public procurement projects. *Okada Trucking Co. v. Board of Water Supply*, 97 Haw. 450 (2002). *Okada Trucking* however, dealt with the issue whether a bidder had to list a specialty contractor it intended to engage as a *subcontractor* pursuant to HRS §103D-302(b). It did not involve and does not require the

¹³ 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).

¹⁴ "Subcontractor" is defined "as any person who enters into an agreement with the contractor to perform a portion of the work for the contractor. HAR §3-120-2.

¹⁵ Although bid shopping may occur at the subcontractor level, the Legislature apparently recognized that the practice is more common at the general contractor level and that it was neither practical nor desirable to attempt to impose a bid shopping prohibition below that level. See generally, *Mechanical Constructors, Inc.*, 1978 U.S. Comp. Gen. LEXIS 2868.

¹⁶ Nevertheless, the Hearings Officer is mindful that the purpose of the subcontractor listing requirement may be frustrated where a bidder retains control over a listed subcontractor or more specifically, over the selection of second-tier subcontractors who will actually do the work. In that event, the bid may be rejected as nonresponsive.

listing of second-tier subcontractors. *Okada Trucking* is therefore inapposite to the case at hand.

3. Nature and Scope of Subcontractor's Work.

But while bidders are not required to list second-tier subcontractors, HRS §103D-302(b) does require that bidders disclose the nature and scope of the work to be performed by its listed subcontractors. This disclosure is necessary to prevent a bidder from listing more than one subcontractor for the same work, then following the award of the contract, bid shop among those listed. By requiring the bidder to (1) disclose in its bid the work to be performed by each subcontractor and (2) use the listed subcontractor to perform only the work previously disclosed in the bid, this problem is avoided.¹⁷ For this reason, the failure to adequately and unambiguously disclose the nature and scope of the work to be performed by each subcontractor may render a bid nonresponsive regardless of whether there is evidence of bid shopping.¹⁸ These principals also dictate that a subcontractor can only subcontract work that is included within the nature and scope of its work as disclosed in the bid.

A problem may arise where, as here, it is unclear whether certain items of work are included in the nature and scope of a subcontractor's work as described in a bid. In that event, the Hearings Officer must look to the plain language of the disclosure and construe any ambiguity against the bidder.¹⁹

In this case, Petitioner takes the position that neither the electrical work nor the chlorination work required on the Project is within the nature and scope of RHS Lee's work as disclosed in Westcon's bid. Westcon and Respondent counter that the electrical and

¹⁷ The substitution of a subcontractor, however, may be justifiable where, for instance, the listed subcontractor fails or refuses to execute a written contract, becomes bankrupt or insolvent, or fails to perform the subcontract.

¹⁸ This is so because the Legislature, rather than rely on after-the-fact inquiries into bid shopping and bid peddling, sought to establish a process that would reduce the opportunity to bid shop or bid peddle and in turn, avoid the delays and expenses of an investigation into the existence of those practices in a given case. As such, strict compliance with the subcontractor listing requirement is required.

¹⁹ An ambiguous disclosure would also allow a low bidder to pressure a listed subcontractor either to perform work that was not included in the subcontractor's bid proposal or risk having the job awarded to another bidder (and consequently to another subcontractor).

chlorination work are “incidental” to and therefore included in “Open cut sewer/manhole” work. According to this theory, because the relocation of the traffic loop detectors, and the relocation and chlorination of the relocated watermain lines are necessary in order to perform the sewer and/or manhole work, the electrical and chlorination work fall within RHS Lee’s scope of work as disclosed in the bid.

While it may be true that the relocation of the traffic loop detectors and the chlorination of the relocated watermain lines are necessary prerequisites to the sewer and/or manhole work, it does not necessarily follow that the work must be performed by RHS Lee. As Petitioner correctly notes in its reply to Westcon’s and Respondent’s closing brief, “[m]erely because one item of work has to be done before another item or work does not equate to the first item being included in the second item.” It is incumbent upon the bidder to adequately describe the nature and scope of its subcontractors’ work.

Based on these considerations, the Hearings Officer cannot conclude from a plain reading of Westcon’s bid that the electrical and chlorination work are included in the “open cut sewer/manhole” work to be performed by RHS Lee. Accordingly, RHS Lee is prohibited from subcontracting out that work. Moreover, because Westcon did not list an electrical and a chlorination subcontractor in its bid, its bid must be deemed to be nonresponsive unless it can establish that (1) acceptance of the bid is in the best interest of Respondent and (2) the value of the work is equal to or less than one percent of the total bid amount. *HRS §103D-302*.²⁰

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that this case be remanded²¹ to Respondent with the following instructions:

²⁰ There has been no determination by Respondent that acceptance of Westcon’s bid would be in Respondent’s best interest and that the value of the electrical and chlorination work is equal to or less than one percent of the total amount of Westcon’s bid.

²¹ In determining an appropriate remedy, the Hearings Officer looks to the pre-award remedies set forth in HRS §103D-706 since the contract involved here has not been awarded. HRS §103D-706 provides that where a solicitation or proposed award of a contract is in violation of the law, the solicitation or proposed award shall be cancelled or revised to comply with the law. In revising the solicitation, the Hearings Officer may remand the case to Respondent for reevaluation of the bids. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997); *Arakaki v. State, Dept. of Accounting and General Services*, 87 Haw. 147 (1998).

1. Respondent shall reevaluate the bids submitted by Petitioner and Westcon for the purpose of determining the low bidder. The low bidder shall be the bidder who submitted the lowest bid *for the sections of the Project that are or will be fully funded prior to the award of the contract.*²²

2. If Petitioner is determined to be the low bidder, Respondent shall award the contract for the funded portions of the Project to Petitioner provided that Petitioner meet all other applicable requirements of the Code and the IFB.

3. If Westcon is determined to be the low bidder, Respondent shall determine whether a waiver of Westcon's failure to comply with the subcontractor listing requirement is appropriate. That is, Respondent shall determine in writing whether (a) acceptance of Westcon's bid is in the best interest of Respondent; and (b) whether the value of the electrical work and the chlorination work are equal to or less than one percent of the total bid amount. In determining whether acceptance of Westcon's bid is in its best interest, Respondent shall consider only those portions of Westcon's and Petitioner's bids that relate to the sections of the Project that are fully funded.

4. The parties shall bear their own attorneys' fees and costs incurred in this matter.

Dated at Honolulu, Hawaii: AUG - 2 2002



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

²² According to the evidence, \$14 million is currently available and sufficient to cover the work included in the Basic Bid and Additive No. 1. Prior to the award of the contract, however, the director of finance must certify the exact amount available for the proposed contract.