



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

In the Matter of

DIEDE CONSTRUCTION, INC.,

Petitioner,

vs.

CHIEF PROCUREMENT OFFICER,
STATE OF HAWAII; DEPARTMENT
OF ACCOUNTING AND GENERAL
SERVICES, STATE OF HAWAII,

Respondents.

PDH-2024-007

HEARINGS OFFICER'S FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
FINAL ORDER

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CONCLUSIONS OF LAW, AND FINAL ORDER

I. INTRODUCTION

On October 7, 2024, Petitioner Diede Construction, Inc. (hereinafter referred to as "Petitioner" or "Diede") filed a request for hearing contesting the Chief Procurement Officer, State of Hawaii and Department of Accounting and General Services, State of Hawaii's denial of Petitioner's protest in connection with the solicitation for bids for the project entitled Kea'au Mountain View Public Library, D.A.G.S. Job No. 11-36-6628 ("Project"). A Notice of Prehearing Conference and Hearing was duly served on the parties.

On October 10, 2024, Respondent Chief Procurement Officer, State of Hawaii filed Respondent State of Hawaii Chief Procurement Officer Bonnie Kahakui's Statement of No Position and Nonappearance as to Petitioner's Request for Administrative Review Filed on October 7, 2024. On the same date, the Department of Accounting and General Services, State of

Hawaii (hereinafter referred to as “Respondent” or “DAGS”) filed its response to Petitioner’s request for administrative hearing.

A prehearing conference was convened on October 11, 2024, with Doug Chin, Esq. representing Petitioner and Deputy Attorney General Stella M.L. Kam, Esq. representing Respondent. A Prehearing Order was issued the same date.

On October 18, 2024, the matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii Revised Statutes (“HRS”) Chapter 103D. Petitioner was represented by Andrew J. Lautenbach, Esq. and John W. Kelly, Esq. Respondent was represented by Deputy Attorney General Stella M.L. Kam, Esq.

The parties’ Joint Exhibits 1–18 were received into evidence. Diede Construction President Steven L. Diede, Contracts Engineer, Dept. of Accounting and General Services, Public Works Division Jolie A. Yee, and Statewide General Contracting & Construction Inc. Operations Manager Darren Domingo testified at hearing. At the conclusion of the hearing, the parties were instructed to submit written closing briefs in lieu of oral closing argument. Accordingly, on October 23, 2024, Petitioner and Respondent filed their closing briefs.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of these proceedings, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and final order.

II. FINDINGS OF FACT

1. Respondent posted a Notice to Bidders for DAGS. Job No. 11-36-6628 (“Solicitation”) for Kea‘au Mountain View Public Library (“Project”), described as clearing and grading of the existing site to accommodate the construction of the new single-story library facility, including but not limited to the installation of underground utilities, site improvements including landscaping (soft and hard), walkways, parking area and driveways, site lighting, site perimeter fencing and gates.”

2. Bids were opened on March 14, 2024, with Respondent receiving bids from three bidders: Petitioner, Isemoto Contracting Co. Ltd., and Nan, Inc.

3. Petitioner’s total bid amount of \$19,478,000.00 was the lowest bid for the Project.¹

¹ Isemoto Contracting Co. Ltd. (“Isemoto”) submitted a bid in the amount of \$20,925,000.00, and Nan, Inc. submitted a bid in the amount of \$22,509,500.00.

4. On July 1, 2024, DAGS Contracts Engineer Jolie Yee, emailed Diede requesting information related to Diede's subcontractor listing form:

We note that your subcontractor listing did not include subcontractors to perform the EIFS, resilient tile flooring, glazing (for the aluminum storefront windows), landscaping and hydromulching, painting, sheet metal flashing and trim, and ceramic tile components of the work. Please let us know how you propose to perform each of those categories of work for this job and provide information to substantiate the cost estimates attributable to each component of work (i.e. subcontractor quotations or cost estimates used in the preparation of [sic] your proposal).

We also noted that a subcontractor was listed to perform 'stucco' work. Please identify where on the plans this work is detailed.

In addition, two subcontractors were listed to perform acoustic panel work (one was listed with gypsum board, acoustical, insulation as its nature of work, while the other was listed as performing 'specialty acoustical panel' work. Please clarify the difference between the work of these subcontractors and reference the respective plan sheets and details associated with the work of each.

5. Diede's subcontractor listing form contains two subcontractors with the same C-01 acoustical specialty contractor license: Harner Wall Systems LLC ("Harner") and Statewide General Contracting & Construction Inc. ("Statewide").

6. Diede's subcontractor listing form describes the nature of work to be performed by Harner as "Gypsum Board, Acoustical, Insulation" and describes the nature of work to be performed by Statewide as "Stucco, Specialty Acoustical Panels."

7. By email from Brett Diede to Ms. Yee dated July 2, 2024, Diede responded to DAGS request for information and clarification related to Diede's subcontractor listing. In response to Ms. Yee's email noting Diede's subcontractor list did not include a subcontractor to perform EIFS, Diede replied that Statewide was listed to perform the EIFS scope and explained that EIFS was named "stucco" on its subcontractor listing form. Diede clarified that "stucco" is a synonym for EIFS and that EIFS is also known as synthetic stucco.

8. Diede's July 2, 2024 email also responded to Ms. Yee's inquiry regarding the additional components of work not listed in Diede's subcontractor listing with the names of subcontractors, quote amounts, and copies proposals for the work to be performed.²

9. The value of the work for each of the subcontractors Diede omitted from its subcontractor listing form is less than 1% of the total bid amount.³

10. Diede's July 2, 2024 response to Ms. Yee also addressed DAGS question regarding the two subcontractors Diede's listed in its bid with the same specialty license:

The two subcontractors were listed to perform acoustic panel work (one was listed with gypsum board, acoustical, insulation as its nature of work, while the other was listed as performing 'specialty acoustical panel' work. Attached is the quote for Statewide General Contracting & Construction and Harner Wall Systems. Our intention was to use Harner Wall Systems for their full scope and price including drywall, metal stud framing, acoustical ceiling, and insulation. Statewide had additional scopes and some of the scope Harner was missing. We listed Statewide for the EFIS/Stucco, the specialty ceiling scope that Harner excluded, and the interior wall/ceiling panel scope.

Harner Wall Systems, LLC

09290 Gypsum Board

Per A-501/5,6,7,8 | A-502/1,2,3,4,5

09511 Suspended Acoustical Tile Ceiling

Per A-102/A | A-411/E | A-412/B,C,D

05400 Cold Formed Steel Framing

Per A-501/5,6,7,8,9 | A-502/1,2,3,4,5

07211 Blanket Insulation

Per A-501/5,6,7,8,9 | A-502/4

² Diede's response included the following information:

Resilient tile flooring – Les' Carpet & Drapery Installation Inc
Glazing (for the aluminum storefront windows) – Big Island Glass Inc DBA Reflections Glass Hawaii listed for glazing includes glazing for the aluminum storefront windows
Landscaping and hydromulching – Green Thumb Inc
Painting – Key Painting
Sheet metal flashing and trim – J&H Sheet Metal
Ceramic tile –Maka Construction

³ The parties stipulated at the prehearing conference that the value of the scope of work to be performed by each of the subcontractors Diede omitted from its subcontractor listing form is less than one percent of the total bid amount.

Statewide General Contracting & Construction Inc.

07240 Exterior Insulation and Finish System (EIFS)

Per A-201/A | A-202/B | A-511/1,5

09820 Acoustical Treatments

Per A-421/1 | A-422/2 | A-424/1,2,3

11. Attached to the July 2, 2024 email response to Ms. Yee, Diede provided copies of estimates from Harner and Statewide.

12. The estimate from Harner dated March 14, 2024, includes Drywall, Acoustical Ceiling, Metal Framing, and Insulation Services for a total bid amount of \$1,186,092.00. Under the Acoustical Ceiling Services description, the estimate notes “Woodworks, Acoustical Plaster panels, and other acoustical treatments by others.”

13. The proposal from Statewide dated March 14, 2024, lists a total base bid of \$2,600,000.00 (G.E. tax included) and lists the following scopes:

Gypsum Scope:	\$1,170,000.00
EIFS/DEFS Scope:	\$600,000.00
ACT Scope:	\$95,000.00
Specialty Ceiling Scope:	\$215,000.00
FRP Scope:	\$5,000.00
Interior Wall/Ceiling Panel Scope:	\$415,000.00
Tile Scope:	\$100,000.00

14. Petitioner’s President Steven Diede testified that he compared the prices between Harner and Statewide’s estimates to assist him in selecting the respective scopes of work that the subcontractors would perform in order to provide the best price possible.

15. Statewide Operations Manager Darren Domingo testified that Statewide has previously done business with Diede and has allowed Diede to engage Statewide to perform less than the full scope of work in estimates Statewide submits to Diede.

16. The Solicitation requires acoustical work and includes two different sections for acoustical work—Section 09511-Suspended Acoustical Tile Ceilings and Section 09280-Acoustical Treatment.

17. By letter dated July 11, 2024, signed by Gordon S. Wood, Public Works Administrator, Respondent rejected Petitioner’s bid as nonresponsive, pursuant to HRS §103D-302(b), due to issues with Petitioner’s subcontractor listing:

Two subcontractors ('Statewide General Contracting and Construction, Inc.' and 'Harner Wall Systems LLC') were listed to perform the work of the C-01 specialty contractor's license without a clear distinction between the nature of the work to be performed by each. Diede was contacted by email to gather information and clarify this issue as well as to determine how Diede intended to perform the work associated with multiple omissions in its subcontractor listing. The information provided with respect to the issues of the listing of the two subcontractors listed to perform acoustical work did not provide the clarity required.

Item 1.05K6B of Section 00210 in the project specifications requires, in part;

“List only one entity per required specialty contractor's classification. A bidder who intends to use more than one entity with the same specialty contractor's classification, will not be permitted to do so unless the nature of work to be performed by each entity is both distinct and separate and is appropriately described (i.e. two C-13 contractors are listed but one has the responsibility for AC control and the other for AC power).”

Failure to make a distinction in the nature of work between two subcontractors of the same trade creates the potential for adjustments in the relative portions of work to be performed by each of the two subcontractors (i.e. creates the potential for bid shopping).

Based on the information provided, the acoustical work was approximately 2.1% of Diede's bid price and therefore subject to the subcontractor listing requirement in section 103D-302(b), HRS. Diede's listing error renders its bid nonresponsive. Moreover, Diede's listing error cannot be waived under section 103D-302(e), HRS, and section 3-122-31, Hawaii Administrative Rules.

18. Item 1.05K6b of Section 00210 in the project specifications of the Solicitation states:

List only one entity per required specialty contractor's classification. A bidder who intends to use more than one entity with the same specialty contractor's classification, will not be permitted to do so unless the nature of work to be performed by each entity is both distinct and separate and is appropriately described (i.e. two C-13 contractors are listed but one has the responsibility for AC control and the other for AC power).

19. By letter dated July 15, 2024, Diede protested Respondent's rejection of its bid ("Protest Letter"). In its Protest Letter, Diede asserts its bid properly distinguished the scope of work between the two acoustical contractors, and that Diede's email further explained in detail the separate scopes of work for the two acoustical contractors. Diede's Protest Letter requests Respondent reconsider its determination that Diede's bid is rejected as nonresponsive and requests it be awarded the contract for the Project as the low bidder.

20. On October 1, 2024, DAGS responded to Diede's Protest Letter and denied the protest ("Protest Denial"). The Protest Denial states in part:

Diede's bid is non-responsive because its subcontractor listing is inconsistent with the requirements of this solicitation, contrary to the intent of the requirement to list subcontractors, and contains a listing error which is ineligible for waiver under HRS §103D-302(b).

- Two subcontractors ('Statewide General Contracting and Construction, Inc.' and 'Harner Wall Systems LLC') were listed to perform the work of a C-01 specialty contractor's license without a clear distinction between the nature of work to be performed by each. Diede was contacted by email to gather information to clarify this issue as well as to determine how Diede intended to perform the work associated with multiple omissions in its subcontractor listing. The information provided with respect to the issue of the listing of the two subcontractors listed to perform acoustical work did not provide the clarity required.
- Item 1.05K6b of Section 00210 in the project specifications requires, in part:

"List only one entity per required specialty contractor's classification. A bidder who intends to use more than one entity with the same specialty contractor's classification, will not be permitted to do so unless the nature of work to be performed by each entity is both distinct and separate and is appropriately described (i.e. two C-13 contractors are listed but one has the responsibility for AC control and the other for AC power)."
- Diede's failure to make a clear distinction in the nature of work to be performed by two subcontractors of the same trade creates the potential for adjustments in the relative portions of work to be performed by each of the two subcontractors (i.e. creates the potential for bid shopping).

- Based on the information provided, the acoustical work was approximately 2.1% of Diede's bid price, so this listing error is ineligible for consideration under HRS §103D-302(b).

Further, Diede's bid was incomplete and inconsistent with Hawaii law with regard to its intentional omission of subcontractors whose work was less than 1% of its bid price.

21. At the time of Diede's protest, no award of the contract had been made.

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. 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, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ.* 85 Haw. 431 (1997). In reviewing the contracting officer's determination, 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).

B. Petitioner's bid is responsive to the Solicitation.

Under HRS §103D-104, a responsive bidder is "a person who has submitted a bid which conforms in all material respects to the invitation for bids." Petitioner contends Respondent erred in rejecting its bid as nonresponsive to the Solicitation for failing to comply with HRS §103D-302 subcontractor listing requirements.

1. Petitioner adequately distinguished the scope of work for the two subcontractors listed in its bid with the same specialty contractor's license.

Petitioner protested DAGS rejection of Diede's bid and its determination that Diede's bid was nonresponsive for noncompliance with HRS §103D-302(b). Respondent rejected Petitioner's bid alleging Petitioner listed two subcontractors to perform the work of the C-01 specialty contractor's license without a clear distinction between the nature of the work to be performed by each in violation of HRS §103D-302 and the Solicitation. HRS §103D-302(b) requires bidders for construction projects to list the name of each subcontractor and the nature and scope of work to be performed by each subcontractor. HRS §103D-302(b) provides in relevant part:

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.

Item 1.05K6b of Section 00210 in the project specifications of the Solicitation provides, "[a] bidder who intends to use more than one entity with the same specialty contractor's classification, will not be permitted to do so unless the nature of work to be performed by each entity is both distinct and separate and is appropriately described." It is undisputed that Statewide and Harner possess the same specialty contractor's classification. Thus, to comply with HRS §103D-302(b) and the Solicitation requirements, Diede must establish that the nature of the work to be performed by Harner and Statewide is distinct, separate, and appropriately described.

In this case, Diede listed two subcontractors, Harner and Statewide, with the same C-01 acoustical specialty contractor's classification. Diede listed Harner to perform "Gypsum Board, **Acoustical**, Insulation" and Statewide to perform "Stucco, **Specialty Acoustical Panels**."

The Solicitation contains two separate scopes of "acoustical work" including **Section 09511, Suspended Acoustical Tile Ceilings** and **Section 09820, Acoustical Treatment**. Petitioner asserts that its bid expressly distinguished and described the work to be performed by the two C-01 specialty contractor's license subcontractors.

Petitioner asserts that its bid distinguished between the two workers and described the work to be performed by each. Petitioner argues that in response to DAGS email for clarification regarding the intended scopes of work for each of the acoustical subcontractors Diede specifically identified the respective plan sheets showing the work that Diede intended to have each subcontractor perform. Conversely, Respondent argues that Diede's subcontractor listing failed to

comply with the requirements of HRS 103D-203(b) because it created ambiguity by listing two subcontractors for acoustical work without sufficiently specifying the work to be done by each subcontractor.

The record established Diede Responded to Ms. Yee’s request to “clarify the difference between the work of these subcontractors and reference the respective plan sheets and details associated with the work of each.” In response to DAGS request for clarification of the difference between the of work Harner and Statewide Diede responded in part:

Our intention was to use Harner Wall Systems for their full scope and price including drywall, metal stud framing, acoustical ceiling, and insulation. Statewide had additional scopes and some of the scope Harner was missing. We listed Statewide for the EFIS/Stucco [sic], the specialty ceiling scope that Harner excluded, and the interior wall/ceiling panel scope.

Diede’s response also referenced the respective plan sheets and details associated with the work of Harner and Statewide indicating that Harner would be providing:

Harner Wall Systems, LLC

09290 Gypsum Board

Per A-501/5,6,7,8 | A-502/1,2,3,4,5

09511 Suspended Acoustical Tile Ceiling

Per A-102/A | A-411/E | A-412/B,C,D

05400 Cold Formed Steel Framing

Per A-501/5,6,7,8,9 | A-502/1,2,3,4,5

07211 Blanket Insulation

Per A-501/5,6,7,8,9 | A-502/4

Statewide General Contracting & Construction Inc.

07240 Exterior Insulation and Finish System (EIFS)

Per A-201/A | A-202/B | A-511/1,5

09820 Acoustical Treatments

Per A-421/1 | A-422/2 | A-424/1,2,3

(Emphasis added.)

Respondent correctly notes that Petitioner’s work descriptions “**Acoustical**” and “**Specialty Acoustical Panels**” do not match the Solicitation’s specification sections dealing with acoustical work entitled “**Section 09511—Suspended Acoustical Tile Ceilings**” and “**Section 09820—Acoustical Treatment.**” Respondent contends Diede’s subcontractor listing is ambiguous and that Diede failed to make a clear distinction in the nature of work to be performed

by C-01 acoustical specialty licensed contractors Harner and Statewide. In support of its position, Respondent cites Ms. Yee's testimony that she found Diede's subcontractor listing confusing because Diede listed "acoustical" in the work description for both subcontractors and that it was not clear how the acoustical work was to be divided between the two acoustical subcontractors. Ms. Yee also testified that she was confused after reviewing the two estimates from Harner and Statewide because there was some overlaps in the quotes. According to Ms. Yee, most of the time the quotes match the scopes listed in the subcontractor listing. Here, Harner's estimate includes drywall, acoustical ceiling, metal framing, and insulation services. Statewide's estimate includes gypsum, EIFS/EFS, ACT, specialty ceiling, FRP, interior wall/Ceiling panel, and tile scopes. In reviewing the estimates, it does appear that the two subcontractors provided estimates for some of the same scopes of work. However, Diede's subcontractor listing does not include all the scopes listed in Statewide's estimate. Diede's subcontractor listing describes the nature of the work to be performed by Statewide as "stucco, specialty acoustical treatments." Steven Diede testified it is common practice to bid and then pick and choose the bids to the contractor's advantage. Additionally, Darren Domingo, Operations Manager for Statewide testified that Statewide has done business with Petitioner in the past and that it is not uncommon for Diede to engage Statewide for less than the full scope of work that was bid on.

It is evident from Diede's July 2, 2024 email response that it intended for Harner to perform the work specified in *09511 Suspended Acoustical Tile Ceiling* and that Statewide would be performing the work for specified in *09820 Acoustical Treatments*. The Hearings Officer agrees with Respondent's that Petitioner could have made its subcontractor listing clearer by either using the same language in the specification sections or by listing the section numbers. For example, Petitioner could have described the work to be provided by Harner as "09511" or "Suspended Acoustical Tile Ceilings" rather than "Acoustical". Likewise, it could have described the work to be provided by Statewide as "09820" or "Acoustical Treatments" rather than "Specialty Acoustical Panels." However, in response to Respondent's request to "clarify the difference between the work of these subcontractors and reference the respective plan sheets and details associated with the work of each," Petitioner stated its intent to use Harner "for their full scope and price including drywall, metal stud framing, acoustical ceiling, and insulation" and referenced the relevant project specification: *09511 Suspended Acoustical Tile Ceiling*. Petitioner also clarified that it listed Statewide to perform the "specialty ceiling scope that Harner excluded, and the interior wall/ceiling panel scope" and referenced the relevant project specification: *09820 Acoustical*

Treatments.

Notwithstanding the fact that Petitioner could have initially listed the specification numbers and/or used the same language in the specifications in its subcontractor listing form, the record established that Petitioner adequately distinguished and described the work to be performed by subcontractors Harner and Statewide. Diede's July 2, 2024 email to Ms. Yee clearly stated Harner would be performing the acoustical work for Section 09511—Suspended Acoustical Tile Ceilings and that Statewide would be performing the acoustical work for Section 09280—Acoustical Treatment.

Respondent posits Petitioner's alleged failure to comply with the Solicitation and HRS §103D-302(b)'s subcontractor listing requirements, by failing to distinguish the nature of and scope of the work to be provided by the two acoustical subcontractors, renders Petitioner's bid ambiguous and therefore nonresponsive.⁴ The Hearings Officer disagrees. The purpose of HRS §103D-302's 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. See *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). Listing two subcontractors with the same specialty license provides an opportunity for bid shopping. However, there is no evidence of bid shopping in this case. Ms. Yee testified that there is no evidence that Diede is bid shopping or that she suspects Petitioner of bid shopping. Petitioner has met its burden of proving it sufficiently distinguished and described the nature of the work to be provided by Harner and Statewide. Accordingly, Petitioner's bid should not be rejected as nonresponsive for listing two subcontractors with the same specialty contractor's license.

⁴ Respondent also appears to argue that the distinction between work is ambiguous because the quote from Statewide lists omitted Section 09820 from the list of Divisions and Sections of Specifications. The Hearings Officer is unpersuaded by this argument and notes that Respondent does not allege the Statewide estimate excludes the scope of work to be done in Section 09820, Acoustical Treatments, but only that Section 09820 was not listed by name.

2. Petitioner's bid should not be rejected on the basis Petitioner failed to list subcontractors providing work valued less than 1% of the total bid amount.

In addition to denying Petitioner's protest of Respondent's rejection of its bid, Respondent's Protest Denial states, "Further, Diede's bid was incomplete and inconsistent with Hawaii law with regard to its intentional omission of subcontractors whose work was less than 1% of its bid price."

Respondent correctly points out that the procuring agency, DAGS in this situation, retains the discretion to waive the violation. Respondent further asserts that the determination to waive the violation is made only after the resolution of any other responsiveness problems with the bid. Having determined Petitioner sufficiently distinguished the scope of work for the two subcontractors listed in its subcontractor listing form with the same specialty contractor license, the question remains whether Petitioner's failure to comply with HRS §103D-302(b) renders Petitioner's bid nonresponsive.

The salient facts are not disputed. Diede omitted several subcontractors from its subcontractor listing form. The parties do not dispute that the value of work to be performed by each of the subcontractors Diede failed to list in its bid was less than one percent of the total bid amount. Diede asserts that its failure to list subcontractors providing work valued at less than 1% of the total bid amount should be waived pursuant to HRS §103D-302(b).⁵ HRS §103D-302(b) provides in relevant part:

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.*

HRS §103D-302(b) (*Emphasis added*).

This office has recognized that although the failure of a bidder to list its subcontractors results in the submission of a non-responsive bid, HRS §103D-302(b) provides an exception to the subcontractor listing requirement provided that acceptance is in the best interest of the State and

⁵ The parties agree that that the subcontractors Diede omitted from its subcontractor listing are each performing work valued at less than one percent of the total bid amount.

the value of the unlisted work is equal to or less than one percent of the total bid amount. *Okada Trucking Co., Ltd., vs. Board of Water Supply et. al, PCH 99-11 (November 10, 1999).*

Petitioner argues that accepting its bid is in the best interest of the State because accepting Diede's bid would likely save taxpayers \$3,000,000.00. Diede's total bid amount for the Project was \$19,478,000.00 and the second lowest bidder, Isemoto, bid \$20,925,000.00. Diede speculates that Isemoto's bid may be nonresponsive to the Solicitation because Isemoto neither holds a C-01 license to perform acoustical work nor did Isemoto list a C-01 subcontractor in its bid.⁶ Diede argues if DAGS rejects both its bid and Isemoto's bid, the only remaining bidder on the Project is Nan, Inc., whose bid of \$22,509,500.00 is \$3million more than Diede's bid.⁷

Respondent asserts that the best interests of the State are not solely defined as economic interests when there is a possibility the subcontractor listing could result in bid shopping. Respondent argues there are additional considerations when weighing the State's best interests and deciding whether to accept a bid that failed to list all of its subcontractors. Respondent cites Ms. Yee's testimony that additional time is spent in verifying a bidder's subcontractors and costs incurred in obtaining estimates from a private consultant to determine whether the work omitted on a bidder's subcontractor list is under the one percent threshold. The Hearings Officer is unpersuaded by this argument and notes that the time and costs had already been incurred by the time DAGS issued its letter rejecting Diede's bid as nonresponsive.

Ms. Yee acknowledged that Diede's failure to list the subcontractors performing work valued at less than one percent of the total bid amount is eligible for waiver. She further acknowledged that without the issue of Diede's bid listing the two subcontractors with the same specialty license classification, Diede would probably have been awarded the contract.

A waiver of Diede's failure to list the subcontractors it intends to engage for work valued at less than one percent of the total bid amount would save the State at least \$1.5million and possibly more if the second lowest bidder was not found responsive and responsible. Respondent does not allege Petitioner's failure to list the omitted subcontractors is evidence of bid shopping. In this case, waiver of Petitioner's subcontracting listing error would be consistent with the purpose

⁶ At hearing, Petitioner requested administrative notice be taken of the DCCA's professional vocational licensing website listing the license classes held by Isemoto. Respondent did not object and administrative notice was taken of DCCA's website and that a C-01 acoustic specialty license is not included in the license classes held by Isemoto.

⁷ Petitioner also argues that Diede's failure to list subcontractors performing work valued at less than one percent of the bid amount is not a "material" nonconformity." The Hearings Officer does not consider this argument relevant.

of the Procurement Code of fiscal responsibility and to increase confidence in the integrity of the system.

IV. REMEDIES

The parties agree that the pre-award remedies of HRS §103D-706 are applicable in this case. HRS §103D-706 provides, “If a solicitation or proposed award of a contract is in violation of the law, then the solicitation or proposed award shall be either 1) Cancelled; or 2) Revised to comply with the law.”

Courts elect to apply a broad definition to the term “solicitation” so as to incorporate the process of soliciting bids rather than restricting its definition to the actual document soliciting proposals. *Fletcher Pacific Construction Co., Ltd. v. State Dept. of Transportation*, PCH 98- 2 (May 19, 1998). Here, because it was an error to reject Petitioner’s bid as nonresponsive, under HRS §103D -706, the solicitation process may be revised to comply with the law.

The term “revise” in the context of HRS §103D-706 includes remand and reconsideration. *Arakaki v. State*, 87 Haw. 147, 952 P.2d 1210 (1998). Having determined Petitioner met its burden of proving Respondent erred in determining Petitioner’s bid was nonresponsive, the Hearings Officer concludes the appropriate remedy here is to sustain Petitioner’s protest and remand the matter to Respondent to reconsider Petitioner’s bid accordingly.

Although Petitioner did not renew its request for costs in its closing brief, in its request for administrative hearing, Petitioner seeks attorney’s fees and bid preparation costs. Under HRS §103D-701(g), in the event a protest is sustained and the protestor should have been awarded the contract under the solicitation but is not a protestor is entitled to “actual costs reasonably incurred in connection with the solicitation, including bid or proposal preparation costs but not attorney's fees.” A protestor is entitled to recover its attorney’s fees incurred in prosecuting its protest if (1) the protestor has proven that the solicitation was in violation of the Code; the contract was awarded in violation of HRS §103D-701(f); and (3) the award of the contract was in bad faith. *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431, 946 P.2d 1 (1997); *Jas. W. Glover, Ltd. v. Board of Water Supply*, PCH-2001-002 (August 7, 2001); *Marsh USA Inc. v. City & County of Honolulu, et al.*, PCX-2010-1 (February 11, 2010).

Here, at the time of Petitioner’s protest, no contract award had been made. Thus, Petitioner is not entitled to the remedies under HRS §103D-701(g) or attorney’s fees and costs.

V. DECISION

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

- 1) Respondent's October 1, 2024 denial of Petitioner's protest is vacated;
- 2) This matter is remanded to Respondent to award the contract for the Project to the lowest responsive and responsible bidder;
- 3) Each party shall bear its own attorney's fees, costs, and expenses; and
- 4) 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 determined by the Circuit Court.

DATED: Honolulu, Hawaii, November 21, 2024.



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