



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2018 MAY -8 A 9:15

HEARINGS OFFICE

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

In the Matter of:)	PDH-2018-005
)	
FV COLUCCIO CONSTRUCTION)	HEARINGS OFFICER'S
COMPANY, INC.,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND DECISION
vs.)	
)	
CITY AND COUNTY OF HONOLULU,)	
DEPARTMENT OF ENVIRONMENTAL)	
SERVICES AND DEPARTMENT OF)	
BUDGET AND FISCAL SERVICES,)	
)	
Respondents.)	
)	

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

I. INTRODUCTION

On March 29, 2018, FV Coluccio Construction Company, Inc., ("Petitioner" or "FVCCC"), filed a Request for Administrative Hearing ("Petition") to contest the City and County of Honolulu, Department of Environmental Services and Department of Budget and Fiscal Services' ("Respondent" or "City") letter dated March 22, 2018 (postmarked March 23, 2018), which denied Petitioner's Notice of Protest dated February 21, 2018. The matter was set for hearing on April 19, 2018 and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties. On

April 9, 2018, Respondents filed a Response to the Petition (“Respondents’ Response”) and a Motion for Summary Judgment (“Respondents’ Motion for Summary Judgment”).

On April 10, 2018, a pre-hearing conference was held in this matter. Gerald S. Clay, Esq. and Scott I. Batterman, Esq. appeared on behalf of Petitioner with Petitioner’s representatives, Frank V. Coluccio and Tim Pearia, present. Deputies Corporation Counsel Ryan H. Ota Esq. and Moana A. Yost, Esq. appeared on behalf of Respondents. Harvey E. Lung, Esq. appeared on behalf of James W. Fowler Co. (“JWFC”), a subcontractor of Hawaiian Dredging & Construction Co. (“HDCC”), the winning bidder, and made an *oral motion to intervene* on behalf of JWFC. Both parties objected and the Hearings Officer denied the motion.

On April 16, 2018 at 4:13 p.m., proposed Intervenor HDCC and JWFC (collectively “Intervenor”) filed its *written* Motion to Intervene. On April 17, 2018, Petitioner filed its Memorandum in Opposition to Motion to Intervene.

On April 17, 2018, Petitioner filed its Memorandum in Opposition to Respondents’ Motion for Summary Judgment.

On April 17, 2018, [Proposed] Intervenor filed its Pre-Hearing Brief and Substantive Joinder in Respondents’ Motion for Summary Judgment.

On April 19, 2018, [Proposed] Intervenor’s Motion to Intervene and Respondent’s Motion for Summary Judgment came on for hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii Revised Statutes (“HRS”) Chapters 91, 92 and 103D and Hawaii Administrative Rules (“HAR”) Title 16 Chapter 201 and Title 6 Chapter 22. Gerald S. Clay, Esq. and Scott I. Batterman, Esq. appeared on behalf of Petitioner with Petitioner’s representatives,

Frank V. Coluccio and Tim Pearia, present. Deputies Corporation Counsel Ryan H. Ota, Esq., Moana A. Yost, Esq. and Jessica Y.K. Wong, Esq. appeared on behalf of Respondents with Respondents' representative, Purchasing Administrator Wendale Imamura, present. Harvey E. Lung, Esq. and Leinaala Ley, Esq. appeared on behalf proposed Intervenor with HDCC's representatives, Gary M. Yokoyama, Esq. and Len Dempsey, present, and JWFC's representative, John Fowler, present.

Regarding the Motion to Intervene, Respondents acknowledged that HDCC had standing to intervene, but not JWFC, HDCC's subcontractor. Petitioner opposed the Motion to Intervene. The Hearings Officer adopted the arguments and analysis of Petitioner and denied the Motion to Intervene. Proposed Intervenor were excused from further participation in the proceeding.

Respondents' Motion for Summary Judgment was heard and denied. All evidence and testimony adduced at the hearing on Respondents' Motion for Summary Judgment was incorporated into the hearing on the case-in-chief. Petitioner agreed that all of Respondents' Exhibits, A thru I, may be admitted into evidence. Respondents agreed to admit all of Petitioner's exhibits into evidence *except* Petitioner's Exhibits 13 thru 16 and 19 thru 20. The Hearings Officer accepted the stipulated exhibits into evidence. Petitioner's Exhibits 13 thru 16 and 19 thru 20 were *not* received into evidence.

On April 26, 2018, the parties submitted their closing briefs.

On April 30, 2018, Respondents filed a Motion to Take Further Evidence ("Respondents' Motion to Take Further Evidence"). On May 3, 2018, Petitioner filed its Memorandum in Opposition to Respondents' Motion to Take Further Evidence. For the

reasons stated herein, the Hearings Officer hereby denies Respondents' Motion to Take Further Evidence.

Having heard the evidence and arguments of counsel, and having considered the motions and memoranda, along with the declarations and exhibits attached thereto and memoranda in opposition thereto, together with the evidence, closing briefs, records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision *denying* [Proposed] Intervenors' oral and written Motions to Intervene, *denying* Respondents' Motion for Summary Judgment, *denying* Respondents' Motion to Take Further Evidence, and *granting* Petitioner's Petition.

II. FINDINGS OF FACT

1. Petitioner is registered with the Department of Commerce & Consumer Affairs ("DCCA") as a Domestic Profit Corporation, incorporation date: May 8, 2017, status: active. See Respondents' Motion for Summary, Exhibit I.

2. Petitioner obtained its ABC contractor's license, License No. CT-35781, on October 18, 2017. Petitioner's contractor's license is active, current, valid and in good standing. Petitioner's contractor's license is set to expire on September 30, 2018. Tim Pearia, License No. CT-30854, is listed as Petitioner's Responsible Managing Employee ("RME"). RME Pearia's contractor's license is current, valid and in good standing. See Respondents' Motion for Summary, Exhibit J.

3. Frank Coluccio Construction Company ("FCCC") is registered with the DCCA as Foreign (Washington) Profit Corporation, registration date: April 1, 1977, status: active. As of its April 1, 2017 Annual Report, FCCC's Officers and Directors are

listed as: Nick Coluccio, President/Director; Joseph J. Coluccio, Director/CEO; and Franco¹ Coluccio, Vice-President/Director. See Respondents' Motion for Summary, Exhibit I.

4. FCCC obtained its AC contractor's license, License No. CT-8646, on April 18, 1977. FCCC's contractor's license is active, current, valid and in good standing. FCCC's contractor's license is set to expire on September 30, 2018. FCCC lists two (2) RMEs: Austell William, License No. CT-16679, and Joseph J. Coluccio, License No. CT-8990. Both RMEs' licenses are current, valid and in good standing. See Respondents' Motion for Summary, Exhibit J.

5. On October 9, 2017, Respondents posted Solicitation No. RFB-ENV-1121610 ("Solicitation") for the Awa Street Wastewater Pump Station Force Main and Sewer System Improvements Waiakamilo Road Trunk Sewer Job No. W5-16 ("Project").

6. On October 27, 2017, Respondents issued Addendum No. 2, which states, in part, as follows:

The purpose of this Offeror's Statement of Qualification review is to assure the Contractor and the City and County of Honolulu (City) that full unit responsibility for the **technical requirements** specified within the contract documents **resides in organizations** that are qualified in the following categories of work:

1. Microtunneling (Section 30 01 01)
2. Shaft and Open Excavation Construction (Section 30 01 03)
3. Jet Grouting (Section 31 73 70)

* * *

Qualification Requirements:

¹ At the hearing, it was confirmed that "Franco" Coluccio and "Frank" Vincent Coluccio are one and the same person.

Because of the specialized nature of the work, the City requires that all offerors and/or subcontractors interested in submitting a bid proposal for this project to submit this "Statement of Qualification" (SOQ)...

Only work experience obtained prior to bid advertisement may be used as part of the qualifying work experience. Offerors are responsible to provide all requested information to be qualified for and answer all questions fully and explicitly...

The offeror shall provide correct and sufficient information for each item requested, allowing the City the capability of making an evaluation.

See Petitioner's Exhibit 2, Respondents' Exhibit A. (Emphasis added.)

7. On November 6, 2017, Respondents issued Addendum No. 4

indicating, among other things, that the OSOQ was due on November 16, 2017 and states, in relevant part, as follows:

Each Offeror shall complete and submit the Offeror's Statement of Qualification form which is attached following this Special Notice to Offerors.

Prospective Offerors and/or subcontractors must be capable of performing the work for which the bids are being called. The prospective offeror together with the subcontractors shall demonstrate prior experience in the following categories of work as cited in Section 00 45 13 Bidder's Qualifications:

Microtunneling
Shaft and Open Excavation
Jet Grouting

Pursuant to Hawaii Revised Statutes Section 103D-310, the City will require any prospective offeror and/or subcontractors to submit information requested in the Offeror's Statement of Qualification. Whenever it appears from the Offeror's Statement of Qualification that the offeror is not fully qualified and not able to perform the intended work, a written determination of nonresponsibility of an offeror shall be made by the Purchasing Administrator. The unreasonable failure of an offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such offeror.

See Petitioner's Exhibit 3, Respondents' Motion for Summary, Exhibit A.

8. On November 16, 2017, Petitioner submitted its OSOQ to Respondents with a cover letter signed by Frank V. Coluccio on behalf of FVCCC which states, in relevant part:

Please see attached pre-qualification package for the Waikamilo Trunk Sewer Project. I wanted to make you aware that currently at Frank Coluccio Construction Company (FCCC), we are undergoing some **internal re-organization**. So as to continue uninterrupted service and provide continued support to our clients and team members, I have formed Frank V. Coluccio or FV Coluccio Construction Company (FVCCC) here in Hawaii. **FV Coluccio is fully licensed and bonded** to perform our future work here with the **same team that has been working for the City for decades**. We look forward to a seamless transition.

The personnel listed in the pre-qualification package are all long term employees and long term residents of Honolulu. This team has worked successfully to complete some of the most difficult wastewater projects in Honolulu.

See Respondents Exhibit A (Emphasis added.)

9. On November 17, 2017, Respondents issued Addendum No. 8. See Petitioner's Exhibit 5.

10. On November 29, 2017, Respondents requested additional information of a technical nature from Petitioner regarding qualifications for Shaft Construction and Jet Grouting. See Petitioner's Exhibit 6, Respondents' Exhibit B.

11. On November 30, 2017, Petitioner resubmitted its OSOQ identifying FVCCC as the General Contractor. See Petitioner's Exhibit 4, Respondents' Exhibit C.

12. Upon review of Petitioner's November 30, 2017 OSOQ, by letter dated December 12, 2017, Respondents determined that Petitioner's General Contractor, Microtunneling Contractor/Subcontractor, Shaft Construction

Contractor/Subcontractor and Jet Grouting Contractor/Subcontractor, all identified as FVCCC, as well as specifically named personnel were qualified ("December 12 Qualification Letter"). See Petitioner's Exhibit 7, Respondents' Exhibit D.

13. On December 19, 2017, the bids were opened. Petitioner was the lowest bidder with a bid of \$77,022,798.00, which was almost \$17,000,000 lower than the next bid and \$23,000,000 lower than the third bidder, HDCC, who was awarded the contract. See Petitioner's Exhibit 8.

14. By letter dated December 26, 2017, Respondents informed Petitioner that upon further review of Petitioner's OSOQ, Respondents are "unable to validate the legal status" of FVCCC. Respondents also requested additional *information* regarding the "re-organization of Frank Coluccio Construction Company and how it correlates to the formation of FVCCC." Respondents also noted that "FVCCC is not registered in Hawaii Compliance Express and at this time we are unable to determine responsibility per Section 00 53 03 of the solicitation."

Upon further review of the Offeror's Statement of Qualification (OSOQ), we are unable to validate the legal status of FV Coluccio Construction Company (FVCCC). Please provide additional **information** regarding the **re-organization of Frank Coluccio Construction Company and how it correlates to the formation of FVCCC.**

Please note that FVCCC is not registered in Hawaii Compliance Express and at this time we are unable to determine responsibility per Section 00 53 03 of the solicitation.

See Petitioner's Exhibit 9 (Emphasis added.)

15. By email letter dated January 5, 2018, Jordan Bleasdale for FVCCC responded to Respondents' requests as follows:

Please see attached certificate of Vendor Compliance from Hawaii Compliance Express.²

Frank Coluccio Construction Company (FCCC) has been in business since 1953. FCCC has worked in Hawaii since 1977. The company was founded by Frank Coluccio who died and was succeeded by his three sons; Joe, Franco and Nick. Joe and Nick run the Seattle operations. Franco has lived in Hawaii and ran the Hawaii operations for the last 28 years. He continues to run all Hawaii operations. Joe and Nick wish to retire from all Hawaii interests, while Franco wants to continue living and doing business in Hawaii. **FV Coluccio Construction Company (the successor Hawaii company) will be comprised with the same local personnel and will utilize the same office as FCCC.**

The email also asked Respondents to call or email Jordan Bleasdale of FVCCC if Respondents had any further questions or desired any further information. See Petitioner's Exhibit 10, Respondents' Exhibit E (Emphasis added.)

16. By Letter dated January 26, 2018, Frank V. Coluccio of FVCCC inquired as to the status of the contract and offered to provide additional information:

At the bid opening on 12/19/17 for the above-referenced job, FV Coluccio Construction, Inc., having been prequalified to perform the work, was the lowest responsible and responsive bidder with a bid of \$77,022,798, the next bid was almost \$17 million higher than our bid.

We answered the questions in your 12/26/17 letter. To date we have not had any request for further clarifications.

It has now been almost three weeks, and we have not yet received a form of contract from the City and County of Honolulu. We are anxious to begin the necessary preparation and ordering of material³, so as to ensure a smooth performance of this important job.

² FVCCC's status was COMPLIANT with the following: Hawaii Department of Taxation, Internal Revenue Service, Hawaii Department of Commerce & Consumer Affairs, and Hawaii Department of Labor & Industrial Relations

³ At the hearing, Mr. Coluccio testified that he had one-half million dollars ready to order materials.

If there is any additional information which you need, to allow us to move forward, please let us know at your earliest convenience.

See Petitioner's Exhibit 11 (Emphasis added.)

17. By letter dated February 14, 2018, Tim Pearia, Project Manager and RME for Petitioner, inquired as to the status of the contract and offered to provide additional information:

At the bid opening on 12/19/17 for the above-referenced job, FV Coluccio Construction, Inc., having been prequalified to perform the work, was the lowest responsible and responsive bidder with a bid of \$77,022,798, the next bid was almost \$17 million higher than our bid.

We have made every attempt to be forthcoming and transparent. We answered the questions in your 12/26/17 letter. To date we have not had any request for further clarifications. We sent you a letter on 1/26/18 offering to provide more information and have not received a reply.

In the interest of completeness, I have attached the following documents:

- Your letter dated 12/12/17 confirming our qualification for this project
- Declaration form Franco Coluccio confirming details of his new company
- Letter from our Seattle attorney, Ron Braley, confirming details of Franco's new company

It has now been almost two months since the bid, and we have not yet received a form of contract from the City and County of Honolulu. We are anxious to begin the necessary preparation and ordering of material, so as to ensure a smooth performance of this important job.

If there is any additional information which you need, to allow us to move forward, please let us know at your earliest convenience.

See Petitioner's Exhibit 12 (Emphasis added.)

The attached Declaration from Franco Coluccio confirming details of his new company states, in relevant part, as follows:

1. I am the sole shareholder, officer and director of FV Coluccio Construction Company Inc. ("FV Coluccio"). I make this declaration upon personal knowledge.
2. I am also one of the three co-equal shareholders, co-Presidents, and directors of Frank Coluccio Construction Company, Inc. (Frank Coluccio").
3. Relevant documents showing my interests in FV Coluccio and Frank Coluccio are attached hereto.
4. FV Coluccio is the **successor** to Frank Coluccio with respect to all of the work that was performed by Frank Coluccio in Hawaii, including horizontal drilling, micro-tunneling, jet grouting, and related work.
5. Frank Coluccio has been in business since 1953, and has been working in Hawaii since 1977. The company was founded by my father, Frank Coluccio, who died in 2014 and was **succeeded** by myself and my two brothers, Joe Coluccio and Nick Coluccio.
6. I have lived in Hawaii and run the Hawaii operations of Frank Coluccio for the last 28 years. I have run the Hawaii operation autonomously.
7. My brothers have decided to retire. I have chosen to continue living and doing business in Hawaii. I formed FV Coluccio as a **successor** company to continue the business in Hawaii. I am now running the Hawaii operations of FV Coluccio as well as completing projects for Frank Coluccio.
8. FV Coluccio as the Hawaii **successor** company to Frank Coluccio has all of the same offices, Hawaii personnel, equipment, qualifications and expertise that FCCC had. We have the same organizational chart, with the same supervisors, superintendents, and equipment operators. FV Coluccio is independently capitalized and bonded.
9. Timothy Pearia, who has acted as the Responsible Managing Employee for Frank Coluccio since 2010, is now performing that role for FV Coluccio.

10. In sum, as regards actual expertise and work performed in Hawaii, FV Coluccio is the same company as Frank Coluccio, with the only difference being the removal of two non-local shareholders/officers/directors, and a change of name. FV Coluccio and the City thus retain the same "Qualified Workforce" performing on new projects that they have had in the past.

11. For that reason, we believe that FV Coluccio has properly submitted a statement of qualifications comprised of projects completed under the Frank Coluccio name. The experience and expertise of a construction company is found, not in its corporate name or articles of incorporation, but in its people: Its RME, project managers, project engineers, supervisors, superintendents and specialty qualifiers, skilled personnel and equipment operators remain the same. In order to maintain a separation from Frank Coluccio during this transition period, **we are building up work under FV Coluccio at the same time we are winding up work for Frank Coluccio.**

12. We have listed our experience as is appropriate for a successor company. The people listed in these projects will be the same people working on future FV Coluccio projects. All individuals submitted in our qualification package own the "rights" to their own personal resumes, accomplishments, qualifications, and certifications that we have established over the course of their careers. All proposed specialty qualifiers (individuals) in our submitted qualification package have committed to performing said specialty work for FV Coluccio on this proposed project.

13. This is the project team of FV Coluccio, which shows that our team has the experience required for the Uluniu Avenue Sewer Reconstruction Sewer I/I Ala Moana Basin project. There are 12 people listed in our qualification package, who have worked for me here in Hawaii an average of 20 years ranging from 5 years to 28 years.

* * *

See Petitioner's Exhibit 12 (Emphasis added.)

The attached letter dated January 22, 2018 from Seattle attorney, Ron Braley, confirming details of Franco's new company states in relevant part as follows:

I have been asked to help respond to your letter of January 18, 2018 re F.V. Coluccio Construction Company. I am the attorney for Frank V. Coluccio. For the past 28 years he has run the Hawaii operation of Frank Coluccio Construction Company, a company that his father founded many decades ago. He is a one third owner of this company with his two brothers owning the other two thirds.

For the past several years, Frank has been working diligently with his brothers for him to acquire the Hawaii part of the construction business, if not the entire company. **The transaction is quite complex and involves the transfer of millions of dollars in real estate and equipment. It is now nearing completion.** In order to pave the road for a smooth transition and to preserve the jobs uninterrupted of the seventy employees in Hawaii, Mr. Coluccio formed F.V. Coluccio Construction Company as a likely successor. The same employees and management will be employed there and will perform the same services as they have with Frank Coluccio Construction Company. Mr. Coluccio owns all of the stock of F.V. Coluccio Construction Company and has capitalized this company with sufficient cash and bonding capacity to complete any job that he might bid.

See Petitioner's Exhibit 12, Respondents' Exhibit F (Emphasis added.)

18. Respondents did not request any further information from Petitioner.

Respondents did not request any legal documentation from Petitioner.

19. By letter dated February 20, 2018, Respondents rescinded their December 12 Qualification Letter and rejected Petitioner's Bid "due to non-responsibility." See Petitioner's Exhibit 17, Respondents' Exhibit G.

20. By separate letter, also dated February 20, 2018, Respondents informed Petitioner that its bid has been determined to be "non-responsible" in accordance with HRS §103D-310(b) and HAR §3-122-108. See Petitioner's Exhibit 18.

21. By letter dated February 20, 2018, Respondents awarded the contract to HDCC, the third lowest bidder, in the amount of \$100,699,000. See Petitioner's Motion for Summary Judgment, Exhibit 9.

22. On or about February 21, 2018, Petitioner filed its *Notice of Protest by FV Coluccio Construction Company of the Department of Budget and Fiscal Services' Rejection of Offeror's Bid Under Solicitation No. RFB-ENV-1121610* ("Notice of Protest") with Respondents wherein Petitioner alleges, among other things, that:

Mr. Coluccio is the sole shareholder, officer and director of FVCCC. He is also one of the three co-equal shareholders, co-Presidents, and directors of Frank Coluccio Construction Company, Inc. ("Frank Coluccio").

FVCCC is the **successor** to Frank Coluccio with respect to all of the work that was performed by Frank Coluccio in Hawaii, including horizontal drilling, micro-tunneling, jet grouting, and related work.

Frank Coluccio has been in business since 1953, and has been working in Hawaii since 1977. The company was founded by Mr. Coluccio's father, Frank Coluccio, who died in 2014 and was succeeded by Frank Coluccio and his two brothers, Joe Coluccio and Nick Coluccio.

Mr. Coluccio has lived in Hawaii and run the Hawaii operations of Frank Coluccio for the past 28 years. He has run the Hawaii operation autonomously.

Mr. Coluccio's brothers have decided to retire. He has chosen to continue living and doing business in Hawaii and formed FVCCC as a **successor** company to continue the business in Hawaii. **He is now running the Hawaii operations of FVCCC as well as completing the projects for Frank Coluccio.**

FVCCC as the Hawaii **successor** company to Frank Coluccio has **all of the same offices, Hawaii personnel, equipment, expertise and qualifications that Frank Coluccio had. It has the same organizational chart, with the same supervisors, superintendents, and equipment operators. FVCCC is independently capitalized and bonded.**

Timothy Pearia, who has acted as the local Responsible Managing Employee to Frank Coluccio since 2010, is now performing that role for FVCCC.

In sum, as regards to expertise and work performed in Hawaii, FVCCC is the same company as Frank Coluccio, with the only

difference being the removal of two non-local shareholders/officers/directors, and a change of name. FVCCC and the City thus retain the same “Qualified Workforce” performing on new projects that they have had in the past.

By any standard, FVCCC would be considered the **successor** to Frank Coluccio. For that reason, FVCCC has properly submitted a statement of qualifications comprised of projects completed under the Frank Coluccio name.

Even if FVCCC were not the **successor** to Frank Coluccio – which it is – it still meets the qualification and experience requirements for Solicitation No. RFB-ENV-1121610. The experience and expertise of a construction company is found, not in its corporate name or articles of incorporation, but **in its people**: Its RME, project managers, project engineers, supervisors, superintendents and specialty qualifiers, skilled personnel and equipment operators remain the same, regardless of their employer.

FVCCC has listed its experience as is appropriate for a **successor** company. **The people listed in these projects will be the same people working on future FVCCC projects.** All individuals submitted in the qualification package own the “rights” to their own personal resumes, accomplishments, qualifications, and certifications that they have established over the course of their careers. All proposed specialty qualifiers (individuals) in FVCCC’s submitted qualification package have committed to performing said specialty work of FVCCC on this proposed project.

This is the project team of FVCCC, which shows that the team has the experience required for the Awa Street Wastewater Pump Station Force, Main and Sewer System Improvement, Waiakamilo Road Trunk Sewer. There are 12 people listed in the qualification package, who have worked for Mr. Coluccio in Hawaii an average of 20 years ranging from 5 years to 28 years. FVCCC does not believe that any other bidder can match the Hawaii-based qualifications submitted by FVCCC.

See Respondents’ Exhibit H (Emphasis added.)

23. By letter dated March 22, 2018 (postmarked March 23, 2018),

Respondents denied Petitioner’s Notice of Protest stating, among other things, that:

Based upon review of the SOQ⁴ submitted by FVCCC and subsequent information provided by FVCCC, the City determined the projects and experience identified in the SOQ were performed by Frank Coluccio under Contractor License No. CT-8646, and not FVCCC. Therefore, without the required experience and record of performance, FVCCC did not meet the qualifications of the SOQ. FVCCC obtained its contractor's license in October 2017, and the projects listed were performed prior to FVCCC's issuance of a contractor's license. Furthermore, FVCCC had not provided any **documentation** to the City that it is the **successor** to Frank Coluccio on any projects with the City and are legally responsible for such projects.

The City's decision to rescind the December 12, 2017 letter was based on the following:

- Per section 1.4 of the OSOQ, Offeror has not listed experience in preparing bids in similar subsurface and utility conditions by FVCCC under Contractor's License No. CT-35781.
- Per section 1.5 of the OSOQ, Offeror has not listed construction projects performed by FVCCC under Contractor's License No. CT-35781.
- Unable to confirm projects stated in Section 2.0, 3.0, and 4.0 were performed by FVCCC under Contractor's License No. CT-35781.

As a result of the rescinded qualifications, FVCCC's [bid] was determined to be **non-responsible**. Furthermore, FVCCC did not provide projects, work experience and qualifications that it has performed or met as required in the Solicitation. In accordance with Hawaii Revised Statutes ("HRS") §103D-310(b) and HAR §3-122-108, the City was unable to "determine whether the prospective offeror has the financial ability, resources, skills, capability and business integrity necessary to perform the work," and was "not fully qualified and able to perform the intended work."

Additionally, by failing to meet the requirements and criteria set forth in the Solicitation, as outlined above, FVCCC's bid was non-responsive in accordance with HRS §103D-302(h) and HAR §3-122-97, and properly rejected.

⁴ SOQ and OSOQ are used herein interchangeably.

* * *

FVCCC contends that it is a successor company of Frank Coluccio. However, **FVCCC has not provided any legal document substantiating the matter.** In fact, Mr. Coluccio's own attorney stated that the transaction is "nearing completion" and that FVCCC is the "likely successor". FVCCC has not provided any evidence in accordance with HRS §§ 414-271 through 414-274 confirming any conversion or merger of the companies. Instead FVCCC formed a new entity with different ownership, and Frank Coluccio continues to operate as a separate entity. Additionally, FVCCC has not been obligated to any current City contracts contracted with Frank Coluccio. One of the critical components of becoming a "successor", is that the successor "becomes invested with rights and assumes burdens of the first corporation." Black's Law Dictionary, 6th Ed. (1990) at 1431.

Based on the aforementioned reasons, FVCCC's protest is denied.

See Respondents' Exhibit I (Emphasis added.)

24. On March 29, 2018, Petitioner's filed the instant Petition.

III. MOTIONS

A. MOTIONS TO INTERVENE

At the pre-hearing conference on April 10, 2018, Harvey E. Lung, Esq. appeared on behalf of James W. Fowler Co. ("JWFC"), a *subcontractor* of Hawaiian Dredging & Construction Co. ("HDCC"), the winning bidder, and made an *oral motion to intervene* on behalf of JWFC. Both parties objected to the motion and the Hearings Officer denied the motion on the grounds that JWFC was a *subcontractor* of the winning bidder and not a real party in interest, in relation to the review process, as described in HRS §103 D-709(d).

On April 16, 2018 at 4:13 p.m., proposed Intervenor JWFC and HDCC (collectively "Intervenor") filed its *written* Motion to Intervene. On April 17, 2018, Petitioner filed its Memorandum in Opposition to Motion to Intervene.

On April 19, 2018, [Proposed] Intervenor's Motion to Intervene came on for hearing before the undersigned Hearings Officer. Respondents acknowledged that HDCC, as the winning bidder, had *standing* to intervene, but not JWFC, HDCC's *subcontractor*. Petitioner opposed the Motion to Intervene. The Hearings Officer denied the Motion to Intervene and adopted the arguments and analysis of Petitioner, including, but not limited to:

1. That Proposed Intervenor's Motion to Intervene was *untimely* under HRCF Rule 24 and HAR §3-126-51 (filed less than 72 hours before the hearing on the case-in-chief);

2. The appeal was between FVCCC and the City on the issue of FVCCC's *responsibility*, which had nothing to do with HDCC's bid. In other words, Petitioner was not alleging that HDCC's bid was improper;

3. The City was adamantly defending its denial of Petitioner's protest and, therefore, could adequately represent HDCC's interest;

4. The hearing would likely involve presentation of confidential information that Petitioner did not want its competitors to know; and

5. HDCC was the *third* lowest bidder and a protest by the *second* lowest bidder, Michaels's Tunneling, was still pending.

After denying the Motion to Intervene, Proposed Intervenor's were excused from further participation in the proceeding. However, they stayed in the hearings room as members of the public to observe the proceedings. Proposed Intervenor's Pre-Hearing Brief and Substantive Joinder in Respondents' Motion for Summary Judgment was *not* considered by the Hearings Officer.

B. RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

On April 9, 2018, Respondents filed its Motion for Summary Judgment with Exhibits A thru J. On April 17, 2018, Petitioner filed its Memorandum in Opposition to Respondents' Motion for Summary Judgment with four (4) Declarations and fifteen (15) Exhibits.

Summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, must be viewed in the light most favorable to the non-moving party. See, *Nan, Inc. vs. DOT, SOH and Hawaiian Dredging Construction Company, Inc.*, PDH 2015-006 (Sept. 4, 2015), citing *Koga Engineering & Construction, Inc. v. State*, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010). "Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact[.]" *Reed v. City & County of Honolulu*, 76 Haw. 219, 25, 873 P.2d 98, 104 (1994).

The Hearings Officer concludes that the four (4) Declarations and fifteen (15) Exhibits proffered by Petitioner raise genuine issues of material fact *viewing the evidence in the light most favorable to Petitioner* and therefore, Respondents' Motion for Summary Judgment is/was DENIED.

One significant material fact in dispute is whether FVCCC is a *successor* company to FCCC and, therefore, entitled to use FCCC's experience in qualifying for this Solicitation. Respondents assert that FVCCC is *not* a legal successor to FCCC.

Petitioner asserts that they are. Viewing the facts in the light most favorable to Petitioner, the non-moving party, the Hearings Officer concludes that Petitioner has proffered sufficient declarations and exhibits to establish a factual dispute as to whether or not FVCCC is a *successor* company of FCCC. The Declaration of Frank Vincent Coluccio attached to Petitioner's Memorandum in Opposition to Respondents' Motion for Summary Judgment in particular establishes a genuine issue of material fact and states, in part, as follows:

1. I am the sole shareholder, officer and director of [sic] Declarant is an employee of FV Coluccio Construction Company Inc. ("FV Coluccio").
2. I am also one of the three co-equal shareholders, co-officers, and directors of Frank Coluccio Construction Company, Inc. ("FCCC").
3. FV Coluccio is the **successor** to FCCC with respect to all of the work that was performed by FCCC in Hawaii, including horizontal drilling, micro-tunneling, jet grouting, and related work.
4. FCCC has been in business since 1953, and has been working in Hawaii since 1977. The company was founded by my father, Frank Coluccio, who died in 2014. For the last 25 years it has been run by myself and my two brothers, Joe Coluccio and Nick Coluccio.
5. I have lived in Hawaii and run the Hawaii operations of FCCC for the last 28 years.
6. My brothers have decided to retire. I have chosen to continue living and doing business in Hawaii. I formed FV Coluccio as a **successor** company to continue the business in Hawaii. I am now running the Hawaii operations of FV Coluccio while also managing the wind down of FCCC projects.
7. FV Coluccio as the Hawaii **successor** company to FCCC has all of the same offices, Hawaii personnel, equipment, qualifications and expertise that FCCC had. We have the same organizational chart, with the same supervisors, superintendents, and equipment operators. I have full authority, under agreements with my

brothers, to use all of the Hawaii offices, Hawaii personnel, and Hawaii equipment of FCCC for the work of FV Coluccio.

8. Timothy Pearia, who has acted as the Responsible Managing ("RME") Employee for FCCC since 2010, is now performing that role for FV Coluccio.

9. In sum, as regards actual expertise and work performed in Hawaii by real people, FV Coluccio is the same company as FCCC, with the only difference being the removal of two non-local shareholders/officers/directors, and a **change of name**. FV Coluccio and the state of Hawaii thus retain the same "Qualified Workforce" performing on new projects that they have had in the past.

10. For that reason, FV Coluccio Properly submitted a statement of qualifications comprised of projects completed under the FCCC name. The experience and expertise of a construction company is found, not in its corporate name or articles of incorporation, but in its people: Its RME, project managers, project engineers, supervisors, superintendents and specialty qualifies, skilled personnel and equipment operators.

11. We have listed our experience as is appropriate for a **successor** company. The people listed in these projects will be the same people working on future FV Coluccio projects. All of the individuals submitted in our qualification package, including myself, own the "rights" to our own personal resumes, accomplishments, qualifications, and certifications that we have established over the course of our careers. All proposed specialty qualifiers (individuals) in FVCCC's submitted [OSOQ] have committed to performing said specialty work of FVCCC on this proposed project.

15. This is the project team of FV Coluccio, which shows that our team has the experience required for the Awa Street Wastewater Pump Station Force Main and Sewer System Improvements Waiakamilo Road Trunk Sewer Job No. W5-16. There are 12 people listed in our qualification package, who have worked for me here in Hawaii an average of 20 years ranging from 5 years to 28 years.

* * *

See, Declaration of Frank Vincent Coluccio attached to Petitioner's Memorandum in Opposition to Respondents' Motion for Summary Judgment (Emphasis added.)

C. RESPONDENTS' MOTION TO TAKE FURTHER EVIDENCE

On April 30, 2018, Respondents filed a Motion to Take Further Evidence ("Respondents' Motion to Take Further Evidence"). Respondents assert that the hearing should be reopened because the City "has obtained information that directly contradicts the oral testimony of Frank V. Coluccio and Tim Pearia to the critical point regarding the current activities of FCCC as an ongoing entity rather than an entity that is shutting down." In support of its Motion, the City proffers the Declaration of HDCC's Vice President and General Counsel, Gary M. Yokoyama, Esq., and Exhibit A, a redacted "Quote+conditions" dated 3/10/2018 from Tim Pearia of FCCC to provide HDCC, the prime contractor, "Jet Grouting Only" services for the HECO – Ala Wai Canal 46kV Project. The City also "notes that sometime after April 11, 2018, FCCC was recently declared the "Apparent Low Bidder" in a procurement issued by the City of Seattle and that the City of Seattle intends to award FCCC a contract worth \$2,539,400 for its base bid." See Respondents' Motion to Take Further Evidence filed April 30, 2018.

On May 3, 2018, Petitioner filed its Memorandum in Opposition to Respondents' Motion to Take Further Evidence. Petitioner asserts that the proposed evidence is neither new nor material and is *not* contradictory to the testimony adduced at hearing. The Hearings Officer is persuaded by Petitioner's arguments and adopts same by reference as its own findings and/or conclusions.

HAR §3-126-71 states, among other things, that, "[t]he reopening of a hearing shall be at the *sole discretion* of the hearings officer." The Hearings Officer in

exercise of its discretion, declines Respondents' request to reopen the hearing and, accordingly, *denies* Respondents' Motion to Take Further Evidence.

The hearing was held on April 19 and 20, 2018. The proposed "rebuttal evidence" is dated March 10 and April 11, 2018, and therefore, was available *prior to hearing* and could have been introduced at hearing, but wasn't. This is buttressed by the fact that HDCC's counsel and/or representative(s) who had the information were present during the hearing as members of the public.

Respondents' Motion to Take Further Evidence is untimely. Procurement appeals to this Office are *expedited* proceedings. See HRS §§ 103D-701(a), 103D-712(a), 103D-709(b) and 103D-712(b). After two days of hearing on April 19 and 20, 2018, both parties rested their cases. To wait 10 days to file this Motion, in light of the fact that the proposed "rebuttal evidence" was available *prior to hearing*, is untimely.

The City of Seattle's award to FCCC is irrelevant. It is the *Hawaii operations* of FCCC that FVCCC is taking over. Furthermore, according to the Declaration of Frank Vincent Coluccio, "The FCCC Board of Directors has expressly agreed to not bid any work that could not be completed by or near the end of 2018." The Seattle job "is a short duration job which has to be completed this year."

Frank V. Coluccio testified that FCCC is ramping down and FVCCC is ramping up. FCCC is not taking on any new projects and its last competitive bid was in April 2017. If there's something "quick" for example, equipment rental, FCCC will do it. According to the Declaration of Tim Pearia, "The HECO Project first came out for bid in February 2017. In keeping with the decision to wind down the company, FCCC

declined to bid on the job. Instead, it only gave a quote to [HDCC] for the Jet Grouting, because that work would have been finished before the end of 2018.”

IV. 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 AND BURDEN OF PROOF

HRS §103D-709(a) extends jurisdiction to the Hearings Officer to review and determine *de novo* any request from any bidder, offeror, contractor or governmental body aggrieved by a determination 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. 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, and shall order such relief as may be appropriate. See §HRS 103D-709(h).

Petitioner has the burden of proof, including the burden of producing evidence and the burden of persuasion. The degree of proof shall be a preponderance of the evidence. See §HRS 103D-709(c).

The issue for determination by this Office is whether Respondents’ denial of Petitioner’s Notice of Protest was proper. The sub-issues include:

- 1) Whether Petitioner was a *responsible* offeror; and
- 2) Whether Petitioner can rely on the experience and projects of FCCC in submission of its OSOQ and Bid.

B. DE FACTO MERGER DOCTRINE DOES NOT APPLY TO PROCUREMENT CASES.

Respondents argue that the *de facto merger* doctrine is a “**judge-made device**” the purpose of which is to “**impose liability or responsibility** on a successor company to avoid injustice, not to grant the successor company any rights and privileges that may arise from association from the predecessor company.” See Respondents’ Closing Brief at page 5 (Emphasis in original.) As such, the *de facto merger* doctrine “has not been applied to impose the experience and capabilities of an existing or predecessor company to a purported successor company for the purposes of government procurements.” *Id.*

Petitioner does *not* argue that the *de facto merger* doctrine applies. See Petitioner’s Closing Argument. Petitioner does argue that FVCCC is a *de facto successor* and/or *legal continuation* of FCCC. See Petitioner’s Closing Argument at page 5.

The Hearings Officer concludes that both arguments are correct. Accordingly, the Hearings Officer will not apply the *de facto merger* doctrine to the facts of this procurement case. The Hearings Officer concludes that based on the unique facts of this case, FVCCC is a *de facto*⁵ *successor* to FCCC and/or a *legal continuation*⁶ of FCCC.

⁵ “*de facto*” when used as an adjective means: actual, genuine, effective, existing and/or real; When used as an adverb “*de facto*” means: in effect, to all intents and purposes, in reality, actually, effectively and/or in fact.

⁶ Under the “continuity of enterprise” and/or “continuing business enterprise” theory cited in Petitioner’s Closing Argument.

C. RESPONDENTS' DENIAL OF PETITIONER'S NOTICE OF PROTEST
WAS UNREASONABLE

On February 20, 2018, Respondents *retroactively* rescinded its December 12, 2017 Pre-Qualification letter⁷ because the projects listed in FVCCC's OSOQ were performed by FCCC, a different *organization*, and rejected Petitioner's Bid as being "non-responsible." Petitioner filed its Notice of Protest, which was denied and the instant appeal was filed.

Respondents argue that its determination was reasonable. See Respondents' Closing Brief at page 8. Petitioner argues that it was not.

Respondents' Procurement Officer has the responsibility to determine whether Petitioner is a "responsible" offeror, that is, whether Petitioner *has the financial ability, resources, skills, capability, and business integrity necessary to perform the work*. HRS §103D-310 provides in relevant part:

§103D-310 Responsibility of offerors.

* * *

(b) Whether or not an intention to bid is required, **the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work.** For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board.

HRS § 103D-310 (Emphasis added.)

Responsibility may be determined *at any time prior to award*:

A responsible bidder is a **person** who has the **capability** in all respects to perform fully the contract requirements, and the **integrity** and **reliability** which will assure good faith performance.

⁷ Respondents explain that they "erroneously qualified" FVCCC. See Respondent's Closing Brief at page 3.

Capability refers to the capability **at the time of award of contract**. Accordingly, these definitions are consistent with the conclusion that Responsibility may be **determined at any time up to the awarding of the contract**.

Browning -Ferris Industries of Hawaii, Inc. v. Dept. of Transportation, PCH 2000-4 (June 8, 2000); Okada Trucking Co. v. Board of Water Supply, et al. 97 Haw. 544 (App. 2001) (Emphasis added.)

The intent of the Procurement Code, as expressed in the Senate Committee's Report, is to allow for *flexibility and common sense* which will *benefit of the people of the state*:

This Bill lays the foundation and sets the standards for the way government purchases will be made, but allows 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 the State.**"

See, *The Systemcenter, Inc. v. State Dept. of Transportation*, PCH 98-9 (December 10, 1998) as annotated in Hawaii Procurement Code Desk Reference at page 7 (2005) (Emphasis added.)

Saving public funds can sometimes outweigh *technical violations*.

A savings of \$21,000 of public funds would do more to foster public confidence in the integrity of the procurement system than would a strict adherence to a largely technical requirement. The requirement of Hawaii Administrative Rules ("HAR") §3-122-108(a)⁸ was not meant to cost the public bodies thousands of dollars by requiring acceptance of higher bids for mere **technical violations**.

See, *Standard Electric, Inc. vs. City & County of Honolulu et al.*, PCH 97-7 (January 2, 1998) as annotated in Hawaii Procurement Code Desk Reference at page 7 (2005) (Emphasis added.)

A bidder's *responsibility* may be established by a sufficient showing that it possesses the *ability to obtain the resources necessary* to perform the contractual obligations.

⁸ Pertaining to Offeror's responsibility.

A bidder's **responsibility** may be established by a sufficient showing that it possesses the **ability to obtain the resources necessary** to perform the contractual obligations. The procuring agency will be given wide discretion and will not be interfered with unless the determination is unreasonable, arbitrary or capricious."

Browning -Ferris Industries of Hawaii, Inc. v. Dept. of Transportation, PCH 2000-4 (June 8, 2000) as annotated in Hawaii Procurement Code Desk Reference at page 19 (2005).

An acquisition transaction can be in *transition* as long as *key personnel and assets* of the predecessor firm (FCCC) are transferred to or otherwise available to FVCCC in order to provide *continuity of operations*.

As noted by the agency, however, MedPro's proposal indicated that MedPro was in the process of "**transitioning** from International Public Works, LLC" (IPW), and that both MedPro and IPW were owned by a professional engineer who was proposed as the overall project manager for this project. MedPro Proposal at 3, 16. In this regard, the agency indicates that, in evaluating MedPro's **corporate experience**, it considered such information as the fact that MedPro's overall project manager for the current project had personally overseen VA project activities for IPW, and that other key personnel from IPW who had worked on numerous VA medical center projects (including the proposed construction project manager and site superintendent) were proposed for this current project.

Here, the record indicates that **key personnel and assets** of IPW, the predecessor firm, are now transferred to **or otherwise available** to MedPro, providing for **continuity of operations** between the two firms and making IPW's **experience relevant to predicting MedPro's successful performance of the contract**.

Matter of: Harbor Services, Inc., File: B-408325, Date: August 23, 2013 (Emphasis added.)

A properly licensed organization may expand its infrastructure to meet the needs of a given project.

A bidder's ability to perform may warrant close scrutiny under circumstances where even though at the time of bid opening, the general contractor (or its designated subcontractors) had the

required licenses(s) to perform, neither the general contractor nor the subcontractors had the actual workforce needed to accomplish the project. Nevertheless, such circumstances do not reflect noncompliance with the requirements for submitting a bid. The size and makeup of a construction firm can fluctuate considerably depending on the volume of their work at any given time, and as long as they are **properly licensed they may expand their infrastructure to meet the needs of a given project.**

Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation, PCH 98-2 (May 19, 1998 as annotated in Hawaii Procurement Code Desk Reference at page 18 (2005).

D. PETITIONER HAS THE ABILITY TO OBTAIN THE PERSONNEL AND RESOURCES NECESSARY TO COMPLETE THIS PROJECT

Evidence adduced at hearing establishes that the subject OSOQ was developed by Respondents, through the Department of Design & Construction (“DDC”) and their consultants Okahara & Associates and their sub-consultants Yogi Kwong Engineers, LLC. Yogi Kwong Engineers, LLC not only developed the OSOQ, but also evaluated the OSOQs submitted by offerors on the *technical requirements* of the Project.

On November 16, 2017, Petitioner submitted its completed OSOQ to Respondents using FCCC’s projects and personnel. In its cover letter, Petitioner informed Respondents, among other things, that FCCC was undergoing some “internal re-organization” and that FVCCC was formed “to provide continued support to our clients and team members.” On November 29, 2017 Respondents requested additional information from Petitioner of a *technical nature* in order to make a determination for qualification for Shaft Construction and Jet Grouting. On November 30, 2017, Petitioner resubmitted its OSOQ.

Mr. Deven Nakayama, project manager for Yogi Kwong Engineers, LLC, testified that after reviewing the resubmitted OSOQ, he determined that Petitioner *met*

the minimum qualification requirements for the Project, albeit based on FCCC projects.

Mr. James Kwong, Mr. Nakayama's supervisor, testified that for purposes of the Solicitation, both the organization's and personnel's experience are important. Mr. Kwong noted that FVCCC and FCCC were different companies. This information was called to the attention of the City and Okahara & Associates.

Wendale Imamura, Purchasing Administrator for Respondents, testified that her committee was aware of the different company names and initially assumed that it was just a "name change". Notwithstanding, the two different, albeit similar company names, Respondents *pre-qualified* Petitioner by letter dated December 12, 2017. On December 19, 2017, the bids were opened and Petitioner was the lowest bidder.

One week after bid opening, on December 26, 2017, Respondents requested additional *information*⁹ on the "re-organization" of FCCC and "how it correlates to the formation of FVCCC." According to Ms. Imamura, HDCC had "inquired" (not protested) whether FVCCC, a recently formed company, can bid on this Project. Respondents also noted that FVCCC is not registered in Hawaii Compliance Express and were unable to determine responsibility per Section 00 53 03 of the Solicitation.

By email letter dated January 5, 2018, Petitioner, by Jordan Bleasdale, responded to Respondents' request for additional *information* as follows:

⁹ Respondents did not specifically request *documentary proof* of a legal successorship.

Please see attached certificate of Vendor Compliance from Hawaii Compliance Express.¹⁰

Frank Coluccio Construction Company (FCCC) has been in business since 1953. FCCC has worked in Hawaii since 1977. The company was founded by Frank Coluccio who died and was succeeded by his three sons; Joe, Franco and Nick. Joe and Nick run the Seattle operations. Franco has lived in Hawaii and ran the Hawaii operations for the last 28 years. He continues to run all Hawaii operations. Joe and Nick wish to retire from all Hawaii interests, while Franco wants to continue living and doing business in Hawaii. **FV Coluccio Construction Company (the successor Hawaii company) will be comprised with the same local personnel and will utilize the same office as FCCC.**

* * *

Please call or email me should you have any further questions. Or if you desire any further information, Franco Coluccio would be happy to meet with you.

See Petitioner's Exhibit 10. (Emphasis added.)

Having not received any response, on January 26, 2018, Petitioner sent another (2nd) letter to Respondents asking Respondents for status of the contract and whether Respondents needed any additional information. See Petitioner's Exhibit 11.

Having not received any response, on February 14, 2018, Petitioner sent yet another (3rd) letter to Respondents asking Respondents for status of the contract and whether Respondents needed any additional information. See Petitioner's Exhibit 12. This third letter also included copies of a Declaration from Franco Coluccio (dated January 22, 2018) confirming details of his new company and a Letter from Seattle attorney, Ron Braley (also dated January 22, 2018) confirming details of Franco's new company.

¹⁰ Tax clearance certificate is a matter of *responsibility*. See, *Standard Electric, Inc. vs. City & County of Honolulu, et al.* PCH 97-7 (January 2, 1998). Since Petitioner submitted its tax clearance from Hawaii Compliance Express, they are "responsible" on this requirement.

By letter dated February 20, 2018, Respondents *retroactively rescinded* its December 12, 2017 pre-qualification letter and determined that Petitioner's Bid was *non-responsible*. The subject protest, denial and appeal followed.

Ms. Imamura testified that after investigation, Respondents determined that they could *not* credit FVCCC with projects FCCC completed because there were no *legal documents* to show that FVCCC was a *successor* company to FCCC or that FVCCC was assuming FCCC's operations. Ms. Imamura testified that although DDC and the consultants deemed that the *individuals* listed in the OSOQ had the requisite experience, the *organization*, FVCCC, did not. Ms. Imamura acknowledged reviewing the letter and Declaration from Frank V. Coluccio and letter from Mr. Coluccio's attorney, Ronald Braley, but testified that without "documentary proof", it was only a "story." Ms. Imamura acknowledged that her office did *not* request documentary proof of a legal successorship. Ms. Imamura testified that under the terms of this Solicitation, the *organization* must be qualified. Offerors cannot be deemed qualified based solely on its RME or key personnel. The City cannot waive this requirement. Ms. Imamura testified that the City has awarded contracts to FCCC in the past and that she is not aware of any projects that FCCC failed to complete for the City.

It is undisputed that Petitioner is a new business. It is also undisputed that Petitioner and FCCC are two separate construction companies in Hawaii. It is also undisputed that there were no *legal* documents submitted to the City establishing that Petitioner is the *legal* successor company to FCCC. The issue remains however, whether, under these unique circumstances, FVCCC can rely on the experience and projects of FCCC in qualifying (being "responsible") to bid on this Project. The Hearings

Officer concludes that it can because all of FCCC's Hawaii based personnel, resources and assets *were available for FVCCC to use* by way of *agreement* between FCCC and FVCCC.

The evidence establishes that Franck V. Coluccio is the sole owner of Petitioner, FVCCC, and a one-third owner of FCCC. Based on the Declaration of Frank Vincent Coluccio¹¹, "Relevant **documents** showing my interests in FV Coluccio and Frank Coluccio are **attached hereto**" (emphasis added.) Thus, there was at least some "documentary proof" provided to the City in support of this "story." FCCC and FVCCC are *related* companies in that they have a common owner. FVCCC is a second-generation *family run business*. FVCCC's name bears the dominant term "Coluccio" because FVCCC is entitled to use the name. FCCC has not complained that FVCCC's name infringes on FCCC's rights to the name because the *two companies agree* that FCCC will wind down and FVCCC will take over the Hawaii operations. Mr. Coluccio's *brothers* own the other two-thirds of FCCC. *Mr. Coluccio has run the Hawaii operations of FCCC for the last 28 years*. Joe Coluccio and Nick Coluccio are based in Seattle and run the Seattle operations. Joe Coluccio and Nick Coluccio want to "draw in liabilities" and do not want to bid on any new contracts in Hawaii. Mr. Coluccio is completing the FCCC contracts in Hawaii and wants to continue living and working in Hawaii. He formed FVCCC to keep his team, who also live in Hawaii, working and for continuity of the Hawaii operations.

The Hearings Officer credits the testimony of Frank Coluccio. Mr. Coluccio testified that he has run the Hawaii based operations of FCCC for 28 years and continues to do so. His two brothers do not interfere with Mr. Coluccio's running of

the Hawaii operations. One of his brothers is getting up there in age and both want to “draw in liabilities” and “preserve wealth.” Thus, FCCC does not want to bid any new projects in Hawaii. Mr. Coluccio is blessed with a good business and talented employees. He wants to continue the Hawaii operations of FCCC for his team and clients. He formed FVCCC which is both licensed and bonded. The plan is for FCCC to ramp down and FVCCC to ramp up. Mr. Coluccio wants a smooth transition to continue providing jobs for his employees and for continuing customer service.

Mr. Coluccio has a verbal *agreement* with his brothers to use the current assets/resources of FCCC including its offices, equipment and personnel under FVCCC. The brothers are still working on a Memorandum of Understanding to cover the Mainland assets, but the Hawaii part has been worked out. Employees currently on FCCC payroll will transfer to FVCCC as work for FCCC decreases and work for FVCCC increases. RME Tim Pearia is committed to working for FVCCC.¹² All other employees are loyal to Mr. Coluccio and have committed to work for him at FVCCC. Most of the key personnel have over 20 years experience with FCCC. One employee in particular, the microtunneling machine “driver”, has won the lifetime achievement award and is probably ranked number 1 or 2 in the country. It’s not surprising with these credentials, that all four (4) of the other bidders had asked FVCCC to be their subcontractor for this Project.

¹¹ See Respondents’ Exhibit F at page 370 which was available to Respondents prior to award.

E. PETITIONER'S ORGANIZATION HAS THE FINANCIAL ABILITY,
RESOURCES, SKILLS, CAPABILITY AND BUSINESS INTEGRITY
NECESSARY TO PERFORM THE WORK FOR THIS PROJECT

The Hearings Officer concludes that Petitioner's organization *has the financial ability, resources, skills, capability, and business integrity necessary to perform the work*¹³. The Hearings Officer concludes that the evidence is overwhelming that FVCCC possesses the *ability to obtain the resources necessary* to perform the contractual obligations of this Project. The Hearings Officer concludes that FVCCC can rely on the experience of FCCC in predicting FVCCC's successful performance of this Project.

FINANCIAL ABILITY

FVCCC's owner, Frank Coluccio, owns one-third of FCCC's assets *including one-third of the Hawaii based assets*. Frank Coluccio has an *agreement* with his brothers to use the other two-thirds of FCCC's Hawaii resources/assets. This part of the Memorandum of Understanding is non-revocable. According to Attorney Braley, the transaction for Mr. Coluccio to acquire the Hawaii part of FCCC involves the transfer of "millions of dollars in real estate and equipment." In addition to the FCCC assets, the 3 brothers jointly own five (5) properties held in LLCs. Frank Coluccio has managed the Hawaii based operations of FCCC for the past 28 years. According to RME Tim Pearia, FCCC has completed 15 micro-tunneling projects in Hawaii since 1996 totaling 13 -14 miles or \$400 Million worth of work. According to James Binder, Liberty Mutual bonded (performance and payment) FCCC for the \$400 Million worth of work. According to Ms. Imamura, she is not aware of any projects that FCCC has failed to complete for the City.

¹² Based on the correspondence between the parties it would appear that Jordan Bleasdale is also employed by FVCCC. See Respondents' Exhibit G.

According to Frank Coluccio, FVCCC is also independently capitalized and bonded. He underwent a “rigorous grilling” by Liberty Mutual’s agent before being qualified for the bid bond on this Project. According to James Binder, insurance broker for FCCC and FVCCC, after careful evaluation, FVCCC has qualified for the 5% (\$3.85 Million) bid bond underwritten by Liberty Mutual submitted with its Bid. Liberty Mutual also stands ready to put up a \$77 Million performance bond and \$77 Million payment bond for this Project. According to Mr. Coluccio, FVCCC has the one-half million dollars necessary to start the Project (purchase materials).

RESOURCES

FVCCC’s owner, Frank Coluccio, owns one-third of FCCC’s resources including, but not limited to, the Hawaii offices and equipment. Frank Coluccio has a verbal *agreement* with his two brothers to use the other two-thirds of FCCC’s Hawaii resources until dissolution of FCCC. By agreement with his brothers, FVCCC is in the process of acquiring the Hawaii operations of FCCC, but the process is complex because it involves multiple properties and *millions of dollars* in real estate. FCCC is winding down so there will be no competition for resources as FVCCC increases its work.

SKILLS

Based on the project experience of key personnel submitted in its OSOQ, FVCCC was deemed qualified on the *technical requirements* by Yogi Kwong Engineers, LLC, Respondents’ consultant’s sub-consultant and hence, by Respondents. According to Frank Coluccio, *all FCCC workers* have committed to working for FVCCC. The twelve (12) people listed in the OSOQ have worked for Frank Coluccio in Hawaii an

¹³ See HRS §103D-310.

average of 20 years ranging from 5 years to 28 years. According to James Kwong, of Yogi Kwong Engineers, LLC, the personnel listed on the OSOQ completed some of the most challenging projects in Hawaii and “expanded the state of art of microtunneling.”

CAPABILITY

Yogi Kwong Engineers, LLC determined that the OSOQ submitted by FVCCC met the minimum qualifications requirements. Beyond that, the personnel listed on the OSOQ completed some of the most challenging projects in Hawaii and expanded the state of art of microtunneling.

As the Hawaii *likely* successor company to FCCC, FVCCC has all of the same offices, Hawaii personnel, equipment, qualifications and expertise that FCCC has. FVCCC has the same organizational chart, with the same supervisors, superintendents, and equipment operators. FVCCC's owner, Frank Coluccio, has full authority, under agreements with his brothers, to use all of the Hawaii offices, Hawaii personnel, and Hawaii equipment of FCCC for the work of FVCCC. According to Tim Pearia, formerly RME for FCCC and now RME for FVCCC (because he can only be RME for one company), all four (4) of the other bidders contacted FVCCC and asked if FVCCC would be their subcontractor on this Project. There is no question that FCCC/FVCCC personnel, *who are one and the same*, were (and still are) capable of performing the work on this Project at the time of the award.

BUSINESS INTEGRITY

FVCCC is a *licensed and bonded second-generation family run business*. FCCC is in many respects the “parent” company of FVCCC. FVCCC's owner, Frank Coluccio, is the son of FCCC's founder, also named Frank Coluccio who died in 2014

and left the company to his three sons via stock transfer. Frank Coluccio is a one-third owner of FCCC. FCCC has been doing business in Hawaii for 28 years under the management/leadership of Frank Coluccio. Liberty Mutual has bonded the Hawaii operations of FCCC for over 60 years in the estimated amount of \$400 Million. According to James Binder, the surety broker for FCCC since 1984 (and currently FVCCC's surety broker), Liberty Mutual is aware of the ongoing transition from FCCC to FVCCC and *after full investigation* of FVCCC's "character, capacity and capital" has not only put up the \$3.85 Million bid bond, but also stands ready to put up the \$77 Million performance bond and \$77 Million payment bond for this Project. Liberty Mutual stands behind FVCCC based on their dealings with Mr. Coluccio and the *organization*. FCCC has completed all projects in Hawaii under Frank Coluccio's management/leadership.

It's true that Petitioner has not produced any *legal* documents showing that it is a *legal* successor to FCCC. The Hearings Officer finds, however, that the two entities are in the process of formalizing FVCCC's acquisition of FCCC's Hawaii operations, but that it is "quite complex" and "nearing completion."

As noted by Ronald E. Braley, Frank V. Coluccio's attorney:

For the past several years, Frank has been working diligently with his brothers for him to acquire the Hawaii part of the construction business, if not the entire company. The transaction is **quite complex** and involves the transfer of millions of dollars in real estate and equipment. It is now **nearing completion**.

See Respondents' Exhibit G. (Emphasis added.)

Frank Coluccio testified that in addition to the FCCC assets, the 3 brothers jointly own five (5) properties held in LLCs. Mr. Coluccio and his brothers are working on a Memorandum of Understanding regarding the Mainland assets, but they have

reached an agreement regarding the Hawaii based operations. Mr. Coluccio has *full authority, to use all of the Hawaii offices, Hawaii personnel, and Hawaii equipment of FCCC for the work of FVCCC*. The Hearings Officer concludes that the *organization, FVCCC*, has the *ability to obtain the resources necessary* to perform the contractual obligations of this Project. See, *Browning -Ferris Industries of Hawaii, Inc. v. Dept. of Transportation, PCH 2000-4 (June8, 2000)*. The Hearings Officer concludes that FVCCC is a *de facto successor* to FCCC's Hawaii based operations and/or a *legal continuation* of the Hawaii based operations of FCCC.

Respondents argue that FVCCC is a *new business* and cannot rely on the experience and projects of FCCC, a *predecessor* company, because the two entities continue to exist. While it is true that FCCC and FVCCC continue to exist, *by agreement*, FVCCC is in the process of acquiring the Hawaii operations of FCCC. To reject an otherwise qualifying bid on this basis alone is putting "form over substance." The substance is that FCCC is a *family run* business by three brothers. One of the brothers, Frank Coluccio, is taking over the Hawaii operations *by agreement* with his two brothers. It doesn't make sense for FCCC to take on any new long-term Hawaii projects since it is winding down. The plan is for FCCC to ramp down as FVCCC ramps up. Frank Coluccio, who has run the Hawaii operations of FCCC for the past 28 years, is doing both because he is a *common owner* of both entities. The transaction is "nearing completion." An acquisition does not have to be fully completed before FVCCC can rely on the experience and projects of FCCC. An acquisition transaction can be in *transition* as long as *key personnel and assets* of the predecessor firm (FCCC) are transferred to **or otherwise available** to FVCCC in order to provide

continuity of operations. See, *Matter of: Harbor Services, Inc.*, File: B-408325, Date: August 23, 2013.

The Hearings Officer concludes that FCCC's *key personnel and assets were otherwise available* to FVCCC at the time of the award of the contract to HDCC and are still available to FVCCC. Respondents assert that FVCCC did not produce a single legal document showing that they are the legal successor to FCCC, however, according to Ms. Imamura, *she did not ask*. Petitioners have shown that on at least 3 occasions, they asked Respondents if they needed/required any further information, there was no response.

F. OVERALL CONCLUSION

The Hearings Officer concludes that Petitioner has established by a preponderance of the evidence that as an *organization* it is a *responsible offeror* and, therefore, that Respondents denial of their Notice of Protest was improper. Under the unique facts of this case, a flexible and common-sense approach leads to the only reasonable conclusion that FVCCC is a *de facto* successor to FCCC's Hawaii operations and/or that FVCCC is a *legal continuation* (by agreement between the two entities) of FCCC's Hawaii operations. FCCC's Hawaii personnel are winding down the Hawaii projects of FCCC and all have committed to transfer to FVCCC as its work increases. At least three FCCC employees, Frank Coluccio, Tim Pearia and Jordan Bleasdale are already employed by FVCCC and FVCCC has the *ability to expand its infrastructure and obtain the resources* necessary to complete the Project. For *all intents and purposes*, FCCC's Hawaii operations and FVCCC's resources, skills, capability, financial ability, business integrity, experience, assets, offices, equipment

and personnel *are one and the same*. *In effect and in reality*, FVCCC is the legal continuation of FCCC's Hawaii operations, notwithstanding the two entities continue to exist (for now.)

At the end of the day, the Procurement Code was meant to ensure that government purchases will be made in an economical and efficient manner that will *benefit the people of the State*. Here, a more flexible and a common-sense approach would have saved the public \$23 Million thereby fostering public confidence in the integrity of the procurement system. The Hearings Officer concludes that Respondents' requirement that Petitioner produce a *legal document* showing that they are the *legal successor* to FCCC is a "technical" requirement, at best. Under the unique circumstances of this case, that requirement should not stand in the way of the public saving \$23 Million in public funds.

The Hearings Officer concludes that Respondents improperly determined that FVCCC's bid was non-responsible at the time of award. Accordingly, the Hearings Officer finds and concludes that Respondents' denial of Petitioner's Protest was improper.

G. REMEDIES.

Having sustained Petitioner's protest, pursuant to HRS §103D-707(1), the Hearings Officer has two options after an award has been made where the person awarded the contract has not acted fraudulently or in bad faith:

A) ratify and affirm, or modify the contract to HDCC, provided it is determined that doing so is in the best interest of the State; or

B) terminate the contract 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.

Both parties agree that HDCC has not acted in bad faith. Nor does the Hearings Officer find that HDCC acted in bad faith.

Respondents acknowledge that if the Hearings Officer sustains the Protest, the Hearings Officer may ratify and affirm, or modify the contract, if it is in the City's best interest. Respondents did not take a position on whether it is in the City's best interest to *ratify and affirm* the contract. Respondents do not believe that *modification* of the contract would be in the City's best interests. See Respondents' Closing Brief at page 12. Respondents argue that if the award is terminated, HDCC would *not* be entitled to compensation for any expenses, as the contract award occurred on February 20, 2018 and HDCC was notified of the protest on March 8, 2018, *prior to* the execution of the written contract and any notice to proceed being issued.¹⁴ Finally, Respondents argue that the Hearings Officer has *no authority* to direct that an award be made to FVCCC.

Petitioner argues that HRS §103D-707(1) subsection (A) does not apply because it is not in the City's best interests to spend \$23 Million it does not need to spend. Petitioner argues that the contract awarded to HDCC should be terminated. Petitioner further argues that since the contract was not actually signed, HDCC has not incurred any expenses and is not entitled to any profits. Finally, Petitioner argues that

¹⁴ There is no evidence in the record that a written contract between the City and HDCC was executed or that a notice to proceed was issued to HDCC.

the Hearings Officer should direct Respondents to award the Awa Street Project to FVCCC, as the lowest responsible and responsive bidder.

The Hearings Officer concludes that neither ratification and affirmation, nor modification is appropriate here. The Hearings Officer concludes that ratifying and affirming, or modifying a contract to HDCC where the City improperly determined that FVCCC's bid was non-responsible at the time of award *is not* in the State's best interest because it "can only undermine the public's confidence in the integrity of the system and, in the long run, discourage competition." The Hearings Officer also concludes that Petitioner should be given the opportunity to have its proposal properly evaluated by Respondents.

As annotated in the Hawaii Public Procurement Code Desk Reference (2015 Edition):

Ratification of an illegally awarded contract *can only undermine the public's confidence in the integrity of the system and, in the long run, discourage competition*. Any concerns Respondent may have had 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 Code. As such, ratification of the KTW contract would not be in the best interest of the State. *Environmental Recycling v. County of Hawaii*, PCH 98-1 (July 2, 1998). (Emphasis added.)

Moreover, unless the contract is terminated, *Petitioner would be denied the opportunity to have its bid properly evaluated by Respondent*. Termination would also 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, as well as HAR §3-126-38(a)(4) which provides that even where performance has begun, termination is the preferred remedy. *Kiewit Pacific Co. v. Dept. of Land and Natural Resources et al.*, PCH-2008-20 (February 20, 2009); *Access*

Service Corp. v. City and County of Honolulu, et al., PCX-2009-3 (November 16, 2009). (Emphasis added.)

For all of these reasons, the Hearings Officer concludes that termination of the award to HDCC is the only reasonable remedy. Since HDCC was notified of the protest *prior to* the execution of the written contract and any notice to proceed being issued, HDCC is *not* entitled to compensation for any expenses. Finally, the Hearings Officer agrees with Respondents that it has no authority¹⁵ to award the contract to FVCCC, the successful protestor.

V. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders as follows:

1. HDCC and/or JWFC's Motion(s) to Intervene are DENIED;
2. Respondents' Motion for Summary Judgment is DENIED;
3. Respondents' Motion to Take Further Evidence is DENIED;
4. Respondents' denial of Petitioner's protest is vacated;
5. The contract awarded to HDCC is terminated and HDCC is not entitled to compensation for any expenses;
6. Each party shall bear its own attorneys' fees and costs; and

¹⁵ *The Carl Corp. v. Department of Education*, 85 Haw. 431, 946 P.2d 1 (Haw. 1997) case cited by Petitioner does not give the Hearings Officer authority to award the contract to a successful protestor.

7. Petitioner's cash bond shall be returned upon the filing of a declaration by Petitioner attesting that the time to appeal to Circuit Court has lapsed and that no appeal has been timely filed. In the event of a timely application for judicial review of the decision herein, the disposition of the bond shall be subject to determination by the Circuit Court.

Dated at Honolulu, Hawaii: MAY - 8 2018



RODNEY K.F. CHING
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

*Hearings Officer's Findings of Fact, Conclusions of Law, and Decision;
In Re FV Coluccio Construction Co., Inc., PDH-2018-005.*