



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

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

HEARINGS OFFICE

In the Matter of	)	PCH-2007-3
	)	
PARSONS RCI, INC.,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND DECISION
vs.	)	
	)	
DEPARTMENT OF TRANSPORTATION,	)	
HIGHWAYS DIVISION, STATE	)	
OF HAWAII,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
KIEWIT PACIFIC CO.,	)	
	)	
Intervenor.	)	
	)	

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

I. INTRODUCTION

On June 8, 2007, Parsons RCI, Inc. ("Petitioner"), filed a request for administrative review of the Department of Transportation, Highways Division, State of Hawaii's ("Respondent") June 4, 2007 decision to deny Petitioner's May 23, 2004 protest in connection with a project designated as *North-South Road, Phase 1C, Federal Aid Project No. STP-8930(4), District of Ewa, Island of Oahu* ("Project"). Petitioner's request for administrative review was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709.

The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On June 18, 2007, Kiewit Pacific Co. (“Intervenor”) filed a motion to intervene in this proceeding. By order dated June 20, 2007, the Hearings Officer granted Intervenor’s motion.

On June 22, 2007, the matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Janice E.C. Teramae, Esq. appeared for Petitioner; Stella M.L. Kam, Esq. appeared for Respondent; and Kale Feldman, Esq. and Daniel T. Kim, Esq. appeared for Intervenor.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing arguments. Accordingly, on June 28, 2007, Petitioner filed its post-hearing brief and on June 29, 2007, Respondent and Intervenor filed their post-hearing briefs. An amendment and supplement to Petitioner’s post-hearing brief was filed on June 29, 2007.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, 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

1. In or about March 2007, Respondent issued a Notice to Bidders (“IFB”) for the purpose of soliciting bids for the construction of the Project.

2. The Project involved the construction of a new roadway and a freeway interchange in Ewa, Oahu, between Farrington Highway and the Interstate H-1 Freeway. According to the notice, the work included clearing, grubbing, demolition, grading, installation of PCC pavement, AC pavement, bridge work, curbs, gutters, sidewalks, guardrails, storm drainage system, pavement underdrain system, lighting system, landscaping and grassing, irrigation system, and erosion controls.

3. The Project also included waterproofing work for which a contractor holding a C-55 specialty contractor’s license was required.

4. The IFB provided in part:

(B) Substituting Subcontractors. Under Section 103D-302, HRS, the Contractor is required to list the names of persons or firms to be engaged by the Contractor as a subcontractor or joint contractor in the performance of the contract. Contractors may enter into subcontracts only with subcontractors listed in the proposal or with non-listed joint contractors/subcontractors permitted under Subsection 102.06 – Preparation of Proposal.

\* \* \* \*

Bids that do not comply with the above requirements may be accepted if acceptance is in the best interest of the State and the value of the work to be performed by the subcontractor or joint contractor is equal to or less than one percent of the total bid amount.

5. Bids were originally due and were scheduled to be opened on April 19, 2007. The bid opening was subsequently moved to May 17, 2007.

6. Three bids were submitted by the May 17, 2007 deadline.

7. Intervenor was the apparent low bidder, having submitted a bid of \$56,975,000.00. Petitioner was the second lowest bidder, having submitted a bid of \$57,785,329.37.

8. Intervenor did not include or otherwise identify in its bid the name of a subcontractor for the waterproofing work required on the Project<sup>1</sup>. Petitioner, on the other hand, named a subcontractor in its bid to perform “waterproofing”.

9. In preparing its bid, Intervenor was aware that the Project required waterproofing work for which a C-55 specialty contractor’s license was required. Intervenor does not possess a C-55 specialty contractor’s license.

10. By its own estimation and past experience, Intervenor believed that the value of the required waterproofing work was significantly less than one percent of the total bid amount.

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<sup>1</sup> Intervenor did list a subcontractor with a C-55 specialty contractor’s license, Harry Asato, for the “striping/markers” work. However, Intervenor readily acknowledges that it did not intend to use this subcontractor to perform the waterproofing work required on the Project.

11. Because Intervenor believed that the value of the waterproofing work was less than one percent of the total bid amount, and given the limited time it had to complete its bid prior to the May 17, 2007 deadline, Intervenor did not list a waterproofing subcontractor in its bid or solicit any proposals for the waterproofing work from any subcontractor before submitting its bid.

12. The value of the waterproofing work<sup>2</sup> required on the Project was less than one percent of Intervenor's total bid amount.

13. By letter dated May 23, 2007, Petitioner submitted a bid protest:

Parsons RCI Inc. (Parsons) was among three bidders who submitted bids for the subject work on Thursday, May 17, 2007. We learned from a review of the bids that were received by the State and available publicly that the apparent low bidder's bid was inconsistent with the requirements of the bid invitation. Specifically, the apparent low bidder does not appear to have a C-55 license for waterproofing work. Without such a license, a contractor is unqualified to perform this work with its own forces. Concurrently, the apparent low bidder failed to identify a qualified specialty subcontractor with a C-55 license to perform waterproofing.

\* \* \* \*

Please note that the C-55 license is required for waterproofing the structural concrete bridge members, barrier, and box culvert, as specified in the Special Provisions on page 503-5a in subparagraph 503.03(G) "Joints" and in many of the bid package drawings ...

\* \* \* \*

14. By letter dated May 30, 2007, Intervenor provided Respondent with a response to Petitioner's protest:

This letter is written in response to Parsons' Protest Letter dated May 23, 2007. Special Provision 108.01B and Hawaii Revised Statute 103D-302 each allows the addition of a non-specified subcontractor if "acceptance is in the

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<sup>2</sup> Although Petitioner's and Intervenor's estimates of the quantity of waterproofing work required on the Project differed slightly, the value of both quantities amounted to less than one percent of the total bid amount.

best interest of the State and the value of the work is equal to or less than one percent of the total bid amount.”

Kiewit Pacific Co. is the responsive low bidder on the referenced project by more than \$800,000, a significant savings to the State and therefore in the State’s “best interest”. Moreover, the value of the waterproofing work is significantly under one percent of the total bid amount, amounting to approximately \$5000. It is Kiewit’s intention to use a qualified person or firm with any appropriate license classification to perform the waterproofing work. Harry Asato, one of the listed subcontractors, is eligible to perform the waterproofing work under their current C-55 license classification.

\* \* \* \*

15. By letter dated June 4, 2007, Respondent denied Petitioner’s protest:

In response to your letter dated May 23, 2007, regarding the above-referenced Project, the Department of Transportation (“DOT”) has completed the evaluation of bids, and plans to meet with Kiewit Pacific Co. (“Kiewit”) as the lowest responsive bidder to review Kiewit’s escrow proposal documents.

As for your concerns regarding Kiewit’s or any of its listed subcontractor’s not possessing a valid C-55 license at the time of bid opening, the DOT has verified with the Department of Commerce and Consumer Affairs’ Contractor’s Licensing Board that Kiewit’s subcontractor Harry Asato Painting has a current C-55 license.

\* \* \* \*

16. Following the opening of the bids, Respondent determined from its own evaluation and estimate, that the value of the waterproofing work required on the Project was less than one percent of Intervenor’s total bid amount. Based on that determination and the fact that the amount of Intervenor’s bid was over \$800,000.00 less than Petitioner’s bid amount<sup>3</sup>, Respondent planned to waive Intervenor’s failure to list a waterproofing

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<sup>3</sup> Jamie Ho, Respondent’s Construction and Maintenance Branch Chief, testified that Respondent also considered fairness to other bidders and the expediency of the Project in determining whether to waive Intervenor’s subcontractor listing violation.

subcontractor once Respondent had completed its review and verification of Intervenor's escrow proposal documents and prior to the issuance of the award letter.

17. By letter dated June 8, 2007, Petitioner filed its request for administrative review of Respondent's June 4, 2007 denial of Petitioner's bid protest.

18. On June 18, 2007, Intervenor obtained a proposal from Consolidated Painting to "[a]pply Flashing Compound Waterproofing" on the Project for the sum of \$13,781.00.

### III. CONCLUSIONS OF LAW

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).

This appeal requires the Hearings Officer to determine whether Intervenor's failure to list a waterproofing subcontractor renders its bid nonresponsive to the IFB and, if so, whether Respondent may properly waive Intervenor's failure to list a subcontractor to perform the waterproofing work required on the Project. HRS §103D-302 provides in relevant part:

\* \* \* \*

b) An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to the procurement. *If the invitation for bids is for construction, it shall specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. Construction bids that*

*do not comply with this requirement may be accepted if acceptance is in the best interest of the State and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one per cent of the total bid amount.*

(Emphasis added).

Construed literally, HRS §103D-302(b) requires that bidders in a construction project include in their bids, the name of those subcontractors who are “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.” *Okada Trucking Co. v. Board of Water Supply, 97 Hawaii 544 (Hawaii App. 2001)* (“*Okada I*”). By requiring bidders to include this information in their bids, the legislature sought to prevent bid shopping and bid peddling:

Thus, the listing requirement of HRS §103D-302(b) was, in part, based upon the recognition that a low bidder who is allowed to replace a subcontractor after bid opening would generally have greater leverage in its bargaining with other, potential subcontractors (footnote omitted). *By forcing the contractor to commit, when it submits its bid, to utilize a specified subcontractor, the Code seeks to guard against bid shopping and bid peddling.*

*Hawaiian Dredging Construction Company v. City & County of Honolulu, PCH 99-6 (August 9, 1999)* (emphasis added).

Accordingly, bidders are required to disclose in their bids the work to be performed by each subcontractor it intends to engage and use the listed subcontractor to perform only the work previously disclosed in the bid. *Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002)*. “Of course, once a bidder names a subcontractor, that subcontractor cannot be substituted, unless substitution is permitted pursuant to HRS §103D-302(g). Conversely, if a bidder does not name a subcontractor for specialty work and the bidder subsequently wishes to use a subcontractor to perform such work, the bidder will similarly not be allowed to do so unless authorized to do so pursuant to HRS §103D-302(g).” *Okada I, supra*. Moreover, strict compliance with these principles is required in order to effectuate the legislature’s intent “to establish a process that would reduce the opportunity to bid shop or bid peddle” and “avoid

the delays and expenses of an investigation into the existence of those practices in a given case”. *Frank Coluccio Construction Company, supra*.

It is uncontroverted that Intervenor does not possess a C-55 specialty contractor’s license and that such a license is required in order to undertake the waterproofing work required on the Project. Nor does Intervenor dispute that it did not name in its bid a person or firm to be engaged by it as a waterproofing subcontractor for the Project. Consequently, Intervenor’s bid is nonresponsive<sup>4</sup>. *Okada Trucking Co., Ltd. v. Board of Water Supply, City and County of Honolulu, 101 Hawaii 68 (Hawaii App. 2002)*(“*Okada II*”); *CC Engineering & Construction, Inc. v. Department of Budget and Fiscal Services, City and County of Honolulu, PCH-2005-6 (Nov. 1, 2005)*.

The inquiry however, does not end here because HRS §103D-302(b) specifically authorizes a procuring agency to waive a noncompliance with the subcontractor listing requirement where acceptance is in the best interest of the State and the value of the work to be performed by the subcontractor is equal to or less than one percent of the total bid amount<sup>5</sup>.

Petitioner contends that application of the waiver would not be appropriate where, as here, the application of the waiver would allow Intervenor to retain and identify a subcontractor *after the bid submission deadline*. According to Petitioner, “such switching and substituting, after bid submission” would be “a violation of the spirit and letter of the law, in major part, because it creates the unfair advantage that the Code was intended to prevent.”

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<sup>4</sup> HRS §103D-104 defines a “[r]esponsive bidder” as a person who has submitted a bid which conforms in all material respects to the invitation for bids.

<sup>5</sup> As a preliminary matter, Petitioner asserts that Respondent should be precluded from relying on the waiver provision set forth in HRS §103D-302(b) because Respondent had not earlier raised the waiver as a defense. The evidence, however, established that around the time of Petitioner’s protest, Respondent had been planning to meet with Intervenor “to review [Intervenor’s] escrow proposal documents” and that a formal decision to waive Intervenor’s noncompliance with the subcontractor listing requirement and to award the contract to Intervenor would have been made once the documents had been reviewed and verified. Moreover, by the time of the June 18, 2007 prehearing conference, Petitioner was well aware that the waiver issue had been raised and would be addressed in this proceeding. The Hearings Officer’s June 18, 2007 Prehearing Order confirmed as much: “Based on Petitioner’s request for administrative hearing filed on June 8, 2007, Respondent’s response filed on June 15, 2007, and the discussion held at the prehearing conference, the hearing will address some or all of the following issues . . . d. Whether Respondent is entitled to rely on the *de minimus* waiver provision set forth in Hawaii Revised Statutes §103D-302(b) and, if so, whether (1) the acceptance of Kiewit’s bid is in the best interest of the State and (2) the value of the waterproofing work to be performed is equal to or less than one per cent of the total bid amount”. Under these circumstances, there is no legitimate basis to preclude Respondent from asserting the waiver in this proceeding.



In *Okada II, supra*, the Intermediate Court of Appeals reviewed, among other things, the hearings officer's determination that the Board of Water Supply ("BWS") could not waive the low bidder's nonconformance with the subcontractor listing requirement. There, the hearings officer had concluded that acceptance of the low bidder's bid would not be in the best interest of the BWS because it was contrary to the expressed purposes and principles of the procurement code. In reversing the hearings officer's decision, the court explained:

According to the hearings officer, HRS § 103D-302(b) was primarily concerned with halting "bid shopping" and, since Inter Island did not have a subcontractor listed or "lined up" at the time of bid opening, it would be able to "bid shop" if BWS were allowed to waive the subcontractor listing requirement. The hearings officer further concluded that bid shopping was contrary to public policy, and therefore, it was improper for BWS to waive the subcontractor listing requirement in those instances where the general contractor did not have its subcontractors lined up prior to bid opening.

For the following reasons, we disagree with the hearings officer's construction of the waiver statute. The plain language of HRS §103D-302(b) provides that "[c]onstruction bids that do not comply with [the subcontractor listing] requirement may be accepted" if two conditions, which were undisputably present in this case, have been met.

The legislative history of HRS §103D-302(b) reflects a clear legislative intent to vest discretion in procurement officers to waive minor violations of the subcontractor listing requirement if the value of the work to be performed by the subcontractor is equal to or less than one percent of the total amount bid, "in addition to being deemed by the policy office to be in the best interest of the public[.]"

*Id.* at 76.

And in commenting on the original version of HRS §103D-302(b), the court noted that the provision gave broad discretion to the chief procurement officer to accept bids

which did not comply with the subcontractor listing requirement and as such, was consistent with one of the stated purposes of the procurement code, to allow “for flexibility and the use of common sense by purchasing officials to implement the law in a manner that will be economical and efficient and will benefit the people of this State.” Sen. Stand. Comm. Rep. No. S8-93, Senate Journal, Sp. Sess. The court also noted that according to the legislative history underlying Act 186, which amended HRS §103D-302(b) to its present language, the amendment:

*[e]xempt[s]* a construction bid from the requirement that all joint contractors and subcontractors be named and their work described in the bid, if the value of the work to be performed by each of the joint contractors or subcontractors is equal to or less than one per cent of the total bid amount, in addition to being deemed by the [procurement] policy office to be in the best interest of the public[.]

Sen. Stand. Comm. Rep. No. 2959, in 1994 Senate Journal, at 1177 (emphasis added).

Based on these considerations, the court reasoned that:

[b]y construing HRS §103D-302(b) as precluding a procurement officer from waiving a subcontractor listing violation unless a contractor had the unlisted subcontractor lined up and contractually bound to perform the contract on bid opening date, the hearings officer essentially eliminated the flexibility afforded to the procurement officer by the statute. We will not construe a statute so that it is rendered meaningless.

Moreover, having rejected the argument that a low bidder who did not have a subcontractor listed or “lined up” at the time of bid opening would be able to “bid shop” if the subcontractor listing requirement was waived, the court in *Okada II* also rejected the hearings officer’s determination that the “evils of bid shopping” which HRS §103D-302(b) was aimed at preventing, outweighed the interest the BWS had in obtaining the lowest price for the project and, instead, concluded that “the prerequisites for BWS’s exercise of such authority were undisputably present in this case.”

In response to the contention that the application of the waiver should be limited to those situations where the failure to list a nonsignificant subcontractor in the bid

proposal was the result of an inadvertent or unintentional mistake on the part of the bidder to list an already lined up subcontractor, and it was in the best interest of the State to accept the non-complying bid proposal, the court reasoned that HRS §103D-302(g) already included a specific provision governing situations involving an inadvertent mistake in a bid submission:

HRS §103D-302(g) already includes a specific provision that governs situations involving an “inadvertent mistake” in a bid submission.

\* \* \* \*

If we were to adopt Okada’s reading of HRS §103D-302(b) as only allowing waiver of a contractor’s inadvertent mistakes that amount to less than one percent of the total amount bid we would essentially be construing HRS §103D-302(b) as superfluous, in violation of the foregoing principles of statutory construction.

Id. at 79-80.

The decision in *Okada II* is dispositive of the issues presented here. The teachings of *Okada II* dictate that a procuring agency maintains the discretion to waive a subcontractor listing violation even where the bidder intentionally fails to list a required subcontractor in its bid<sup>6</sup>, opting instead to solicit bids from subcontractors after bid opening. So long as the value of the work to be performed by the subcontractor is equal to or less than one percent of the total amount bid and the acceptance of the bid would be in the best interest of the State, the agency is authorized to waive violations of the subcontractor listing requirement. And in determining whether acceptance of the bid is in the State’s best interest, *Okada II* makes clear that the agency need not weigh the economic advantage to the State in accepting the low bid against the “evils of bid shopping”. As the court in *Okada II* recognized, this narrow exception to the subcontractor listing requirement was the result of a:

reasonable compromise that the legislature made between the State’s interest in preventing bid shopping and the competing interest of reducing the cost to government if the

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<sup>6</sup> Of course, a bidder who intentionally omits the name of a required subcontractor from its bid assumes the risk that the agency may not waive the bidder’s omission.

lowest bid for a construction job cannot be accepted because of a failure by a general contractor to list a subcontractor whose work is valued at less than one percent of the entire contract.

Id. at 80.

In this case, the evidence was sufficient to prove that the value of the waterproofing work required on the Project was less than one percent of the total bid amount. Moreover, consistent with *Okada II*, the significant cost savings to the State in accepting Intervenor's bid over Petitioner's bid<sup>7</sup> is sufficient to establish that acceptance of Intervenor's bid would be in the State's best interest. Accordingly, the Hearings Officer concludes that Respondent, in the exercise of its discretion pursuant to HRS §103D-302(b), may waive Intervenor's subcontractor listing violation that resulted from its failure to properly list a waterproofing subcontractor in its bid.<sup>8</sup>

Petitioner also complains that it is contrary to the anti-bid shopping policy of HRS §103D-302(b) for Intervenor to solicit bids for the waterproofing work before Respondent had issued a waiver of the subcontracting listing requirement to Intervenor. Nevertheless, in light of the *Okada II* decision, the imposition of a requirement that prohibits contractors from soliciting subcontractor bids until a waiver is formally issued by the procuring agency would serve no useful purpose and may delay the commencement of work.<sup>9</sup> Under *Okada II*, the *only* conditions for a waiver of the subcontracting listing requirement are (1) that acceptance of the bid would be in the best interest of the State and (2) 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. The imposition of any additional requirements by the Hearings Officer would therefore be inappropriate.

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<sup>7</sup> The acceptance of Intervenor's bid over Petitioner's bid results in a cost savings to the State in excess of \$800,000.00.

<sup>8</sup> According to Petitioner, the waiver should not be used to allow Intervenor to retain and identify a subcontractor after the bid submission deadline. However, given the fact that the court in *Okada II* specifically declined to limit the application of the waiver to inadvertent mistakes or to cases where the bidder had "lined up" a subcontractor prior to bid submission, it is difficult to envision a situation in which the waiver would be applicable under Petitioner's theory.

<sup>9</sup> According to Jamie Ho, for larger projects such as this one, any applicable waivers, including a waiver of the subcontractor listing requirement, are issued only after the contractor has submitted its escrow proposal documents to Respondent and those documents are opened and reviewed in the presence of the contractor and its subcontractors.

IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that Petitioner's request for administrative review be and is hereby dismissed and that each party bear its own attorney's fees and costs.

Dated at Honolulu, Hawaii: JUL 13 2007

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