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

In the Matter of KIEWIT PACIFIC CO., Petitioner, vs. DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, Respondent, and PARSONS RCI, INC., Intervenor.	PCH-2008-20 HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND DENYING RESPONDENT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND DENYING RESPONDENT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

I. INTRODUCTION

On December 2, 2008, Kiewit Pacific Co. ("Petitioner"), filed a request for administrative review of the Department of Land and Natural Resources, State of Hawaii's ("Respondent") November 25, 2008 decision to deny Petitioner's September 19, 2008 protest

in connection with a project designated as *Job No. B45XM82B, Maalaea Small Boat Harbor Ferry System Improvements and Job No. B45DM73A Maalaea Small Boat Harbor Sewage Pump-Out Facilities, Electrical and Other Harbor Improvements, Maalaea, Maui, Hawaii* ("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 December 8, 2008, Parsons RCI, Inc. ("Intervenor") filed a motion to intervene in this proceeding. By order dated December 12, 2008, Intervenor's motion was granted.

On December 12, 2008, Petitioner filed a motion for summary judgment and Respondent filed a motion to dismiss or in the alternative for summary judgment. A joinder in Respondent's motion was filed by Intervenor on December 17, 2008.[1]

On January 8, 2009, both motions came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Daniel T. Kim, Esq. appeared for Petitioner; Pamela K. Matsukawa, Esq. appeared for Respondent, and Lorraine H. Akiba, Esq. appeared for Intervenor.

Having considered the motions, memoranda, exhibits, affidavits and arguments presented by counsel, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and final order granting Petitioner's motion for summary judgment and denying Respondent's motion to dismiss or in the alternative for summary judgment.

II. FINDINGS OF FACT

1. On or about May 23, 2008, Respondent issued a Notice to Bidders ("IFB") for the purpose of soliciting bids for the construction of the Project.

2. The Project generally involved support facilities for an inter-island commuter ferry, including existing building renovation/replacement, water system improvements, sanitary facilities, wastewater treatment plant, electrical and lighting improvements, and supporting infrastructure.

[1] The parties were in agreement that all of the issues presented in this matter could be addressed and disposed of by way of these motions.

3. The IFB included a form to be completed by the bidder entitled, "JOINT CONTRACTORS OR SUBCONTRACTORS TO BE ENGAGED ON THIS PROJECT" ("Subcontractor Listing Form"). The Subcontractor Listing Form stated in relevant part:

> The Bidder agrees that the following is a complete listing of all joint contractors or subcontractors covered under Chapter 444, Hawaii Revised Statutes (HRS), who will be engaged by the Bidder on this project to perform the required work indicated pursuant to Section 103D-302, HRS. **The Bidder certifies that it and its listed subcontractors or joint contractors together hold all licenses necessary to complete the Work, and understands that failure to comply with this requirement may be just cause for rejection of the bid.**
>
> * * * *
>
> The Bidder shall include the complete firm name, license number and nature and classification description of each Joint Contractor or Subcontractor listed below. For projects with Alternate(s), Bidders shall fill out the supplemental schedule and list the Joint Contractor or Subcontractor who will be engaged for the respective Alternate Work. Do not include any Joint Contractor or Subcontractor previously listed.
>
> Bidders shall list only one Joint Contractor or Subcontractor per required specialty contractor's license.

4. Bidders were instructed to complete the Subcontractor Listing Form with the following information for each joint contractor and subcontractor to be engaged by the bidder in connection with the Project pursuant to HRS §103D-302: "Class", "Classification Description", "License No.", and "Complete Firm Name Joint Contractor or Subcontractor".

5. The IFB provided that, "The Department of Land and Natural Resources Interim General Conditions dated October 1994, as amended ("Interim General Conditions"), shall be made a part of the specifications." Section 3.2(g) of the Interim General Conditions provides:

> Where there is an incomplete or ambiguous listing of joint contractors and/or subcontractors the proposal may be rejected. All work which is not listed as being performed by joint contractors and/or subcontractors must be performed by the bidder with his own employees. Additions to the list of joint contractors or subcontractors will not be allowed. Whenever there is a doubt as to the completeness of the list, the bidder will be required to submit within five (5) working days, a written confirmation that the work in question will be performed with his own work force. Whenever there is more than one joint contractor and/or subcontractor listed for the same item of work, the bidder will be required to either confirm in writing within five (5) working days that all joint contractors or subcontractors listed will actually be engaged on the project or obtain within five (5) working days written releases from those joint contractors and/or subcontractors who will not be engaged.

6. Bids in response to the IFB were due and scheduled to be opened on June 27, 2008.

7. Four bids were submitted and opened on June 27, 2008.

8. Maui Master Builders, Inc. ("Maui Master Builders") was the apparent low bidder ($20, 219,073.00) followed, in order, by Goodfellow Bros., Inc. ("Goodfellow") ($20,993,100.00), Intervenor ($23,363,428.54), and Petitioner ($25,367,000.00).

9. In completing the Subcontractor Listing Form, Intervenor identified two subcontractors, SF Masonry and Shoreline Concrete, for "Masonry" and included their specialty contractor's classification ("C-31"), and contractor's license numbers. Intervenor did not provide any other information regarding the nature and scope of the work these two subcontractors were to perform on the Project.

10. Intervenor also listed Dugied Construction Inc. on the Subcontractor Listing Form as a contractor to be engaged by Intervenor to perform work on the Project and indicated that Dugied Construction Inc. held a "B" general building contractor's license.

11. Following the opening of the bids, two protests were filed by Maui Master Builders: the first on July 1, 2008 and the second on July 15, 2008. Both protests were denied on August 21, 2008. Maui Master Builders did not file a request for administrative review in connection with either protest.

12. On July 18, 2008, Nami J. Wong, Respondent's project engineer for the Project, sent an e-mail to Intervenor which stated:

> Please address the following regarding Parsons RCI Inc.'s subcontractor list by 4:30 pm on Friday, July 25, 2008.
>
> The instructions on P-14 of the bid proposal states that . . . "Bidders shall list only one Joint Contractor or Subcontractor per required specialty contractor's license." Parsons RCI Inc. has listed three subcontractors with a C-31 specialty contractor's license.
>
> Sea Engineering, Inc. is listed as having a C-31 license and doing spall repairs, but in fact Sea Engineering, Inc. has an "A" license and does not have a C-31 license.
>
> SF Masonry and Shoreline Concrete are both listed as having a C-31 license and both are listed as doing masonry work, but in fact none possess a C-31 license. Both listed subcontractors in fact have a C-31A license.
>
> Dugied Construction Inc. is listed as having a B license and doing general building and there are numerous sub-trades requiring a specialty license, but there are no such subcontractors listed. Examples would be C-42, C-21, C-51, C-22, C-37, C-52 and C-44. This violates HRS Section 103D-302, as Parsons RCI Inc. and/or Dugied Construction Inc. have not listed the proper subcontractors that hold the necessary licenses to complete the work.

13. By e-mail dated July 23, 2008, Intervenor responded to Wong's July 18, 2008 e-mail:

> In response to your request, Parsons offers the following points:

1) Parsons listed three subcontractors under the C-31 license category because we intend to have three subcontractors perform three separate and distinct scopes of work defined broadly under this category of license. Specifically, we intend to award the following work:

Sea Engineering – repair of spalled concrete associated with the existing harbor pier.

SF Masonry – placement of concrete for curbs, gutters, and sidewalks.

Shoreline Concrete – placement of PCC pavement for the parking lot.

* * * *

4) Parsons intends to subcontract all of the general building construction to Dugied Construction, Inc. who has a "B" license and is therefore qualified to perform that work. Parsons acknowledges that there are numerous subtrades needed to perform the entirety of the building construction, however, the State of Hawaii has previously determined that bidders are not required to list second tier subs. Dugied has received quotes from and will contract with numerous specialty subcontractors to execute that work in a lawful manner. It's worth noting that Parsons received separate quotes for all of the specialty work covered by C-42, C-21, C-51, C-22, C-37, C-52 and C-44 licenses and none of them exceeded the 1% criteria established [sic] the State of Hawaii for the listing of subcontractors.

* * * *

14. On September 12, 2008, Respondent rejected the bids of Maui Master Builders and Goodfellow as being nonresponsive to the IFB, and approved the awarding of the contract to Intervenor.

15. On September 12, 2008, a notice of award to Intervenor was posted and Intervenor was informed by Respondent that it would be awarded the contract.

16. On September 19, 2008, Petitioner submitted a protest of the award of the contract to Intervenor. Respondent denied the protest on November 25, 2008.

17. On December 2, 2008, Petitioner filed the instant request for administrative review of Respondent's November 25, 2008 denial of Petitioner's bid protest.

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).

Respondent first contends that Petitioner's protest was untimely under HRS §103D-701(a). That section provides:

> **§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. Except as provided in sections 103D-303 and 103D-304, *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 days after the posting of award of the contract under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; provided further that *no protest based on the content of the solicitation shall be*

considered unless it is submitted in writing prior to the date set for the receipt of offers.

(Emphasis added).

According to Respondent, Petitioner's protest was based on the application of Section 3.2(g) of the Interim General Conditions and the Subcontractor Listing Form, and is therefore a "protest based on the content of the solicitation." As such, Respondent argues that under HRS §103D-701(a), Petitioner was required to submit its protest within five working days following the May 23, 2008 posting of the IFB when Petitioner knew or should have known of the facts giving rise to its protest, and, in any event, no later than the June 27, 2008 bid submission deadline.

Contrary to Respondent's contention, however, Petitioner's September 19, 2008 protest was *not* based on Section 3.2(g) of the Interim General Conditions. The protest was based on the allegations that Intervenor's listing of two subcontractors "for the same scope of work violates the statutory purpose of preventing bid shopping", and that Intervenor's listing of Dugied Construction Inc.'s scope of work was ambiguous and nonresponsive. The application of Section 3.2(g) was instead raised by *Respondent* as justification for its November 25, 2008 denial. Neither was the protest based on the Subcontractor Listing Form. Rather, the protest was based on Intervenor's listing of two subcontractors for "Masonry", and the listing of a general building contractor whose scope of work was allegedly ambiguous.[2] Based on this record, the Hearings Officer concludes that Petitioner's protest was not a protest based on the content of the solicitation. *See generally, Frank Coluccio Construction Company v. City & County of Honolulu, et al., PCH 2002-7 (August 2, 2002)(because the protest was based in part on information that was not included in the bid documents, the protest was not a protest based upon the content of the solicitation).*

Notwithstanding the foregoing conclusion, Petitioner was still required to submit its protest within five working days after it knew or should have known of the facts giving rise to its protest. As noted in *GTE Hawaiian Telephone Co., v. County of Maui, PCH*

[2] Nevertheless, the Subcontractor Listing Form left much to be desired. For instance, the form did not specifically ask bidders to provide a description of the nature and scope of work for each listed subcontractor. Notwithstanding this, however, it is the bidder's responsibility to ensure that its bid complies with HRS §103D-302(b).

98-6 (December 9, 1998), it was the Legislature's intent to provide for the expeditious processing of protests through an efficient and effective procurement system so as to minimize the disruption to procurements and contract performance. In *GTE Hawaiian Telephone Co., supra,* the Hearings Officer found that the basis for a protest grounded upon the alleged nonresponsiveness of another bid, is, in addition to the alleged nonresponsiveness itself, the protestor's knowledge that the government has awarded or intends to award the contract to the nonresponsive bidder. "Prior to that time, a protest would be premature since the government could well reject the offending bid. In other words, the adverse action being protested is the government's acceptance of the alleged nonresponsive bid, not merely the offeror's submission of such a bid."

Although Petitioner knew or should have known of the contents of the IFB upon its issuance on May 23, 2008, and, for that matter, the contents of Intervenor's bid when the bids were opened on June 27, 2008, it was not until Respondent rejected the bids submitted by Maui Master Builders and Goodfellow[3] and awarded the contract to Intervenor on September 12, 2008, that Petitioner knew or should have known of the facts giving rise to its protest. Accordingly, Petitioner's filing of its protest on September 19, 2008 was in compliance with the time limitations set forth in HRS §103D-701(a).

Addressing the merits of this case, there is no dispute that Intervenor listed two subcontractors, SF Masonry and Shoreline Concrete, for "Masonry". The question here is whether the listing of the two subcontractors as such complies with the subcontractor listing requirement set forth in HRS §103D-302(b).

This Office has previously held that HRS §103D-302(b) requires 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. This problem is avoided by requiring the bidder to disclose in its bid the work to be performed by each subcontractor and use the listed subcontractor to perform only the work previously

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[3] Petitioner was the fourth lowest bidder after Maui Master Builders, Goodfellow, and Intervenor. Therefore, prior to the rejection of Maui Master Builders' and Goodfellow's bids on September 12, 2008, Petitioner would not have been in line for award even if its protest was found to have merit. Thus, Petitioner did not attain "aggrieved party" status and consequently, did not have standing to submit its protest prior to Respondent's rejection of those bids.

disclosed in the bid." *Frank Coluccio Construction Company v. City & County of Honolulu, supra.* In *Frank Coluccio Construction Company, supra,* the Hearings Officer also noted that an ambiguous disclosure would 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). For these reasons, the failure to adequately and unambiguously disclose the nature and scope of the work to be performed by each subcontractor may render the bid nonresponsive[4] regardless of whether there is evidence of bid shopping.[5] *Frank Coluccio Construction Company, supra.* Intervenor's listing of two subcontractors to perform "masonry" work, without more, is ambiguous and, as such, gives rise to an opportunity to bid shop. Intervenor's bid is therefore nonresponsive. Any other conclusion would render the subcontractor listing requirement meaningless.

Respondent nevertheless argues that where there is an ambiguous listing of subcontractors in a bid, Section 3.2(g) of the Interim General Conditions authorizes the bidder "to confirm in writing within five working days that all subcontractors in question will actually be engaged on the project". According to Respondent, because Intervenor "responded within five working days that SF [sic] Masonry and Shoreline Concrete will perform separate and distinct scopes or work . . .", its bid was not irregular.

Following the opening of the bids and in apparent reliance on Section 3.2(g), Respondent requested that Intervenor address, among things, the listing in its bid of both SF Masonry and Shoreline Concrete "as doing masonry work". In its July 23, 2008 response, Intervenor informed Respondent for the first time that the subcontractors would perform "separate and distinct scopes of work": SF Masonry would perform the "placement of concrete for curbs, and sidewalks", and Shoreline Concrete would perform "placement of PCC pavement for the parking lot."

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[4] In apparent recognition of this, the Subcontractor Listing Form states: "Bidders shall list only one Joint Contractor or Subcontractor per required specialty contractor's license."

[5] As explained in *Frank Coluccio Construction Company, supra,* 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.

It is well-settled that matters of responsiveness must be discerned solely by reference to materials submitted with the bid and facts available to the government at the time of the bid opening[6]. *Blount, Inc. v. U.S., 22 Cl.Ct. 221 (1990)*[7]*; Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000), citing Blount with approval. See also, Environmental Recycling v. County of Hawaii, PCH-98-1 (July 2, 1998)(in a competitive bidding procurement, bids must be evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening).* In *Blount*, the claims court was asked to enjoin the Bureau of Prison's rejection, on nonresponsiveness grounds, of the lowest bid for a prison construction contract submitted by Blount. Blount had indicated on a business management questionnaire submitted with its bid that it would be self-performing "approximately 10%" or "approximately $6,000,000" of the work under the contract, notwithstanding a 20% self-performance requirement imposed in the solicitation. The court found:

* * * *

> Blount's response . . . therefore constituted a material deviation from the IFB which rendered its bid nonresponsive at bid opening (footnote omitted). *Blount could not, thereafter, correct its response to the questionnaire or attempt to explain why its bid was in fact responsive to the IFB.* (footnote omitted). *Carothers Constr. Inc. v. United States, 18 Cl.Ct. 745 (1989).*

And in a footnote, the court concluded:

> Blount's bid as submitted was nonresponsive to the IFB and *the [contracting officer] acted improperly by seeking clarification of the bidder's response to the Business Management Questionnaire.* Put another way, had the CO awarded the contract to Blount after permitting the bidder to change its response to question 3 of the business

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[6] Responsibility determinations, on the other hand, are made at the time of award. A bidder may therefore present evidence subsequent to bid opening but prior to award to demonstrate the bidder's responsibility. *Hawaiian Dredging Construction Co. v. City & County of Honolulu, PCH 99-6 (August 9, 1999).*

[7] The *Blount* court explained that, "[t]he rule is designed to . . . to assure that the government evaluates bids on an equal basis." *Blount, supra, citing Cibinic and Nash, Formation of Government Contracts (2nd Ed., 1986) at p. 394.*

> questionnaire, the award would be void *ab initio*. *Prestex, Inc. v. United States, 162 Ct.Cl. 620, 320 F.2d 367 (1963).*

Blount at 228-29. (Emphasis added).

Similarly, in *Southern Food Group, L.P. v. Dept. of Education, 89 Haw. 443 (1979)*, the Hawaii Supreme Court cited, with approval, the U.S. Court of Claims discussion of bid responsiveness in *Toyo Menka Kaisha, Ltd. v. U.S., 597 F.2d 1397 (1979)*:

> Although addressing the United States government's alleged breach of an awarded contract, the United States Court of Claims, in *Toyo Menka Kaisha, Ltd. v. United States, 597 F.2d 1397, 1376-77 (Ct. Cl. 1979),* penned a discussion on bid responsiveness that is particularly insightful.
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> * * * *
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> [r]esponsiveness is determined by reference to when [the bids] are opened and not by reference to subsequent changes in a bid. (citation omitted). Allowing a bidder to modify a nonresponsive bid when, upon opening the bids, it appears that the variations will preclude an award, would permit the very kind of bid manipulation and negotiation that the rule was designed to prevent.
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> * * * *

Southern Food Group, L.P. at 457.

Respondent's consideration of Intervenor's July 23, 2008 "clarification" flies in the face of these principles and was improper notwithstanding Section 3.2(g).[8]

For all of these reasons, the Hearings Officer concludes that Intervenor's bid was nonresponsive to the IFB. Having arrived at this conclusion, it is unnecessary to address Petitioner's contention that Intervenor's listing of Dugied Construction in its bid was

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[8] The Hearings Officer also notes that nothing in Section 3.2(g) provides the bidder with the opportunity to clarify or correct an otherwise ambiguous bid. Rather, that section provides that where there is more than one subcontractor "listed for the same item of work", the bidder shall "either confirm in writing . . . that all . . . subcontractors listed will actually be engaged on the project or obtain . . . written releases from those . . . subcontractors who will not be engaged." Intervenor's July 23, 2008 letter went far beyond merely confirming that the subcontractors in question would be engaged on the Project.

ambiguous and contrary to HRS Chapter 103D. It is, however, necessary to determine an appropriate remedy.

All parties agree that HRS §103D-707 is applicable here. That section provides:

> **§103D-707 Remedies after an award.** If after an award it is determined that a solicitation or award of a contract is in violation of law, then:
>
> (1) If the person awarded the contract has not acted fraudulently or in bad faith:
>
> (A) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interests of the State; or
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> (B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination;
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> * * * *

Both Respondent and Intervenor urge the Hearings Officer to ratify the contract even if Intervenor's bid is found to be nonresponsive as Intervenor's bid was lower than Petitioner's bid. Thus, according to Respondent, "[i]t is in the best interests of the State to affirm the contract award to Parsons, which would result in a lower cost to the State than would an award of the contract to Kiewit." Notwithstanding that, however, in determining whether ratification of an illegally awarded contract is in the State's best interests, the Hearings Officer must consider the State's interest in achieving the purposes of HRS Chapter 103D ("Code").[9] *Carl Corp. v. State Dept. of Educ., 85 Hawaii 431 (1997), citing with approval Planning & Design Solutions v. City of Santa Fe, 885 P.2d 628 (1994).* In *Planning & Design Solutions,* the New Mexico Supreme Court explained:

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[9] In enacting HRS Chapter 103D, the Legislature sought to establish a comprehensive code that would: (1) provide for fair and equitable treatment of all persons dealing with the 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 purposes of the Procurement Code are to provide for the fair and equitable treatment of all persons involved in public procurement, to maximize the purchasing value of public funds and to provide safeguards for maintaining a procurement system of quality and integrity. *Of all the interests involved in competitive bidding, the public interest is the most important.* An economical and efficient system of procurement directly benefits taxpayers . . . It is certainly in the public interest that the [State] abide by the procurement rules it has set for itself.

Id. at 631. (Emphasis added).

There is no doubt that ratification of an illegally awarded contract can seriously undermine the public's confidence in the integrity of the procurement system and, in the long run, discourage competition. On balance, the Hearings Officer must conclude that the potential cost savings to the State in this case does not justify the ratification of the contract with Intervenor.[10]

Additionally, Respondent alleges that Petitioner's bid also listed two subcontractors who were "potentially going to do the same work." Thus, according to Respondent, if Intervenor's bid is determined to be nonresponsive and the contract terminated, Petitioner's bid must similarly be rejected. Respondent would then be required to resolicit bids for the Project which would result in unnecessary expenses and delays in the commencement of the work and the loss of $2,500,000.00 in State funds. This argument, however, is premised on the claim that Petitioner's bid is nonresponsive. That claim, however, has neither been proven nor properly brought before this Hearings Officer and, as such, is irrelevant here.[11]

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[10] The Hearings Officer also notes that there is nothing in the record to establish the progress, if any, made by Intervenor towards the performance of the contract.

[11] Moreover, the affidavit submitted by Respondent to establish that "[i]f the . . . jobs were to be re-solicited in a new invitation for bids, $2,500,000 of state fund would be lost" did not explain the basis for this representation and was, at best, conclusory. Furthermore, this Office has previously held that "[a]ny concerns Respondent may have in avoiding the additional expenses and inconvenience that may result in having to engage in a second solicitation must give way to the State's interest in promoting and achieving the purposes of the Procurement Code." *Environmental Recycling, supra.*

Based on all of these considerations, the Hearings Officer concludes that ratification of the illegally awarded contract would be contrary to the State's best interests and therefore not an appropriate remedy under the circumstances presented here. On the other hand, unless the contract is terminated, Petitioner would be denied the opportunity to have its bid properly evaluated by Respondent. Moreover, the Hearings Officer notes that termination would be consistent with HAR §3-126-38(a)(3), which requires termination of the contract where, among other things, performance has not begun and there is time for resoliciting bids[12], as well as HAR §3-126-38(a)(4) which provides that even where performance has begun, termination is still the "preferred remedy."

On the basis of all of these considerations, the Hearings Officer concludes that there are no genuine issues of material fact and that Petitioner is entitled to judgment as a matter of law.

IV. FINAL ORDER

Based upon the foregoing findings and conclusions, the Hearings Officer denies Respondent's motion to dismiss or in the alternative for summary judgment and grants Petitioner's motion for summary judgment and orders as follows:

1. The contract awarded to Intervenor in conjunction with the IFB is hereby terminated;

2. Intervenor shall be compensated for actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated to the point of termination; and

3. Each party shall bear its own attorneys' fees and costs incurred in this matter.

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[12] Of course, if Petitioner is found to be the lowest responsible and responsive bidder, resolicitation may not be necessary. Beyond that, the evidence did not establish that there was no time to resolicit bids for the Project – only a general and conclusory statement by the project engineer that, "constructing sewage pump-out facilities will protect public health and the environment by providing a proper means of vessel sewage disposal and will reduce the amount of untreated sewage currently being disposed of in the ocean, for which there has been a public outcry." *See generally, Okada Trucking Company, Ltd. v. Board of Water Supply, et. al, PCH 99-11 (November 11, 1999) (rev'd on other grounds)(where bidder had been notified of its being awarded the project but a notice to proceed had not been issued, and the evidence did not establish that there was no time to resolicit the project, the appropriate remedy would be termination of the contract and the bidder being compensated for actual expenses, if any, that were reasonably incurred under the contract and reasonable profit based upon any performance on the contract up to the time of termination).*

Dated at Honolulu, Hawaii: FEB 20 2009

/s/ CRAIG H. UYEHARA

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