

**Electronically Filed
FIRST CIRCUIT
1CCV-21-0000438
07-MAY-2021
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Dkt. 83 ORDG**

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI`I

In the matter of
MAUI KUPONO BUILDERS, LLC

Appellant,

vs.

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII; DESIREE L.
HIKIDA; and GRACE PACIFIC, LLC,

Appellees.

Civil No. 1CCV-21-0000438 (JMT)
(Agency Appeal)

ORDER GRANTING APPLICATION FOR
JUDICIAL REVIEW

DATE: May 4, 2021
TIME: 1:00 p.m.
JUDGE: Honorable John M. Tonaki

ORDER GRANTING APPLICATION FOR JUDICIAL REVIEW

Appellant MAUI KUPONO BUILDERS, LLC'S ("MKB"), Application for
Judicial Review (the "Appeal"), filed April 8, 2021, came on for hearing at 1:00 p.m.

on May 4, 2021, before the Honorable John M. Tonaki, with Anna H. Oshiro, Esq. appearing on behalf of MKB, Jeffrey M. Osterkamp, Esq. appearing on behalf of GRACE PACIFIC, LLC ("Grace Pacific "), Deputy Attorneys General Duane M. Kokesch, Esq. appearing on behalf of Appellees DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII ("DOT"), and Erik D. Eike, Esq. appearing on behalf of Amicus Curiae GENERAL CONTRACTORS ASSOCIATION OF HAWAII ("GCA"). No appearances were made for Appellee DESIREE L. HIKIDA.

Based upon the pleadings submitted, the Record on Appeal, and the arguments of counsel presented herein,

The Court finds, orders, and adjudges as follows:

The question of whether trucking companies in the context of the instant case are subcontractors is, the Court finds, ambiguous at best given the lack of a clear definition of the term "subcontractor" in the procurement code.

Hawaii Administrative Rules ["HAR"] §3-120-2 defines "subcontractor" as meaning any person who enters into an agreement with the contractor to perform a portion of the work for the contractor.

The lack of a more detailed definition of "subcontractor" compels a bidder to use its plain and common experience as to what a trucking company's role would be in a project such as the one in this case.

Common experience says that a trucker who transports materials to the work site does not perform any of the work which was specified as the scope of work in the

instant Invitation for Bids specifically, “reconstructing weakened pavement areas, cold planing, resurfacing, adjusting utility boxes and manholes, installing pavement markings.”

The definition of "subcontractor" in the Invitation for Bids itself is identical to that provided in HAR §3-120-2, but adds “an individual partnership, firm, corporation or joint venture or other legal entity, as covered by Chapter 444 of the Hawaii Revised Statutes,” which regulates licensed contractors.

Adding to the ambiguity or the uncertainty of the term "subcontractor" in the bid solicitation is the “Confirmation by DBE” form which treats licensed subcontractors in a separate category from truckers, suppliers, manufacturers, consultants, brokers, and vendors. Thus, the forms regarding Disadvantaged Business Enterprises [“DBE”] used by the DOT place licensed subcontractors and truckers into different categories.

The DBE program requires bidders to make good faith efforts to utilize certified disadvantaged businesses on their jobs, and to try to meet a DBE participation percentage goal set by the DOT.

Historically, DBEs have been placed by bidders on the subcontractor listing form even though they were not subcontractors to indicate good faith efforts to meet the DBE participation goal set by the DOT.

The apparent prevailing practice in the public procurement realm regarding construction cases has been that truckers have not been classified as subcontractors but have been listed to meet the DBE participation goal.

This is evidenced by subcontractor listings for previous bids submitted by other contracting companies listing multiple truckers, similar to the MKB bid in this case.

Deputy Attorney General Duane Kokesch, Esq., representing the DOT, acknowledged that the established practice in the public procurement field has been to list truckers in the identical manner that MKB listed truckers in their bid in the instant case.

The DOT deemed MKB the lowest responsive responsible bidder and awarded this contract originally to MKB. This award was made after MKB responded to inquiries raised by the DOT regarding the DBE goal and how the allocation of trucking services was going to be handled. The inquiries apparently settled any questions that the DOT had about MKB's bid.

Grace Pacific's subsequent protest did not raise any issues that the DOT did not have before them and presumably considered prior to awarding the contract to MKB.

Moreover, Grace Pacific withdrew its protest, which in the consideration of the Court would seem to constitute a waiver of any objections they had with MKB's bid.

Grace Pacific, in their own bid submittal on this project, seemed to treat truckers not as subcontractors subject to listing requirements. This is evidenced by Grace Pacific's e-mail to the DOT stating an intent to use additional truckers on the project other than those listed in their bid.

Because of the uncertainty and ambiguity caused by the subcontractor listing forms, the applicable administrative rules, the bid solicitation itself, and what appears to have been the prevailing practice in the industry and with regard to other similar procurements, the Court finds, pursuant to Haw. Rev. Stat. § 103D-710(e)(6), that it was arbitrary and capricious and an abuse of discretion for the hearings officer to find in Case No. PDH 2021- 003 that MKB's bid listing multiple DBE trucking companies was nonresponsive for failing to comply with the subcontractor listing requirement of Haw. Rev. Stat. § 103D-302.

Moreover, the Court finds that the following sequence of events: (1) Grace Pacific filing a protest to the awarding of the contract to MKB; (2) prior to decision on Grace Pacific's protest, Grace Pacific's president engaging in a personal telephone call with the deputy director of the DOT; (3) Grace Pacific withdrawing its protest; and (4) Grace Pacific being subsequently awarded the contract, directly violated the requirements of ethical public procurement mandated by Haw. Rev. Stat. § 103D-101.

These events gave the impression of a behind-the-scenes nontransparent deal inuring to the clear benefit of Grace Pacific, which is in direct contravention of the procurement code's requirements of ethical public procurement.

Specifically, these events violated Haw. Rev. Stat. § 103D-101 (a)(2), which states "[a]ll public employees shall conduct and participate in public procurement in an ethical manner. In conducting and participating in procurement, public employees shall remain independent from any actual prospective bidder, offeror,

contractor, or business."

Also, Haw. Rev. Stat. § 103D-101 (a)(6) was violated, which requires that public employees "[e]ncourage economic competition by ensuring that all persons are afforded an equal opportunity to compete in a fair and open environment."

Finally, Haw. Rev. Stat. §103D-101 (a)(7) was violated, which requires that public employees "[a]void the intent and appearance of unethical behavior."

These actions constituted a violation of statutory provisions pursuant to Haw. Rev. Stat. §103D-710, subsection (e)(l), which prejudiced the substantial rights of the bidder MKB.

In its ruling, this Court acknowledges the presumption of validity accorded to the decision of the hearings officer acting within the sphere of her expertise.

However, in consideration of the foregoing points, the Court finds that MKB met the heavy burden of making a convincing showing that the hearings officer's decision was invalid because it is unjust and unreasonable in its consequences.

Southern Foods Group vs. Department of Education, 89 Haw. 443, 974 P.2d 1033 (Haw. 1999).

Therefore, based upon the foregoing, the Court hereby enters an order reversing the hearings officer's decision in PDH 2021-003 and directs the DOT to reinstate the original award of this project to MKB, which the DOT originally found to be the low responsible responsive bidder by Notice of Award issued on October 27th, 2020.

But for the decision of the hearings officer which invalidated MKB's bid as non-responsive due to the foregoing issue of listing of DBE truckers, MKB would have been the prevailing bidder as evidenced by the initial Notice of Award on October 27, 2020.

Pursuant to its authority under Haw. Rev. Stat. §103D-710, and §103D-703, the Court will order any attempted award of contract to Grace Pacific that occurred after the decision in PDH 2021-003 to be rescinded and any contract shall be terminated.

ORDER

Based upon the foregoing findings, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

- A. MKB's Appeal, and the relief requested therein, are granted;
- B. The Hearing Officer's decision is reversed;
- C. The DOT is ordered to rescind its unlawful award, if applicable, and terminate any contract entered into with GRACE PACIFIC, and reinstate its original award to MKB.

There are no remaining appeals, cross-appeals, parties or claims.

DATED: Honolulu, Hawaii, May 7, 2021

/s/ John M. Tonaki



JUDGE OF THE ABOVE-ENTITLED COURT

NOTICE OF ELECTRONIC FILING

**Electronically Filed
FIRST CIRCUIT
1CCV-21-0000438
07-MAY-2021
12:10 PM
Dkt. 84 NEF**

An electronic filing was submitted in Case Number 1CCV-21-0000438. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID: 1CCV-21-0000438

Title: Maui Kupono Builders, LLC v. Department of Transportation, State of Hawaii Desiree L. Hikida and Grace Pacific, LLC

Filing Date / Time: FRIDAY, MAY 7, 2021 12:10:26 PM

Filing Parties: First Circuit Court 4th Division

Case Type: Circuit Court Civil

Lead Document(s):

Supporting Document(s): 83-Order Granted

Document Name: 83-ORDER GRANTING APPLICATION FOR JUDICIAL REVIEW

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai'i Electronic Filing and Service Rules.

This notification is being electronically mailed to:

Bryan C. Yee (bryan.c.yee@hawaii.gov)

Erik D. Eike (eike@eikelaw.com)

First Circuit Court 4th Division (4thdivision.1cc@courts.hawaii.gov)

Stella M.L. Kam (stella.m.kam@hawaii.gov)

Patricia T. Ohara (patricia.t.ohara@hawaii.gov)

Jeffrey Mark Osterkamp (josterkamp@caedes.com)

Duane Michael Kokesch (duane.m.kokesch@hawaii.gov)

Loren Ariela Seehase (Las@hawaiilawyer.com)

Anna H. Oshiro (aho@hawaiilawyer.com)

The following parties need to be conventionally served:

ALL PARTIES-RE DOCKET ONLY-NOT PARTY RE SERVICE REQUIREMENT

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FIRST CIRCUIT
1CCV-21-0000438
07-MAY-2021
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Dkt. 89 FJ

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

In the matter of

MAUI KUPONO BUILDERS, LLC

Appellant,

vs.

DEPARTMENT OF TRANSPORTATION,
STATE OF HAWAII; DESIREE L.
HIKIDA; and GRACE PACIFIC, LLC,

Appellees.

Civil No. 1CCV-21-0000438 (JMT)
(Agency Appeal)

FINAL JUDGMENT

DATE: May 4, 2021

TIME: 1:00 p.m.

JUDGE: Honorable John M. Tonaki

FINAL JUDGMENT

In accordance with Rule 54 (b) and Rule 58 of the Hawaii Rules of Civil Procedure, the Court's determination that there is no just reason for delay under and pursuant to the Court's Order and Final Judgment Granting Application for Judicial Review, filed herein on May 7, 2021, judgment is hereby entered in favor of Appellant

Maui Kuponu Builders, LLC and against Appellees Department of Transportation, State of Hawaii; Desiree L. Hikida; and Grace Pacific, LLC.

IT HEREBY ORDERED, ADJUDGED and DECREED as follows:

- A. Maui Kuponu Builders, LLC's Appeal , and the relief requested therein, are granted;
- B. The Hearings Officer's decision is reversed; and
- C. The Department of Transportation is ordered to rescind its unlawful award, if applicable, and terminate any contract entered into with Grace Pacific, LLC, and reinstate its original award to Maui Kuponu Builders, LLC.

This Final Judgment resolves all claims raised by the all the parties in the case. All claims, counterclaims or cross-claims not specifically addressed herein are hereby dismissed with prejudice and there are no remaining appeals, cross-appeals, parties or claims.

DATED: Honolulu, Hawaii, May 7, 2021

/s/ John M. Tonaki



JUDGE OF THE ABOVE-ENTITLED COURT

**Electronically Filed
Intermediate Court of Appeals
CAAP-21-0000343
27-AUG-2021
08:45 AM
Dkt. 43 OAWST**

NO. CAAP-21-0000343

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

IN THE MATTER OF
MAUI KUPONO BUILDERS, LLC, Appellant-Appellee, v.
DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII;
DESIREE L. HIKIDA, Appellees-Appellees,
and GRACE PACIFIC, LLC, Appellee-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 1CCV-21-0000438)

ORDER APPROVING STIPULATION FOR DISMISSAL

(By: Hiraoka, Presiding Judge, Nakasone and Fujise, JJ.)

Upon consideration of the Stipulation for Dismissal With Prejudice of Appeal of All Claims and Parties, filed August 11, 2021, by Appellee-Appellant Grace Pacific, LLC, the papers in support, and the record, it appears that (1) the appeal has been docketed; (2) the parties stipulate to dismiss the appeal with prejudice and bear their own attorneys' fees and costs; (3) the stipulation is signed by counsel for all parties appearing in the appeal; and (4) dismissal is authorized by Hawaii Rules of Appellate Procedure Rule 42(b).

Therefore, IT IS HEREBY ORDERED that the stipulation is approved and the appeal is dismissed with prejudice. The parties shall bear their own attorneys' fees and costs on appeal.

DATED: Honolulu, Hawaii, August 27, 2021.

/s/ Keith K. Hiraoka
Presiding Judge

/s/ Karen T. Nakasone
Associate Judge

/s/ Alexa D.M. Fujise
Associate Judge

NOTICE OF ELECTRONIC FILING

**Electronically Filed
Intermediate Court of Appeals
CAAP-21-0000343
27-AUG-2021
08:45 AM
Dkt. 44 NEF**

An electronic filing was submitted in Case Number CAAP-21-0000343. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID: CAAP-21-0000343

Title: In the matter of Maui Kupono Builders, LLC, Appellant-Appellee, vs. Department of Transportation State of Hawaii, Desiree L. Hikida, Appellees-Appellees, Grace Pacific LLC, Appellee-Appellant.

Filing Date / Time: FRIDAY, AUGUST 27, 2021 08:45:53 AM

Filing Parties:

Case Type: Appeal

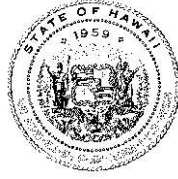
Lead Document(s):

Supporting Document(s): 43-Order Apprv Withdrw/Stp to Dsm

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai`i Electronic Filing and Service Rules.

This notification is being electronically mailed to:
Desiree L Hikida (dhikida@dcca.hawaii.gov)
Erik D. Eike (eike@eikelaw.com)
Patricia T. Ohara (patricia.t.ohara@hawaii.gov)
Stella M.L. Kam (stella.m.kam@hawaii.gov)
Duane Michael Kokesch (duane.m.kokesch@hawaii.gov)
Loren Ariela Seehase (Las@hawaiilawyer.com)
Anna H. Oshiro (aho@hawaiilawyer.com)
Kirk Marshall Neste (kneste@caedes.com)
Jeffrey Mark Osterkamp (josterkamp@caedes.com)





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

In the Matter of)	PDH-2021-003
)	
MAUI KUPONO BUILDERS, LLC)	
)	HEARINGS OFFICER'S FINDINGS
Petitioner,)	OF FACT, CONCLUSIONS OF LAW,
)	AND DECISION
vs.)	
)	
DEPARTMENT OF TRANSPORTATION,)	
STATE OF HAWAII,)	
)	
Respondent,)	
and)	
)	
GRACE PACIFIC LLC,)	
)	
Intervenor.)	
_____)	

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

I. INTRODUCTION

On February 11, 2021, Petitioner Maui Kupono Builders. (“MKB” or “Petitioner”) filed a request for administrative review to contest Respondent Department of Transportation, State of Hawaii’s (“DOT” or “Respondent”) denial of Petitioner’s protest in connection with a project designated as Kamehameha Highway, Kamananui Road and Wilikina Drive Rehabilitation, Vicinity of Weed Circle to H-2 Project No. NH-099-1(031), HIePRO Solicitation No. B21000263 (“Project”). A Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

Respondent filed its response to Petitioner's request for administrative review and hearing on February 18, 2021.

A pre-hearing conference in the matter was convened by telephone on February 18, 2021. Anna H. Oshiro, Esq. and Loren A. Seehase, Esq. appeared on behalf of Petitioner; Deputy Attorney General Duane M. Kokesch, Esq. appeared on behalf of Respondent; and Jeffrey M. Osterkamp, Esq. appeared on behalf of prospective intervenor Grace Pacific, LLC. Grace Pacific, LLC's ("Grace Pacific" or "Intervenor") request to intervene was granted by stipulation of the parties. Intervenor filed its response to Petitioner's request for administrative review and hearing on February 22, 2021.

On February 22, 2021, Petitioner filed a motion for partial summary judgment; Intervenor filed a motion for summary judgment; and Respondent filed a motion to dismiss and motion for summary judgment. On February 24, 2021, Petitioner filed its omnibus memorandum in opposition to the motions filed by Respondent and Intervenor; and Respondent and Intervenor filed their respective memoranda in opposition to Petitioner's motion.

The motions came on for hearing before the undersigned Hearings Officer on February 25, 2021, in accordance with the provisions of Hawaii Revised Statutes ("HRS") Chapter 103D; Anna H. Oshiro, Esq. and Loren A. Seehase, Esq. appearing for Petitioner; Deputy Attorney General Duane M. Kokesch, Esq. appearing for Respondent; and Jeffrey M. Osterkamp, Esq. appearing for Intervenor.

Having heard the argument of counsel, and having considered the motions, along with the memoranda, 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 granting Respondent's and Intervenor's motions for summary judgment, and denying Petitioner's motion for partial summary judgment.

II. FINDINGS OF FACT

1. On or about August 20, 2020, Respondent issued an Invitation for Bids ("IFB") for the project described as Kamehameha Highway, Kamananui Road and Wilikina Drive Rehabilitation, Vicinity of Weed Circle to H-2 Project No. NH-099-1(031), HlePRO Solicitation No. B21000263 ("Project").

2. The IFB includes required Federal-Aid Contract Provisions, as well as Disadvantaged Business Enterprise (“DBE”) requirements for the contract.

3. On September 28, 2020, bids were opened. MKB was the lowest bidder at \$23,237,080.60. Grace Pacific was the second lowest bidder at \$23,993,937.00.

4. On or about October 26, 2020, MKB was awarded the contract.

5. On October 30, 2020, Grace Pacific protested the award of the contract to MKB. Grace Pacific’s protest alleges MKB violated HRS §103D-302(b) by listing three proposed subcontractors in its bid for the same scope of work: trucking. Grace Pacific’s protest asks Respondent to determine MKB’s bid is nonresponsive and reject MKB’s bid.

6. At the request of Respondent, MKB provided a response to Grace Pacific’s protest by letter dated November 13, 2020. In its response, MKB states Grace Pacific’s protest is untimely “because any issue regarding whether truckers must be listed on bid documents related to the Project would have been a question to be asked at a prebid meeting or addressed as a pre-bid protest.” MKB also responds that Grace Pacific’s protest is meritless because truckers for this Project are not “subcontractors” and as such are not subject to the subcontractor listing requirement of the code.

7. In its bid proposal, MKB lists three firms on its Subcontractor Listing form: EC Trucking, LLC, Boyd Enterprises, LLC, and Aiwohi Bros. Inc., and describes the nature of work for each firm as “Trucking Services.”

8. MKB’s proposal also includes “Confirmation by DBE” forms for the three firms listed to perform “Trucking Services” on its Subcontractor Listing form. The “Confirmation by DBE” form completed by EC Trucking, LLC describes the work to be performed as “Trucking.” The form for Boyd Enterprises, LLC describes the work to be performed as “Hauling Services;” and the form for Aiwohi Bros. Inc. described the work to be performed as “trucking, paving, hauling.”

9. The Special Provisions of the IFB include the following definitions under General Provisions, Section 101 – Terms, Abbreviations and Definitions:

Subcontractor – An individual partnership, firm, corporation, or joint venture or other legal entity, as covered in Chapter 444 of the Hawaii Revised Statutes as amended, which enters into an agreement with the Contractor to perform a portion of the work.

Work – The furnishing of all labor, material, equipment, and other incidentals necessary or convenient for the successful execution of all the duties and obligations imposed by the contract.

10. By letter dated December 23, 2020, Grace Pacific withdrew its protest.
11. On December 28, 2020, MKB sent a protest letter to Respondent stating in

part:

Maui Kuponu Builders LLC has received communications that Grace Pacific LLC has been or will be awarded the above-entitled Project. Although we have also been informed that no decision has been made, in order to protect its interests in the event such a decision is in the works, Maui Kuponu protests the award of the Project to any entity other than itself, the low responsive, responsible bidder for the job. For the reasons set forth in the attached letter, Maui Kuponu asserts any award to Grace Pacific would be a violation of the procurement code.

12. Attached to MKB's December 28, 2020 protest letter was MKB's November 13, 2020 response to Grace Pacific's October 30, 2020 protest.

13. By letter dated February 8, 2021, Respondent denied MKB's protest on the basis that the protest was untimely and that MKB's bid was nonresponsive.

14. Respondent's February 8, 2021 denial letter states in part:

Maui Kuponu indicated in the letter it protests the award of the Project for the reasons "set forth in the attached letter." The attached letter was the November 13, 2020 response (response letter) from Maui Kuponu regarding a protest by Grace Pacific. Maui Kuponu did not provide a separate "statement of reasons for the protest" leaving HDOT to interpret its reasons based on its response to Grace Pacific's protest. Hawaii Administrative Rules (HAR) §3-126-3. Therefore, the HDOT denies Maui Kuponu's protest for failing to comply with HAR §3-126-3. Notwithstanding, after careful consideration of the facts and circumstances surrounding the procurement in this matter and the HDOT's interpretation of the statement of reasons attributed to Maui Kuponu based on its response letter, the HDOT denies Maui Kuponu's protest based on the reasons as put forth and on its merits.

Turning to the interpreted reasons in Maui Kuponu's response letter:

1. Untimely.

Maui Kuponono's first argument is that the content of the solicitation was ambiguous, and Grace Pacific should have protested prior to the date for receipt of bids. On page 6 under the subheading "Grace Pacific's Protest is Late," Maui Kuponono indicates "DOT lacks jurisdiction" because trucker listing questions could have been raised at a pre-bid meeting.

Response: Maui Kuponono's protest is denied as untimely for the same reason it argued Grace Pacific's protest was untimely. Maui Kuponono indicated that Grace Pacific's protest was filed late because Grace Pacific had knowledge of the content ambiguity in the solicitation and it was required to protest prior to the date set for receipt of offers. The date set for receipt of offers was August 20, 2020. The same argument applies to Maui Kuponono. Therefore, the HDOT must deny Maui Kuponono's protest as untimely.

15. Respondent's February 8, 2021 letter also includes the following response to Petitioner's protest:

a. On page 8 under the subheading "Grace Pacific's Protest is Meritless," Maui Kuponono indicates "truckers for this Project are not 'subcontractors' and as such are not subject to the subcontractor listing requirements of the code."

Response: Maui Kuponono's bid was nonresponsive because it: listed three companies on "Subcontractor Listing" page (P-5) with the exact same nature of work, "Trucking Services;" failed to unambiguously differentiate what services each company would provide; and failed to demonstrate it prohibits bid shopping through the bid documents provided or information gleaned therefrom. In addition, as described above, Maui Kuponono's protest is untimely because its argument is based on the content of the solicitation.

16. On February 11, 2021, Petitioner filed the instant request for review of Respondent's February 8, 2021 denial of Petitioner's protest.

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. 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). In the instant case, the Hearings Officer must determine whether the DOT's determination that MKB's bid is nonresponsive is consistent with the Procurement Code set forth in HRS Chapter 103D ("Code"), and its implementing rules.

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. Standards for summary judgment.

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).

C. MKB's bid does not comply with HRS §103D-302(b) subcontractor listing requirement and was properly determined as nonresponsive.

The salient facts are not in dispute. MKB's bid lists three firms on its Subcontractor Listing form with the same work description. MKB lists EC Trucking, LLC, Boyd Enterprises, LLC, and Aiwohi Bros. Inc. on its Subcontractor Listing form and describes the nature of work for each of the firms as "Trucking Services."

DOT and Grace Pacific argue that MKB's subcontractor listing fails to comply with the listing requirements set forth in HRS §103D-302(b) and consequently MKB's bid is nonresponsive. 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 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.

MKB asserts that its bid is responsive and the award of the contract to MKB must stand. The issue is whether MKB's subcontractor listing fails to comply with HRS §103D-302(b) subcontractor listing requirements and whether DOT properly determined MKB's bid is nonresponsive.

1. Truckers are "subcontractors" subject to the listing requirements set forth in HRS §103D-302(b).

MKB first argues that truckers are not subcontractors subject to the subcontractor listing law requirements of HRS §103D-302(b). Hawaii Administrative Rules ("HAR") §3-120-2 defines subcontractor as "any person who enters into an agreement with the contractor to perform a portion of the work for the contractor." MKB argues that HRS

§103D-302 does not define what is meant by the word “subcontractor”. MKB asserts that truckers are service-providers and not subcontractors subject to the listing requirement. In its motion, MKB argues, “To expand the definition of ‘subcontractor’ beyond anything contemplated by the statute or the law, to include not just the contractors working onsite actually making visible improvements to the property, as defined under the existing law, but also anyone providing services to the contractor, regardless of whether they actually ‘perform a portion of the work’ as unlicensed subcontractors subject to the listing laws.” MKB appears to assert that the definition of “subcontractor” in the context of HRS §103D-302’s listing requirement is limited to “contractors working onsite actually making visible improvements on the property.” The definition of “subcontractor” in the Code’s rules is clear. HAR §3-120-2 defines subcontractor as “any person who enters into an agreement with the contractor to perform a portion of the work for the contractor.”

Grace Pacific notes in its opposition to MKB’s motion for partial summary judgement that the definition of “subcontractor” in HAR §3-120-2 is applicable to the procurement practices of all departments and agencies and contracts made by governmental bodies.¹ The Hearings Officer agrees with Grace Pacific that HAR §3-120-2 is law applicable to the Code. HAR §3-120-2’s definition of “subcontractor” is the only law directly applicable to the Code and is clear on its face.

According to MKB’s bid documents, the three proposed trucking firms listed on MKB’s subcontractor listing form completed “Confirmation by DBE” forms. In the Confirmation by DBE forms, the trucking firms describe the work to be provided to MKB as trucking, paving, and hauling services. HAR §3-120-2 defines “subcontractor” as “any

¹ HAR §3-120-3 Applicability. These rules shall apply to:

- (1) The procurement practices of all entities created by the State’s and counties’ constitutions, charters, statutes, ordinances, administrative rules, or executive orders, including the office of Hawaiian affairs, and the departments, commissions, councils, boards, bureaus, committees, institutions, authorities, legislative bodies, agencies, government corporations, or other establishment or office of the executive, legislative, or judicial branches of the State or its several counties; and
- (2) All procurement contracts made by governmental bodies, whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance; provided that nothing in this chapter or rules adopted hereunder shall prevent any governmental body from complying with the terms and conditions of any other grant, gift, bequest, or cooperative agreement.

person who enters into an agreement with the contractor to perform a portion of the work for the contractor.” The IFB defines “work” as “[t]he furnishing of all labor, material, equipment and other incidentals necessary or convenient for the successful execution of all the duties and obligations imposed by the contract.” Clearly, trucking, paving, and hauling services fall within the IFB’s definition of “work.” There is no dispute that MKB’s proposed truckers intend to provide the “work” of trucking, paving and hauling for MKB. Accordingly, the Hearings Officer concludes that truckers, fall under the Code’s definition of subcontractors: “any person who enters into an agreement with the contractor to perform a portion of the work for the contractor.” HAR §3-120-2.

This office has also long 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).

Given the purpose of HRS §103D-302 subcontractor listing requirement, the definition of “subcontractor” is presumably broad in order to effectively prevent bid shopping in general. Despite the broad definition of “subcontractor,” MKB asserts that truckers provide “non-project specific services” on a construction project and are not “subcontractors” subject to the listing requirement.

In *Oceanic Companies, Inc. v Dept. of Transportation, PCH-2003-15 (July 3, 2003)* this office noted:

[T]he requirement set forth in HRS §103D-302(b) to list all subcontractors “to be engaged by the bidder” is not limited to those subcontractors whose work requires a subcontractor’s license. “Subcontractor” is defined as “any person who enters into an agreement with the contractor to perform a portion of the work for the contractor. *Hawaii Administrative Rules §3-120-2*.

In support of its motion for summary judgment, Grace Pacific asserts that *Oceanic* established that the subcontractor listing requirements of HRS §103D-302 is not restricted to licensees. MKB argues that *Oceanic* is inapplicable and dealt solely with the listing of would-be subcontractors who would be performing work on the job for the contractor. MKB posits that the definition of “subcontractor” was not intended to include “service-providers.” The Hearings Officer declines this argument. A purpose of the listing requirement is to prevent contractors from bid shopping and bid peddling. Taking into consideration that purpose, there is no logical reason why the general contractor should be prevented from bid shopping vis-à-vis licensed subcontractors while other vendors he has a direct relationship with are not similarly protected.

MKB also contends that the trucking entities listed in its Subcontractor Listing form are not entities subject to the listing requirements of the law; but were only listed in order to comply with DBE requirements. MKB maintains that it was industry practice to list ‘service providers’ such as truckers on DOT/DBE projects where bidders are provided only two types of forms for listing DBE participants. In support of its position, MKB states that the solicitation’s bid documents include sheets for DBE entities to fill out which DBE category they fall under. MKB argues that because the DBE sheets lists “trucker” separately from “subcontractor,” the solicitation’s DBE documents told bidders that truckers and subcontractors are not the same.

Grace Pacific argues that DOT’s determination of MKB’s nonresponsiveness is not centered on the DBE portion of the solicitation. Grace Pacific posits that the solicitation’s DBE section is pertinent to this action only if MKB had differentiated the scopes of work of its trucking subcontractors in the DBE section. Grace Pacific asserts that

DOT did not determine that MKB failed to comply with the solicitation's DBE requirements. The record indicates DOT found MKB's bid nonresponsive for failing to comply with the subcontractor listing requirements. The Hearings Officer has determined that truckers are subcontractors subject to the subcontractor listing requirements of HRS §103D-302(b). Accordingly, the Hearings Officer rejects MKB's argument that truckers are listed on its subcontractor list solely to meet its DBE requirements and therefore not subject to the subcontractor listing statute.²

2. MKB's bid is nonresponsive because it lists three subcontractors with the same scope of work to be performed.

DOT and Grace Pacific argue that MKB's protest was properly denied because MKB's bid is nonresponsive. DOT argues that MKB's bid is nonresponsive for failing to adequately and unambiguously describe the nature and scope of work to be performed by each subcontractor. The facts are not in dispute. MKB's Subcontractor Listing form lists three firms: EC Trucking, LLC, Boyd Enterprises, LLC, and Aiwohi Bros. Inc., and describes the nature of work to be provided for each firm as "Trucking Services."

While MKB argues that truckers are not subcontractors, MKB does not contend that it distinguished the work to be provided by its three trucking firms. Although MKB lists the nature of work to be provided by its three trucking subcontractors, it describes the work for all three entities as "Trucking Services" with no distinction or further description.

HRS §103D-302(b) requires that bids for construction "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." In this case, MKB has listed three subcontractors with the same scope of work. This office has previously held that the listing of two subcontractors for the same scope of work, without more, is ambiguous and creates the opportunity to bid shop and renders [the bidder's] bid nonresponsive." *Abhe & Svoboda, Inc. v. Department of Accounting and General Services*,

² MKB also argues truckers should not be defined as "subcontractors" for the purpose of HRS §103D-302 listing requirement based on the definition of contractor in HRS Chapter 444 (regarding Contractors) and based upon past industry practice. Having concluded that the definition of subcontractors in HAR §3-120-2 clearly applies, the Hearings Officer rejects these arguments.

PCX-2009-5 (December 3, 2009) (citing Kiewit Pacific Co. v. Dept. of and & Natural Resources, PCH-2008-20 (February 20, 2009)).

In this case, MKB does not contend that MKB listing three firms to perform “Trucking Services” on its Subcontractor Listing form is unambiguous. Instead, MKB asserts there would be no issue with bid shopping since MKB identified the prospective amount of the trucking to be issued within the time frame required under the bid. (five days after bid opening). MKB opines that because it provided the sum for each trucking company as required by the bid documents, there was no danger or question of bid shopping.

This Office has held that the failure to adequately and unambiguously disclose the nature and scope of the work to be performed by each subcontractor may render the bid nonresponsive regardless of whether there is evidence of bid shopping. See *Kiewit Pacific Co., v Dept. of Land and Natural Resources, State of Hawaii, et al.*, PCH-2008-20 (February 20, 2009), *Frank Colluccio Construction Company V. City & County of Honolulu, et al.*, PCH-2002-7 (August 2, 2002). In this case, despite MKB’s assertions, the Hearings Officer concludes while MKB’s listing of three trucking subcontractors for the same scope of work is not, in and of itself, evidence of actual bid shopping, the ambiguous listing does present the risk of bid shopping.

Based on the foregoing considerations, the Hearings Officer determines that MKB failed to adequately and unambiguously describe the nature and scope of work to be performed by the proposed three subcontractors it listed to perform “Trucking Services.” Accordingly, the Hearings Officer concludes that a MKB’s bid failed to comply with the subcontractor listing requirements of HRS §103D-302(b) and consequently, MKB’s bid is nonresponsive.

3. Respondent denial of MKB’s protest based on the determination that MKB’s bid was nonresponsive was proper.

MKB argues that DOT improperly relied upon Grace Pacific’s alleged untimely protest in determining MKB’s bid is nonresponsive. In its motion, MKB argues the DOT cannot avoid rejecting untimely bid protests by negotiating to have them withdrawn so that the late protester can get the job. The parties all agree that MKB was awarded the contract on September 26, 2020. It is undisputed that on October 30, 2020, Grace Pacific

protested the award of the contract to MKB and then withdrew its protest December 23, 2020. Grace Pacific's protest is not at issue in this case. At issue in this case is whether MKB's bid is responsive. At hearing on the motions, MKB acknowledged that DOT may determine a bid is nonresponsive even after contract has been awarded, and that the DOT could "change its mind." The Hearings Officer notes that although it appears DOT's reasoning for determining MKB's bid is nonresponsive is based upon the arguments made by Grace Pacific, Respondent's determination was nonetheless permissible. MKB has not pointed to any statute or rule which prohibits the agency from making a finding of nonresponsiveness after an award has been made, neither is the Hearings Officer aware of any such authority. MKB argues that DOT's determination that MKB's bid is nonresponsive based on the reasoning provided in Grace Pacific's allegedly late protest is improper and unfair.³ Nonetheless, MKB has failed to provide any authority for its argument that the DOT's determination is contrary to the Procurement Code and its administrative rules.

In reviewing DOT's determination, the Hearings Officer shall decide whether those determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract. HRS §103D-709(i). See, *GTE Hawaiian Telephone Company v. Dept. of Finance*, PCH-98-6 (December 9, 1998). After careful consideration, the Hearings Officer concludes MKB's bid is nonresponsive for failing to comply with the subcontractor listing requirement of HRS §103D-302 and the DOT's determination was proper.

All of these considerations lead the Hearings Officer to find and conclude that there are no genuine issues of material fact left for hearing and that Respondent and Intervenor are entitled to a ruling in their favor as a matter of law.

IV. DECISION

³ The Hearings Officer notes that according to all parties, the Project was slated to begin in December 2020. The DOT represented at hearing that it was unable to move forward on the Project because of the stay in place when Grace Pacific protested in October 2020. DOT neither denied nor sustained Grace Pacific's protest through December 2020. Grace Pacific's December 23, 2020 letter indicates it rescinded its protest based on the understanding from DOT that Grace Pacific would be awarded the contract if it withdrew its protest.

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

1. Petitioner's motion for partial summary judgment is denied;
2. Respondent's motion to dismiss and for summary judgment is granted, and Intervenor's motion for summary judgment is granted;
3. Respondent's February 8, 2021 denial of Petitioner's protest is affirmed and the contract awarded to Petitioner is terminated;
4. Each party shall bear its own attorney's fees, costs, and expenses; and
5. Petitioner's bond shall be deposited into the State of Hawaii's General Fund.

DATED: Honolulu, Hawaii, _____ March 29, 2021 _____.



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