



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-2002-12
	)	
FRANK COLUCCIO	)	HEARINGS OFFICER'S
CONSTRUCTION COMPANY,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Petitioner,	)	AND ORDER GRANTING
	)	INTERVENOR/RESPONDENT
vs.	)	WESTCON MICROTUNNELING,
	)	INC.'S MOTION TO DISMISS
DEPARTMENT OF BUDGET AND	)	PETITIONER'S REQUEST FOR
FISCAL SERVICES, CITY AND	)	ADMINISTRATIVE REVIEW AND
COUNTY OF HONOLULU,	)	TO RECONVENE PROCEEDINGS
	)	FILED ON SEPTEMBER 27, 2002
Respondent,	)	
	)	
and	)	
	)	
WESTCON MICROTUNNELING, INC.,	)	
	)	
Intervenor/Respondent.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING INTERVENOR/RESPONDENT WESTCON MICROTUNNELING, INC.'S MOTION TO DISMISS PETITIONER'S REQUEST FOR ADMINISTRATIVE REVIEW AND TO RECONVENE PROCEEDINGS FILED ON SEPTEMBER 27, 2002

This matter having come on for hearing before the undersigned Hearings Officer on October 16, 2002; Charles W. Gall, Esq. appearing for Intervenor/Respondent Westcon Microtunneling, Inc. ("Westcon"); Amy R. Kondo, Esq. appearing for Respondent Department of Budget and Fiscal Services, City and County of Honolulu ("Respondent"); and Ken T. Kuniyuki, Esq. appearing for Petitioner Frank Coluccio Construction Company ("Petitioner"); and after due consideration of the motion, memoranda, affidavits and exhibits

filed herein and the arguments of counsel in light of the entire record in this matter, the Hearings Officer hereby sets forth the following Findings of Fact, Conclusions of Law and Order.

I. FINDINGS OF FACT

1. On February 12, 2002, Petitioner protested the contemplated awarding of the contract to Westcon for the project known as Job W8-01, the Kalaheo Avenue Reconstructed Sewer-Phase 1, Kailua, Oahu, Hawaii ("Project"). The Project was the subject of an invitation for bids issued by Respondent on October 18, 2001.

2. The Project consisted of a Basic Bid and four additive sections.

3. On or about April 23, 2002, Respondent denied Petitioner's protest and on April 29, 2002, Petitioner filed a Request for Administrative Review of its protest and Respondent's determination of that protest with the Office of Administrative Hearings. That matter was designated as PCH-2002-7.

4. On August 2, 2002, the Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision in PCH-2002-7. The Hearings Officer remanded the case to Respondent with the following instructions:

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.*

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.

5. On August 12, 2002, Respondent and Westcon applied for judicial review of the Hearings Officer's decision in PCH-2002-7. On August 27, 2002, Petitioner filed a Notice of Partial Cross-Appeal in the First Circuit Court regarding the Hearings Officer's decision in PCH-2002-7.

6. On September 26, 2002, Respondent certified in writing that there were sufficient funds (\$16,854,779.43) available to cover Contract No. F00712 involving the work required in the Basic Bid and the first two additives of the Project.<sup>1</sup>

7. There is no electrical work involved in the Basic Bid and the first two additives<sup>2</sup>.

8. On September 26, 2002, Respondent approved a waiver of the "failure of Westcon Microtunneling Inc. to list a subcontractor for C-37d water chlorination, pursuant to Hawaii Revised Statutes Section (HRS) 103D-302(b)."<sup>3</sup>

9. By letter dated September 26, 2002, Respondent notified Westcon that Westcon would be awarded Contract No. F00712. A copy of that letter was provided to Petitioner's counsel. On the same date, a notice of the awarding of the contract to Westcon was posted by Respondent.

10. On September 27, 2002, Petitioner filed a Request for Administrative Review and to Reconvene Proceedings with the Office of Administrative Hearings to consider Respondent's waiver of Westcon's failure to list a subcontractor for the water chlorination work.

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<sup>1</sup> Respondent determined that Westcon was the low bidder with respect to the Basic Bid and additives 1 and 2 by some \$2,600.00.

<sup>2</sup> In PCH-2002-7, the Hearings Officer found that the relocation of two traffic loop detectors was the only electrical work required on the Project. The parties are in agreement that the work on the traffic loop detectors are not part of the Basic Bid or the first two additives.

<sup>3</sup> In its September 26, 2002 memorandum, Respondent stated that a "[w]aiver would be in the best interest of the City because it would permit the award of the contract, for the basic bid and additives nos. 1 and 2, at the lowest bid price. The savings to the City by this action would be \$2,619.57. The value of the chlorination work is \$2,250. This is well less than one percent (1%) of the \$16,854,779.43 bid amount.

11. On October 10, 2002, Petitioner's counsel wrote to Respondent. The letter stated in part:

FCCC's letter of September 27, 2002 served two purposes. It was an appeal to the DCCA, and secondly it was to alert the City to FCCC's disagreement or protest with respect to the City's September 26, 2002 correspondence indicating that it would award the Project contract to Westcon.

\* \* \* \*

To avoid anymore City confusion, we are hereby notifying you by way of this clarification, that to the extent (if any) required by law, please consider the transmittal of that September 27, 2002 letter to you as a protest by FCCC of all issues addressed therein. That protest was made within five days (one day actually) of the September 26, 2002 City correspondence, and therefore was timely.

12. On October 14, 2002, Westcon filed the instant motion. Respondent filed a Joinder and Petitioner filed a memorandum in opposition to the motion on October 15, 2002.

## II. CONCLUSIONS OF LAW

In bringing this motion, Westcon contends that because Petitioner did not timely protest Respondent's September 26, 2002 waiver of Westcon's failure to list a subcontractor for the water chlorination work, the Hearings Officer lacks jurisdiction to consider Petitioner's September 27, 2002 request for administrative review. Petitioner, on the other hand, argues that the waiver issue was a part of its February 12, 2002 protest which was the subject of PCH-2002-7, and that therefore Petitioner was not required to file another separate protest<sup>4</sup>.

Hawaii Revised Statutes ("HRS") §103D-709(b) provides, in part, that the "hearings officers shall have power to . . . issue a written decision *which shall be final and conclusive* unless a person or governmental body adversely affected by the decision commences an appeal in the circuit court of the circuit where the case or controversy arises under section 103D-710." (emphasis added). And pursuant to Hawaii Administrative Rules

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<sup>4</sup> Petitioner acknowledges that the filing of a timely protest is a prerequisite to the Hearings Officer's jurisdiction over this matter.

(“HAR”) §3-126-73, the hearings officer *shall issue a final decision* as expeditiously as possible after the close of the hearing. (emphasis added).

The foregoing statute and rule clearly direct the Hearings Officer to expeditiously issue a decision on a request for review made pursuant to HRS §103D-709 that disposes of the underlying protest. When issued, that decision is final and conclusive and constitutes a final adjudication of the merits of the protest. The issuance of that decision also terminates the Hearings Officer’s jurisdiction over the request for review.<sup>5</sup>

These considerations lead the Hearings Officer to conclude that Petitioner cannot rely on its February 12, 2002 protest to establish the Hearings Officer’s jurisdiction over its September 27, 2002 request for review. That protest was fully adjudicated in PCH-2002-7. Jurisdiction over that matter currently lies in the First Circuit Court.

Nor can Petitioner rely on its September 27, 2002 “Request for Administrative Review and to Reconvene Proceedings as its “protest” of the waiver issue. At a minimum, a protest must place the procuring agency on notice of the filing of a protest. Such notice is obviously necessary before the agency can take steps to resolve the protest or issue a decision upholding or denying the protest. Additionally, adequate notice of a protest is a prerequisite to the application of the stay provided by HRS §103D-701(f).

Here, Petitioner’s September 27, 2002 letter is devoid of any such notice to Respondent. Moreover, Petitioner’s letter is addressed solely to the Office of Administrative Hearings and refers to a “Request for Administrative Review and to Reconvene Proceedings.” As such, the Hearings Officer cannot conclude from a plain reading of the letter that sufficient notice of a protest was provided to Respondent.<sup>6</sup>

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<sup>5</sup> Neither HRS Chapter 103D nor its implementing rules provide the Hearings Officer with the authority to retain jurisdiction over a matter after a request for review has been decided. Moreover, there is no provision in either HRS Chapter 103D or its implementing rules that allow an aggrieved party to seek reconsideration of the Hearings Officer’s decision. This appears to be consistent with one of the underlying purposes of HRS Chapter 103D to expedite the resolution of protests. *See generally, GTE Hawaiian Telephone Co. Inc. v. County of Maui, PCH 98-6 (December 9, 1998).*

<sup>6</sup> Moreover, there was no indication that the copy of the letter sent to Respondent’s counsel was marked or otherwise referred to as a “Protest”. HAR §3-126-3(c) states in part: “To expedite the handling of protests, the envelope should be labeled “Protest” and either served personally or sent by registered or certified mail, return receipt requested, to the chief procurement officer or head of a purchasing agency. . . .” In sum, there was nothing in the letter that placed Respondent on notice of the filing of a protest.

