

Respondent filed its response to Petitioner's request for administrative hearing on December 24, 2020. On December 30, 2020, Respondent filed a motion to dismiss along with its memorandum in support, Declaration of Jolie Yee, and Exhibits "A"- "F."

On December 30, 2020, Petitioner filed a motion for partial summary judgment. On January 4, 2021, Petitioner filed its opposition to Respondent's motion to dismiss, Declaration of Kevin P. Simpkins, and Exhibits "1"- "2."

Respondent filed its opposition to Petitioner's motion for partial summary judgment on January 4, 2021.

Both motions came on for hearing before the undersigned Hearings Officer on January 5, 2021. Petitioner was represented by Kristi L. Arakaki, Esq. and Respondent was represented by Deputy Attorney General Patricia Ohara, Esq. After hearing arguments on the motions, the Hearings Officer denied Respondent's motion to dismiss and informed the parties that the Hearings Officer would take Petitioner's motion for partial summary judgment under advisement. The parties' request to continue hearing in the matter pending a decision on Petitioner's motion was granted.

By letter dated January 5, 2021, the Hearings Officer informed the parties that she was granting Petitioner's motion for partial summary judgment and setting hearing on the remaining issue for January 11, 2021. By email correspondence dated January 6, 2021, the parties informed the Hearings Officer that given the decision to grant Petitioner's motion for partial summary judgment, the remaining issue raised in Petitioner's request for administrative hearing, that the bids from Stan's Contracting Inc. and Isemoto Contracting Co., Ltd. are nonresponsive, is moot. Accordingly, the January 11, 2020 hearing was taken off calendar. On January 14, 2020, a Stipulation Re: Further Hearing was filed wherein the parties stipulated that Petitioner's remaining claims are moot and that there are no grounds for an evidentiary hearing on the remaining issue.

Having considered the evidence and arguments presented, along with the memorandum, declarations and exhibits attached thereto, together with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and decision denying Respondent's motion to dismiss and granting Petitioner's motion for partial summary judgment.

II. FINDINGS OF FACT

1. On May 27, 2020, Respondent issued a solicitation for D.A.G.S Job No: 61-10-0875. The D.A.G.S Job No: 61-10-0875 invitation for bids (“IFB”) is for a project to reroof the Hilo State Office Building (“Project”).

2. On June 10, 2020, bid were opened. Petitioner was the lowest bidder, having submitted a bid in the amount of \$1,860,143. Stan’s Contracting, Inc. (“Stan”) submitted the second lowest bid in the amount of \$1,933,700. The third lowest bid was submitted by Isemoto Contracting Co., Ltd. (“Isemoto”) in the amount of \$2,349,000.

3. By letter dated August 7, 2020, Respondent informed Petitioner that its bid had been rejected as nonresponsive:

Thank you for your bid which was submitted for the subject project. We regret to inform you that your bid has been rejected due to an issue with your subcontractor listing. We could not confirm a subcontractor’s license for the subcontractor listed to perform the PV work, MaxPro Solar, LLC. A telephone consult with the Contractor’s License Board also confirmed that this is not a licensed entity. This component of the work represents approx. 20% of the estimated cost of construction. Therefore, this listing error cannot be forgiven under HRS §103D-310(c).

4. Petitioner submitted a protest letter dated August 14, 2020, protesting both the rejection of its bid due to the alleged subcontractor listing issue; and the potential award of the Project to Stan or Isemoto, alleging deficiencies in Stan’s and Isemoto’s bids rendering them nonresponsive and/or nonresponsible bidders.

5. In its August 14, 2020 protest letter, Petitioner protested Respondent’s rejection of Petitioner’s bid stating in relevant part:

First, the work to be performed by MaxPro Solar, LLC does not require licensing. CCI has several contracting licenses including a General Engineer Contractor’s “A” license. Under HAR §16-77-32(a), licensees holding the “A” general license also automatically hold various other specialty licenses including the C-61 solar energy systems license.

CCI will be performing work relating to the PV system that requires a solar energy systems license and is authorized to do so via its “A” license which also confers a C-61 license upon the

“A” license holder. Under the procurement code and the bid solicitation / IFB documents, CCI was not required to list itself on page 00410-9 of the bid. MaxPro Solar, LLC (“MaxPro”) is being hired to perform work relating to the PV system that does not require licensing. The PV work is labor intensive, requiring removal of hundreds of PV modules so that the roof work can be performed and then placing all of these PV modules back on top of the roof after the roof work is completed. This is the work that MaxPro will perform and is tantamount to CCI performing the work with its own employee or a day laborer. CCI seeks to engage MaxPro as CCI does not have enough of its own employees to perform this work in the requisite time.

6. In its protest letter, Petitioner’s also protested the potential award of the Project to Stan and Isemoto alleging the following:

- A. Stan’s and Isemoto will not perform at least twenty percent of the contract work as required by the IFB;
- B. Failure to comply with the performance of work clause of the IFB renders Stan and Isemoto’s bids non-responsive; and
- C. Stan and Isemoto lack the requisite licenses to perform at least 20% of the project work with their own respective organizations.

7. By letter dated December 9, 2020, Respondent denied Petitioner’s protest. The denial letter stated in part:

First, the project includes the installation of a photovoltaic system, and either a C-13 (electrical contractor) or C-60 (solar power system contractor) license is required to install a photovoltaic system. The description of the scope of work of the C-60 license in Appendix A of HAR § 16-77 is “To assemble and install photovoltaic panels, batteries, controls, and related low voltage D.C. wiring.” Licensees who hold the C-13 electrical contractor license automatically hold the C-60 license. CCI listed MaxPro Solar, LLC (“MaxPro”), as an entity which does not hold either the C-13 or C-60 license required, to perform the PV work for this project.

Second, CCI’s C-61 license does not authorize CCI to install the photovoltaic system required by this project. The C-61 license allows licensees to install solar hot water systems, heat pumps, or

water heaters, none of which are included in the subject project. Therefore, CCI is not capable of self-performing the PV work.

Third, we note that CCI would have had to list itself if both CCI and MaxPro were intended to perform the same scope of work. If CCI possessed the license required to perform the PV work and intended to share the PV work with MaxPro, the solicitation documents require that in its subcontractor listing, CCI list itself, ensure that the nature of work for both entities was distinct and separate, and describe in the nature of work column, the respective portions of the PV work it and MaxPro would perform. Item 1.05L6b of Section 00210- Instructions to Bidders in the project specifications, states, in part: "...A bidder who intends to perform work that falls under the same specialty contractor's classification as that of a listed subcontractor must list itself, ensure that the nature of work is both distinct and separate, and is appropriately described."

For this project, Item 1.01B4 of Section 800 reduced the bidder's self performance requirement from "not less than 20%" to "not less than 10%". The State requested and received information from both Stan's Contracting Inc. and Isemoto Contracting Co., Ltd. that sufficiently indicate both bidders meet the 10% requirement. Further, we found both companies bids to be responsive.

The State intends to make award to Stan's Contracting Inc., who submitted the lowest responsive, responsible bid for this project.

8. Petitioner's bid lists three subcontractors and the nature of work to be performed as follows:

WDK Electrical Services	Electrician
Skippy's Plumbing	Plumbing
MaxPro Solar, LLC	PV

9. The PV work to be performed by MaxPro Solar, LLC ("MaxPro") involves the removing of PV modules from the roof to allow the roof work to be performed, and then replacing the PV modules.

10. The value of the PV work to be performed by MaxPro is \$150,000.

11. The PV work portion of the Project requires a specialty contractor's license to electrically connect the PV system to an electrical power source.

12. The only electrical work for the Project is the work relating to the electric connectivity of the PV system.

13. The value of the electric work to be performed by Petitioner’s subcontractor WDK Electrical Services (“WDK”) is \$80,000.

14. Stan’s bid lists the following subcontractors and the nature of work to be performed:

Tory’s Roofing	Membrane Roofing
J & H Sheetmetal	Sheetmetal
Key Painting	Painting
Unitek Insulation	Hazmat Abatement
Calvin’s Plumbing	Plumbing
Hawaii Energy Connection	Electrical

15. Stan’s subcontractor bid from Hawaii Energy Connection is for photovoltaic removal, storage, and re-installation.

16. The value of the photovoltaic removal, storage and re-installation work to be performed by Hawaii Energy Connection is \$194,978.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

A. General Considerations

1. **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. HRS §103D-709(i).

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. HRS §103D-709(c).

2. Standards for Summary Judgment Motion

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 a 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 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. *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, 225, 873 P.2d 98, 104 (1994).

B. Respondent's motion to dismiss for lack of jurisdiction.

Respondent alleges that Petitioner's protest matter does not meet the jurisdictional requirements of HRS §103D-709(d)(2) and thus Petitioner's protest appeal should be dismissed for a lack of jurisdiction. HRS §103D-709(d) provides:

Any bidder, offeror, contractor, or person that is a party to a protest of a solicitation or award of a contract under section 103D-302 or 103D-303 that is decided pursuant to section 103D-701 may initiate a proceeding under this section; provided that:

(1) For contracts with an estimated value of less than \$1,000,000, the protest concerns a matter that is greater than \$10,000; or

(2) For contracts with an estimated value of \$1,000,000 or more, the protest concerns a matter that is equal to no less than ten per cent of the estimated value of the contract.

Respondent argues that the Petitioner's request for administrative review does not meet the minimum amount in controversy and jurisdictional threshold of "no less than ten percent of the estimated value of the contract."

There is no dispute that the value of the contract exceeds \$1,000,000; thus, pursuant to HRS §103D-709(d)(2), the protest matter must concern no less than ten percent of the estimated value of the contract. HRS §103D-709(k) defines "estimated value of the contract" as the lowest responsible and responsive bid under section 103D-302. Respondent argues that because Petitioner's bid was rejected due to its defective subcontractor listing, Stan's bid of

\$193,386 is the lowest responsive and responsible bid and estimated value of the contract. On the contrary, Petitioner argues that its bid of \$1,860,143 is the estimated value of the contract because Petitioner was the lowest responsible and responsive bidder. In Petitioner's opposition to Respondent's motion to dismiss, Petitioner points out that Respondent admits in its response to Petitioner's request for hearing that Petitioner's bid is the estimated value of the contract. In its response to the request for hearing Respondent states, "The contract amount is the amount of Petitioner's bid, \$1,860,143. Ten percent of \$1,860,143 is \$186,014.30."

Petitioner is the apparent lowest responsive and responsible bidder. The Hearings Officer determines that Petitioner's bid of \$1,860,143 is the estimated value of the contract and therefore the amount of the matter in controversy must be no less than \$186,014.30 (ten percent of \$1,860,143).

Having established the estimated value of the contract, the Hearings Officer must determine the amount of the matter in controversy. Respondent argues that the matter in controversy is Respondent's rejection of Petitioner's bid due to the unlicensed PV subcontractor MaxPro. Respondent argues that the amount in controversy is the value of the work to be provided by MaxPro, which is estimated to be \$150,000. Petitioner argues that the protest concerns the entirety of the PV work to be completed and not just the subset of the PV work that MaxPro was to perform. On the other hand, Petitioner argues that the labor provided by MaxPro is only a portion of the PV work to be provided for the Project. Petitioner contends that Respondent rejected its bid on the basis of the PV work. In support of its position, Petitioner cites Respondent's letter rejecting Petitioner's bid because Respondent "could not confirm a subcontractor's license for the subcontractor listed to perform the PV work, MaxPro Solar, LLC" and "[t]his component of work represents approx. 20% of the estimated cost of construction." The Hearings Officer notes that Respondent's rejection of Petitioner's bid was based on Respondent's inability to confirm a subcontractor license for MaxPro and Respondent acknowledges the PV work for the Project represents approximately twenty percent of the estimated cost of the construction. Accordingly, the Hearings Officer agrees with Petitioner that the matter in controversy concerns the PV work for the Project, and is not limited to the value of the work to be provided by MaxPro.

It is undisputed that the PV work includes electric work in addition to the labor involved in removing and replacing the PV modules. The value of the electrical work to be provided by Petitioner's subcontractor WDK is estimated at \$80,000, and Petitioner estimates it

will provide \$65,000 of the work itself for the PV portion of the Project. The value of the work to be provided by MaxPro is estimated at \$150,000. Collectively, the estimated value of the PV work to be provided by Petitioner is \$295,000.¹ This amount exceeds \$186,014.30.

The second lowest bidder, Stan, lists electrical subcontractor Hawaii Energy Connection in its bid. The Hawaii Energy Connection estimate for the removal and replacement of PV equipment is valued at \$194,978. The Hearings Officer notes that the estimated value of the PV work to be provided by Stan also exceeds \$186,014.30. Based upon the foregoing, the Hearings Officer determines that the amount of the matter in controversy is more than ten percent of the estimated value of the contract. Accordingly, the Hearings Officer concludes that Petitioner's protest meets the jurisdictional threshold and denies Respondent's motion to dismiss for lack of jurisdiction.

C. Petitioner's motion for partial summary judgment.

In Petitioner's motion for partial summary judgment, Petitioner requests a determination that there is no basis for the rejection of its bid on the grounds that Petitioner erred in its subcontractor listing. Petitioner argues that it properly listed subcontractors for performance of PV and electrical work.²

Respondent rejected Petitioner's bid for the Project, stating the following, "your bid has been rejected due to an issue with your subcontractor listing. We could not confirm a subcontractor's license for the subcontractor listed to perform the PV work, MaxPro Solar, LLC." Petitioner argues that it properly listed MaxPro as a subcontractor performing PV work and that the work to be provided by MaxPro did not require a specialty license.

Petitioner argues that pursuant to HRS §103D-302(b), it was required to list MaxPro as a subcontractor, regardless of whether MaxPro held a specialty license. Petitioner argues that there is no caveat or exceptions that joint contractors or subcontractors be listed only if they will perform specialty work requiring a license or if they have a specialty contractors license. HRS §103D-302(b) provides as follows:

An invitation for bids shall be issued, and shall include a purchase description and all contractual terms and conditions applicable to

¹ Even excluding the value of the amount of work to be provided by Petitioner itself, the PV work to be provided by Petitioner's subcontractors MaxPro and WDK is \$230,000 (\$150,000 + \$80,000).

² Petitioner also argues that it was not required to list itself as one of the contractors that would perform the PV work. Respondent acknowledges that Petitioner does not have to list itself and asserts that the statement in the denial letter was only to provide a hypothetical--in the event Petitioner intended to perform licensed specialty work. The parties agree that the issue is not relevant and therefore will not be addressed.

the procurement. If the invitation for bids is for construction, it shall specify that all bids include the name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract and the nature and scope of the work to be performed by each. Construction bids that do not comply with this requirement may be accepted if acceptance is in the best interest of the State and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one per cent of the total bid amount.

Petitioner also argues that Respondent erred in rejecting Petitioner bid on the basis that MaxPro was not licensed because the PV work to be provided by MaxPro did not require a license. Petitioner argues that the work of physically removing the PV modules from the roof and then putting the modules back on the roof is PV related work, but does not require a license. Petitioner contends that it identified all subcontractors it was required to list and that Petitioner properly listed WDK as the subcontractor that would be performing the electrical work for the Project.

Respondent does not contend that it was improper to list MaxPro as a subcontractor, but rather, argues that Petitioner listing MaxPro and specifying the nature of the work to be performed as “PV” was a defect in Petitioner’s subcontractor listing. Respondent argues that Petitioner’s subcontractor listing is defective for its lack of clarity that opened it to a different interpretation than what may have been intended.

In its opposition to Petitioner’s motion for partial summary judgment, Respondent states, “Petitioner listed an unlicensed subcontractor and specified its nature and scope of work to be performed as ‘PV’ without more...As the only subcontractor with the designation of ‘PV’ on the listing, it was not unreasonable from the listing that DAGS concluded that MaxPro was to perform all of the PV work.”

The undisputed facts establish that the Project includes the installation of a photovoltaic (“PV”) system and that a C-13 (electrical contractor) or C-60 (solar power system contractor) license is required to install a PV system. A contractor who possesses a C-13 electrical contractor license automatically hold a C-60 license. It is undisputed that MaxPro has neither a C-13 nor a C-60 specialty contract license. According to the declaration of Kevin Simpkins, Petitioner’s president, the only portion of the Project that requires an electrical contractor license is the PV work, specifically, connecting the PV system to the electrical power source. Respondent does not dispute this fact. Petitioner listed subcontractor WDK and

described the nature of the work to be provided by WDK as “Electrician.” Respondent does not contend that WDK is improperly listed or dispute that WDK possesses a C-13 electrical contractor license. Rather, Respondent argues that Petitioner did not indicate in its subcontractor listing that another subcontractor was to perform PV work. Respondent argues that based upon Petitioner’s bid with the only the subcontractor designation of “PV” on the listing, it was not unreasonable from the listing that Respondent concluded that MaxPro was to perform all of the PV work.

This office has recognized that a purpose of HRS §103D-302 requirement that a bidder list all of the subcontractors it intends to engage for the Project, and to describe the nature and scope of their work, is to prevent bid shopping. *Hawaiian Dredging Company v. City & County of Honolulu, PCH 99-6 (August 9, 1999)*; *Okada Trucking Co., Ltd. V Board of Water Supply, et.al, 97 Hawaii 544 (App. 2001)*; *Nan Inc. v. Department of Transportation, State of Hawaii, PCH-2008-9 (October 3, 2008)*. By requiring bidders to include subcontractor information in their bids, the legislature sought to prevent bid shopping and bid peddling:

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

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

In this case, there is no evidence of bid shopping or allegation that Petitioner’s listing of MaxPro created the opportunity or risk of bid shopping. Petitioner’s subcontractor lists includes WDK to perform “Electrician” work and MaxPro to perform “PV” work. Respondent acknowledges that Petitioner satisfies the required C-13 or C-60 specialty contractors license for the PV portion of the Project through its listing of WDK. Nonetheless, Respondent argues it was confusing to have two contractors listed and based upon the listing, Respondent opines that it is not unreasonable to assume Petitioner was listing MaxPro to do the PV work under a specialty license. On a practical note, the Hearings Officer agrees with Respondent that Petitioner’s bid could have been written clearer. Petitioner could have included additional information regarding the PV work to be provided by MaxPro in its subcontractor listing. Nonetheless, the Hearings

Officer concludes that Respondent's issue with Petitioner's subcontractor listing is a technical issue which does not create a risk of bid shopping or bid peddling.

One of the stated purposes of the procurement code is to allow "for flexibility and the use of common sense by purchasing officials to implement the law in a manner that will be economical and efficient and will benefit the people of the State." *Standing Committee Report No. S8-93, 1993, Senate Journal at 39. See also, The Systemcenter, Inc. v. State Dept. of Transportation, PCH 98-9 (December 10, 1998) and Parsons RCI, Inc. v. Dept. of Transportation Highways Division, State of Hawaii, et al., PCH-2007-3 (July 13, 2007).* In this case, rejecting Petitioner's bid for the technical issue regarding its subcontractor listing favors form over substance and disregards common sense. It is undisputed that the PV work portion of the Project requires either a C-13 or C-60 license to connect the PV electrical system to an electrical power source. The reroofing Project does not require a C-13 electrical contractor license for any other work on the Project except for the PV portion. Petitioner listed subcontractor WDK to perform "Electrician" work for the Project and unlicensed subcontractor MaxPro to perform "PV" work. The Hearings Officer notes that HRS §103D-302(b) requires bidders to list all of the subcontractors they intend to engage in the project and there is no exclusion of that requirement for subcontractors without a specialty contractor license. The Hearings Officer further notes that there is no contention that Petitioner failed to list a C-13 or C-60 licensed contractor to perform the electrical work required by the Project. Accordingly, based on the foregoing considerations, the Hearings Officer concludes that Petitioner's subcontractor listing of MaxPro did not render Petitioner's bid nonresponsive.

On the basis of the foregoing 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 that the subcontractor listing of MaxPro did not render Petitioner's bid defective.

D. Petitioner's Protest regarding the responsiveness of the Stan's and Isemoto's bids is moot.

The parties stipulated that the remaining issue in Petitioner's protest is moot. Accordingly, the Hearings Officer will not address this issue.

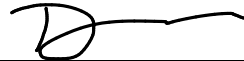
IV. DECISION

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

1. Respondent's motion to dismiss is denied;

2. Petitioner's motion for partial summary judgment is granted;
3. Respondent's December 9, 2020 denial of Petitioner's protest with respect to the rejection of Petitioner's bid is vacated. Petitioner's protest on this issue is sustained;
4. This matter is remanded to Respondent for further evaluation of Petitioner's bid consistent with this decision. Respondent shall thereafter award the contract for the Project pursuant to HRS §103D-302;
5. Each party shall bear its own attorney's fees, costs, and expenses; and
6. Petitioner's cash bond shall be returned to Petitioner upon the filing and service 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 the Circuit Court.

DATED: Honolulu, Hawaii, January 29, 2021.



DESIRÉE L. HIKIDA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs