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

In the Matter of)	PCH-2004-14
)	
ELECTION SYSTEMS & SOFTWARE, INC.,)	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION
Petitioner,)	
)	
vs.)	
)	
STATE PROCUREMENT OFFICE, STATE OF HAWAII,)	
Respondent.)	
_____)	

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

I. INTRODUCTION

On September 23, 2004, Election Systems and Software, Inc. ("Petitioner") filed its request for administrative hearing to contest the State Procurement Office, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Prehearing Conference was duly served on the parties.

On September 30, 2004, Petitioner filed a Motion for Summary Judgment. On October 8, 2004, Respondent filed its Motion for Summary Judgment. On October 11, 2004, Petitioner filed a memorandum in opposition to Respondent's Motion. A hearing on both motions was held on October 12, 2004. Petitioner was represented by Corianne W. Lau, Esq. and Jessica M. Horiuchi, Esq. and Respondent was represented by Patricia Ohara, Esq. At the close of the hearing, the parties agreed to submit proposed findings of fact and conclusions of law. Petitioner submitted its proposed findings of fact and conclusions of law

by e-mail on October 12, 2004 and a hard copy was filed on October 13, 2004. Respondent submitted its proposed findings of fact and conclusions of law by e-mail and filed a hard copy on October 13, 2004.

On October 15, 2004, the Hearings Officer issued an order denying both parties' Motions for Summary Judgment and rescheduled the hearing for October 18, 2004. At the pre-hearing conference held on October 15, 2004 and attended by Ms. Lau and Ms. Horiuchi on behalf of Petitioner, and Russell A. Suzuki, Esq. on behalf of Respondent, the parties agreed to take the hearing scheduled for October 18, 2004 off the calendar because they agreed to submit this matter for final disposition based upon the matters presented by the parties in their respective Motions for Summary Judgment and that any additional exhibits and memoranda are to be filed by 10:00 a.m. October 18, 2004. Petitioner and Respondent filed their memoranda and exhibits on October 18, 2004. By a letter dated October 18, 2004, Petitioner requested leave to address an affidavit filed with Respondent's memorandum. By a letter dated October 18, 2004, the Hearings Officer granted Petitioner's request and allowed the parties the opportunity to file rebuttals no later than noon on October 19, 2004. On October 19, 2004, the parties filed their rebuttal memoranda.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

As a preliminary matter, the proposed findings of fact and conclusions of law filed by the parties have been considered. To the extent that the proposed findings and conclusions submitted are in accordance with the findings and conclusions stated herein, they have been accepted, and to the extent they are inconsistent, they have been rejected. Certain proposed findings and conclusions have been omitted as the Hearings Officer determined them to be not relevant or necessary to a proper determination of the material issues presented.

1. On April 30, 2004, Respondent issued Request for Proposal No. RFP-04-106-SW ("RFP") entitled Lease, Deliver, Install, Test, Maintain and Store a Direct Recording Electronic (DRE) Voting and Vote Counting System for the State of Hawaii. The contract

term included election years 2004 and 2006, up to and including December 31, 2006 with an option to extend, if mutually agreeable, up to one additional 24 month period.

2. Section 6.040 of the RFP states in relevant part:

6.040 OFFEROR QUALIFICATIONS

Offeror shall meet the following qualifications. If Offeror fails to meet these qualifications, the State shall not consider Offeror's proposal for award.

1. Have at least three (3) years actual experience in providing, installing, and supporting the direct recording electronic (touch-screen) technology systems in other...election jurisdictions and at least five (5) years of experience administering elections.

In addition, Section 5 of the RFP provides that offerors with less than three years of relevant experience will be disqualified. The RFP provided six categories of evaluation criteria and assigned points to each category. Five points (out of one hundred points) was assigned to the category Qualification and Financial Stability.

3. The RFP instructs offerors to provide:

A description of the capabilities of the Offeror that pertain to this RFP. This description should not exceed five (5) pages and should include a detailed summary of the Offeror's experience relative to voting systems similar to the system and services required in the RFP. Offerors with less than three (3) years of relevant experience shall be disqualified.

4. Scott Nago, Counting Center Operations, Section Head for the Office of Elections, State of Hawaii, prepared the RFP and chose the terms used in the RFP to place an emphasis on real-time election experience.

5. According to the schedule set out in the RFP, proposals were due and to be opened on June 1, 2004. The Evaluation Committee, which was comprised of six members, evaluated proposals submitted by Petitioner, Hart InterCivic, Inc. ("Hart") and Avante.

6. Dwayne Yoshina, Chief Election Officer of the Office of Elections, State of Hawaii, was not a member of the Evaluation Committee.

7. On July 14, 2004 an article written by Jan TenBruggencate and titled "Workers prepare for elections" was posted on the *Honolulu Advertiser's* website. The article states that disabled and non-English speaking voters will get computerized help at

polling places this year, and refers to a “sip and puff” system that disabled voters may be able to use. The article also states that a new computer system will be stationed in each precinct but that the exact model has not been selected.

8. Mr. Yoshina was interviewed for the article sometime prior to July 14, 2004 by telephone. The article did not include all of the statements made by Mr. Yoshina during the course of the interview, including elements of the upcoming 2004 Election, such as the preparation that went into drafting the RFP, the demonstrations, the solicitations of public comment and the bid process. Mr. Yoshina did discuss the numerous features he hoped would be included in any system selected, such as the “sip and puff” technology, audio ballots, variable font sizes, tactile switches, portability and wheelchair accessibility.

9. Petitioner’s proposal did not offer a “sip and puff” method of voting.

10. The Evaluation Committee took Hart’s proposal on its face and did not make any further inquiry into Hart’s past experience. The Evaluation Committee was familiar with Hart and its products, and did not have any questions about Hart’s experience, and so did not investigate the references of experience made by Hart.

11. The Evaluation Committee reviewed the proposals and assigned points to the three proposals. Hart received 454.28 points, Petitioner received 415.6 points and Avante received 389.18 points.

12. The RFP requires that an “award, if made, shall be to the responsible Offeror whose proposal is determined to provide the best value to the State taking into consideration the evaluation factors set forth in the RFP.”

13. The Evaluation Committee selected Hart based on Hart’s proposal and the requirements of the RFP. Hart was awarded the contract on August 13, 2004.

14. By a letter dated August 13, 2004, Petitioner was notified that the contract had been awarded to another vendor.

15. On August 19, 2004, Petitioner’s attorney attended a debriefing session and was informed that the Evaluation Committee relied on the truthfulness of the individual proposals, without reference to outside information, to determine Hart’s qualifications for award.

16. On August 27, 2004, Petitioner filed a Protest of Award on the grounds that Hart did not have the requisite experience to qualify for award under the RFP.

17. On August 27, 2004, Respondent requested the Chief Procurement Officer's approval to continue with the contract awarded to Hart. This letter states in part:

The Office of Elections must provide a voting system to the disabled community for them to vote independently pursuant to the Help America Vote Act of 2002, which must be in effect for the 2004 Primary Election, September 18, 2004.

...

Time is critical, there being no time to spare between now and the 2004 Primary Election deadline. In order for the Office of Elections to support and deliver this voting service to this community of voters, the contract award must continue[.]

The Chief Procurement Officer approved the request on August 27, 2004.

18. The Help America Vote Act ("HAVA") provides that states shall be required to comply with HAVA on or after January 1, 2006.

19. Mr. Yoshina believed that states could select whether to comply with HAVA in 2004 or 2006, but had to submit a waiver if a state chose to comply in 2006. Because Hawaii had not submitted a waiver, Mr. Yoshina believed that compliance with HAVA was required for the 2004 election.

20. Mr. Nago believed that compliance with HAVA was required for the 2004 elections because it was a condition of the federal grant of election funds to Hawaii.

21. Both Mr. Nago and Mr. Yoshina believed that it was better to try a new system during the 2004 election rather than use a system for the first time for the 2006 election. However, this reasoning was not included in the August 27, 2004 letter to the Chief Procurement Officer requesting approval to continue the contract award to Hart.

22. By a letter dated September 16, 2004, Respondent denied Petitioner's protest, because it was satisfied that Hart had the three and five years of experience described in the RFP.

23. On September 23, 2004, Petitioner filed a request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs.

24. Hart was formerly a division of Hart Graphics, Inc. and was established as a subsidiary called Hart Forms & Services in 1989. In 1999, Hart Forms & Services spun off completely from Hart Graphics, and in 2000, the company became Hart. In 2000, Hart introduced the eSlate Electronic Voting System. In Section 5 (Qualifications and Financial

Stability of Offeror) Hart states that it “traces its support of county governments to 1912” and:

Hart InterCivic has more than 90 years broad-based elections experience, including printing ballots, providing elections supplies kits and providing information and support to counties.

In addition, Hart’s proposal included personnel descriptions of experience dating from 1991.

25. The contract between Hart and Harris County, Texas began in June 2001.

Under the contract, Hart was to provide:

...[a] package of services to support the installation of the eSlate Electronic Voting System, including comprehensive management and support, training, warehouse management, and voter education and outreach services.

The Hart team installed a new election management system on a PC network. Using eSlate for Early Voting in November 2001, the Hart team integrated the eSlate cast vote data with the County’s existing ES&S punch card system (which was used on Election Day).

26. Hart provided the DRE system for Hawaii’s primary election which was held on September 18, 2004 and will provide the DRE system for the general election to be held on November 2, 2004.

III. CONCLUSIONS OF LAW

Petitioner argued that Hart was not a responsible offeror because it did not have three years of actual experience providing, installing and supporting DRE systems in other jurisdictions, and five years of experience administering elections. Petitioner has the burden of proving by a preponderance of the evidence that Respondent’s determinations were not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation or contract.

Hawaii Revised Statutes (“HRS”) § 103D-303(g) provides:

§ 103D-303 Competitive sealed proposals.

...
(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be

used in the evaluation. The contract file shall contain the basis on which the award is made.

A responsible offeror “has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.” See, HRS § 103D-104. Responsibility is determined at any time up to the award of the contract based on any information received by the agency up to that time. *Hawaiian Dredging Construction Co. v. City & County of Honolulu*, PCH-99-6 (August 9, 1999).

Petitioner argued that Hart did not meet the three-year experience requirement because its proposal did not provide a description of three *calendar* years of “actual experience in providing, installing, and supporting the direct recording electronic (touch-screen) system in other...election jurisdictions.” Respondent argued that Hart met the three-year experience requirement because it provided a description of three *election* years of actual experience. Although Respondent acknowledged that the RFP’s three-year requirement could be misinterpreted, Respondent argued that it intended that the RFP require three years of election experience, and that read in context with the entire RFP, it was clear that the RFP did not intend to mean calendar years. Based on the evidence presented, the Hearings Officer concludes that the RFP’s requirement of “three years actual experience” must be interpreted to mean calendar years. As Respondent pointed out, other references in the RFP refer to election years, and accordingly, by not specifying that the offeror must have actual experience for three elections, the Hearings Officer concludes that the RFP must be read to require three calendar years of actual experience.

Next, it must be determined whether Hart’s proposal supported Respondent’s determination that Hart had three calendar years of actual experience in providing, installing and supporting DRE systems in other election jurisdictions. Because the contract to Hart was awarded on August 13, 2004, Hart’s proposal must show that it acquired actual experience in other jurisdictions dating back to August 13, 2001. Respondent argued that Hart’s actual experience started in June 2001, when Hart entered into a contract with Harris County, Texas. However, there is no evidence in the record to show when, pursuant to that contract, Hart began providing, installing and supporting the DRE system for Harris County and the earliest reference to Hart’s actual experience with the DRE system is the reference to its use for Early Voting in November 2001. Accordingly, the Hearings Officer finds that Hart did

not demonstrate that it possessed the three years of actual experience required by the RFP and concludes that Hart was not a responsible offeror.

Petitioner also argued that Hart did not meet the requirement that an offeror have five years of experience in administering elections. Because Petitioner has established that Hart was not a responsible offeror, it is unnecessary to address this alternative claim.

Remedies

A. Ratification, Modification or Termination of the Contract

The remedies available to an aggrieved party following the award of the contract are set forth in HRS § 103D-707 and Hawaii Administrative Rules (“HAR”) § 3-126-38 and provide in relevant part:

§ 103D-707 Remedies after an award. If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) If the person awarded the contract has not acted fraudulently or in bad faith:

(A) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interest of the State; or

(B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses, other than attorney’s fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination[.]

§ 3-126-38 Remedies after an award. (a) When there is no fraud or bad faith by a contractor:

(1) Upon finding after award that a state or county employee has made an unauthorized award of a contract or that a solicitation or contract award is otherwise in violation of law where there is no finding of fraud or bad faith, the chief procurement officer or designee may ratify and affirm, modify, or terminate the contract in accordance with this section after consultation with the respective attorney general or corporation counsel, as applicable.

(2) If the violation can be waived without prejudice to the State or other bidders or offerors, the preferred action is to ratify and affirm the contract.

...

(4) If the violation cannot be waived without prejudice to the State or other bidders or offerors and if performance has begun, the chief procurement officer or designee shall determine in writing whether it is in the best interest of the State to terminate or to amend, ratify, and affirm the contract. Termination is the preferred remedy. The following factors are among those pertinent in determining the State's best interest:

- (A) The cost to the State in terminating and resoliciting;
- (B) The possibility of returning goods delivered under the contract and thus decreasing the costs of termination;
- (C) The progress made toward performing the whole contract; and
- (D) The possibility of obtaining a more advantageous contract by resoliciting.

While Petitioner initially requested that the contract be terminated, in its Response filed on October 18, 2004, Petitioner recognized that contract performance requirements for early voting and general election ballot were imminent, and alternatively, argued that the contract should be modified to allow Hart's performance on the current contract until completion of the 2004 general election period with immediate termination thereafter. Based on the evidence presented, the Hearings Officer agrees with Petitioner's assessment of the current situation and finds and concludes that it would be in the best interest of the State to modify the contract. Accordingly, the contract is modified as follows: the contract's termination date is December 31, 2004 instead of December 31, 2006, and (2) the option to extend is deleted. By modifying the contract's termination date to December 31, 2004, the best interest of the State would be served because there would be no disruption to the November 2004 general election.

B. Proposal Preparation Costs

Petitioner argued that it was entitled to proposal preparation costs because it was second in line to Hart. When the contract has been awarded before the resolution of a protest, HRS § 103D-701(g) entitles a protestor to recover its proposal preparation costs if (1) the protest is sustained and (2) the protestor should have been awarded the contract but is not awarded the contract. *See also, Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 at 456-458. Petitioner has shown that Hart should have been disqualified from award, and that Petitioner's evaluation point total was second to Hart's. Because HRS § 103D-303(g) provides that award shall be made to the responsible offeror whose proposal is most advantageous taking into consideration price and the evaluation factors, and that no other factors or criteria shall be used in the evaluation, Petitioner has shown by a preponderance of the evidence that the contract should have been awarded to Petitioner. Accordingly, the Hearings Officer concludes that Petitioner is entitled to proposal preparation costs.

C. Attorney's Fees

Petitioner also requested its attorney's fees in prosecuting this matter. In *Carl*, the court held that 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; (2) the contract was awarded in violation of HRS § 103D-701(f), and (3) the award of the contract was in bad faith. *Carl Corp.*, 85 Haw. at 460. Petitioner contended that Respondent acted in bad faith when it: (1) determined that the award of the contract was necessary to protect the substantial interests of the State, (2) pre-determined that the award would be made to Hart, as evidenced by the article posted on the *Honolulu Advertiser's* website, (3) unreasonably delayed its response to Petitioner's protest and (4) presented a defense in this matter. A finding of bad faith must be supported by specific findings showing reckless disregard of clearly applicable laws and rules. *See, HAR § 3-126-36(c)*.

Based on the evidence presented, the Hearings Officer concludes that Petitioner has not proven by a preponderance of the evidence that Respondent acted in bad faith. While the reason given to the Chief Procurement Officer for the need to proceed with the award of the contract to Hart was incorrect, based on the evidence presented, the Hearings Officer concludes that Petitioner has not shown that Respondent's conduct was reckless. With

