

OFFICE OF COMMERCIAL
AND CONSUMER AFFAIRS

2011 NOV 18 P 12:07

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

In the Matter of:)	PCH-2011-1
)	
REALTY LAUA, LLC,)	HEARINGS OFFICER'S FINDINGS
)	OF FACT, CONCLUSIONS OF LAW,
Petitioner,)	AND DECISION
vs.)	
)	
HAWAII PUBLIC HOUSING)	
AUTHORITY, DEPARTMENT OF)	
HUMAN SERVICES, STATE OF)	
HAWAII,)	
)	
Respondent.)	
)	

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

I. INTRODUCTION

On July 13, 2011, Realty Laua, LLC ("Petitioner"), filed a request for hearing in connection with Respondent Hawaii Public Housing Authority, Department of Human Services, State of Hawaii's ("Respondent") July 6, 2011 denial of Petitioner's September 10, 2010 protest. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On September 7, 2011, these matters came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Sarah M. Love, Esq. appeared for Petitioner, and John C. Wong, Esq. appeared for Respondent.

Following the conclusion of the hearing, the Hearings Officer directed the parties to file their closing arguments in writing. Accordingly, on September 30, 2011, both parties submitted their closing briefs.

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

II. FINDINGS OF FACT

1. On or about April 29, 2010, Respondent issued Request for Proposals No. RFP PMB-2010-10 (“RFP”), seeking proposals for property management, maintenance and resident services for Federal low-income public housing complexes under Asset Management Project 44 on the Island of Oahu (“AMP 44”). AMP 44 consists of five complexes totaling 260 units.

2. The solicitation contemplated a contract with an initial term of 12 months from June 30, 2010 to June 30, 2011 with Respondent having the option to extend the contract for up to four additional 12-month periods. The RFP provided:

The option to extend the Contract will be at the sole discretion of [Respondent]. *The Contract shall be extended at the same rates as proposed in the original proposal* unless price adjustments are provided herein. Submission of a proposal constitutes acknowledgement of the interested offeror that the interested offeror is able and willing to contract for services up to the maximum allowable length of the Contract.

* * * *

(Emphasis added).

3. According to the RFP, sealed proposals “will be received at [Respondent’s] Central Office . . . on Tuesday, June 1, 2010.”

4. Among other things, the RFP required that the offeror’s total management expense proposal include a management fee not to exceed \$25 per occupied unit a month for each complex under AMP 44. The RFP stated in relevant part:

E. Financial

1. Total Management Expense Proposal

* * * *

Interested offerors shall propose a total management expense proposal for AMP 44. This price will include the interested offeror's management fee, AMP 44 complex personnel salaries, including clerical, housing specialist and site management, personnel fringe benefits, interested offeror's insurance expense associated with managing AMP 44 as well as all applicable Federal, State and Local taxes. The interested offeror's total management expense proposal shall also include office supplies and unit repair supplies and materials expenses.

The total management expense proposal should include direct project expenses such as postage, telephone, copying and other direct AMP 44 office expense. See Attachment 21.

* * * *

The Successful Offeror's management fee shall be calculated at no greater than \$25 per occupied unit a month for each complex under AMP 44.

* * * *

(Emphasis added).

5. The \$25 per occupied unit per month maximum management fee required by the RFP was applicable to the initial contract year as well as to each of the four option years, and constituted a material term of the contract.

6. The RFP also required the Evaluation Committee to conduct an initial review of all of the proposals to ensure that the proposals met the minimum requirements of the RFP:

[Respondent] will conduct an initial review to ensure that all proposals meet the minimum threshold requirements. Proposals will be reviewed to ensure submittal of all required attachments, certifications, forms, and narrative sections.

7. Section 3. III of the RFP set forth the sections that each offeror was required to include in their proposal and the questions that the offeror was required to address under each section. According to the RFP, the proposal would be comprised of the following sections: Title Page, Table of Contents, Background and Summary, Experience and Capability, Personnel: Project Organization and Staffing, Management Plan, Financial, and Other.

8. The RFP further provided:

TIP: Interested offeror should submit their proposal with enough detail to ensure that the reader is able to fully understand their approach to management and maintenance. A good test is to give the proposal to someone who has not written the proposal to see if they are able to get a clear picture of how the management unit will be operated.

9. A pre-proposal conference was held on May 6, 2010 for all prospective offerors.

10. Respondent received two proposals by the June 1, 2010 deadline. Proposals were received from Petitioner and from Ewa Pointe Realty (“EPR”).

11. EPR’s proposal, among other things, proposed a management fee of \$37/occupied unit per month for the first year of the contract and management fees in excess of \$37 per occupied unit per month for the remaining option years. In contrast, Petitioner’s proposal included a management fee of \$25 per occupied unit per month over the life of the contract.

12. On or about June 2, 2010, an Evaluation Committee consisting of five of Respondent’s staff members was appointed to review the submitted proposals.

13. The Evaluation Committee conducted its initial evaluation of the proposals on June 9, 2010. Among other things, the Evaluation Committee found that EPR’s “proposed management fee of \$10,370/month or \$37/per unit per month was . . . excessive as compared to the \$25 per unit per month figure stated in RFP CPO-2010-10.” Nevertheless, the Evaluation Committee deemed EPR’s proposal to be “potentially acceptable.”

14. On June 10, 2010, Respondent issued a request for clarification and additional information to both offerors. Petitioner's and EPR's responses were due by June 16, 2010. Both offerors submitted their responses prior to the deadline.

15. Respondent's request for clarification and additional information to EPR sought additional information as to 29 items in EPR's proposal.

16. By letter dated June 14, 2010, EPR provided Respondent with its answers to Respondent's request for clarification and additional information. In Item 29, EPR provided the following response:

Pg 18, E.2. Financials, Management Fee

[Respondent] has made a general observation that the AMP 44 budget will not be able to support a management fee of \$37/occupied unit.

a. *Ewa Pointe Realty will reduce proposed amount to \$34/occupied unit.* Ewa Pointe Realty elected to include costs on general liability, auto, and TDI insurance with this fee [sic](except for the Worker's Compensation Insurance) as opposed to separate line items.

* * * *

(Emphasis added).

17. On or about June 23, 2010, the Evaluation Committee, apparently treating EPR's and Petitioner's answers to Respondent's requests for clarification and additional information as the offerors' best and final offers ("BAFO"), proceeded to conduct its final evaluation of the proposals.

18. Following its final evaluation of the BAFOs, the Evaluation Committee decided to award the contract to EPR even though EPR's proposed management fee of \$34/occupied unit per month still exceeded the \$25 maximum management fee allowed by the RFP.

19. In scoring EPR's BAFO, one Evaluation Committee member noted that EPR's proposed management fee still exceeded the \$25 maximum management fee allowed by the RFP.

20. Following the Evaluation Committee’s June 23, 2010 final evaluation of the BAFOs, Phyllis Ono, a member of the Evaluation Committee, contacted EPR to discuss the management fee that had been proposed by EPR.

21. Following Ono’s conversation with EPR, EPR faxed a letter dated July 20, 2010 to Respondent. Attached to the letter was a “modified management fee worksheet” that was sent by EPR “per phone conversation with Phyllis last week.” EPR’s modified management fee worksheet reflected management fees as follows:

	Monthly	Per Unit Cost
Year 1	\$6,500 + GE Tax	\$25.00 + GE Tax
Year 2	\$6,825 + GE Tax	\$26.25 + GE Tax
Year 3	\$7,166.25 + GE Tax	\$27.56 + GE Tax
Year 4	\$7,514 + GE Tax	\$28.93 + GE Tax
Year 5	\$7,900 + GE Tax	\$30.38 + GE Tax

22. On or about August 19, 2010, Respondent awarded the contract for AMP 44 to EPR.

23. Following the award of the contract to EPR, Petitioner requested a debriefing meeting with Respondent. The debriefing meeting was held on August 31, 2010.

24. On September 2, 2010, Respondent sent Petitioner a letter concluding the debriefing and transmitting to Petitioner certain requested documents including EPR’s proposal and evaluation score sheets, as well as Petitioner’s score sheets.

25. After reviewing the documents provided by Respondent, Petitioner submitted a protest to Respondent on September 10, 2010. Among other things, the protest alleged that EPR’s proposal exceeded the management fee ceiling of \$25 per occupied unit per month for each complex under AMP 44 and that EPR’s proposal did not meet the minimum mandatory threshold requirements as required by the RFP.

26. By letter dated July 6, 2011, Respondent denied Petitioner’s September 10, 2010 protest. Among other things, the denial stated:

* * * *

4. Response: The HPHA concurs that Ewa Pointe Realty's Clarification/Additional Information for RFP PMB-2010-10 dated June 14, 2010 as requested by [Respondent] failed to meet the required Management Fee ceiling of \$25 per occupied unit per month as stated in Section E, Financial, Total Management Expenses/Management Fee. As indicated in the RFP, [Respondent] shall enter into discussion with proposals deemed potentially acceptable. As such, [Respondent] entered into discussion with Ewa Pointe Realty as a potentially acceptable proposal. Subsequently, Ewa Pointe Realty submitted a revised price proposal with a management fee calculated at \$25 per occupied unit per month.

* * * *

27. On July 13, 2011, Petitioner filed the instant request for administrative review.

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.

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(f).

In seeking to overturn Respondent's July 6, 2011 denial of its September 10, 2010 protest, Petitioner advances a number of arguments:

1. EPR's cost proposal exceeded the management fee ceiling of \$25 per occupied unit per month for each complex under AMP 44 as required in the RFP;

2. EPR's Clarification/Additional Information, sent to Respondent on June 14, 2010, failed to meet the management fee ceiling of \$25 per occupied unit as required by the RFP;
3. EPR's proposal did not meet the minimum mandatory threshold requirements as required by the RFP;
4. There was a conflict of interest with members of the Evaluation Committee;
5. There was bias within the Evaluation Committee which influenced the final results and evaluation in favor of EPR; and
6. The Evaluation Committee failed to adequately evaluate Petitioner's past performance as a means of evaluating the credibility of Petitioner's approach to work accomplishment in the Management Plan of the RFP.

At the outset, Petitioner complains that EPR's proposal was not responsive to the RFP because it did not comply with the requirement that the offeror's management fee be calculated at no greater than \$25 per occupied unit per month for each complex under AMP 44. Moreover, according to Petitioner, EPR's proposal did not meet that requirement even after it was reminded by Respondent that Respondent's budget for AMP 44 "will not be able to support a management fee of \$37/occupied unit" and provided with an opportunity to clarify its proposal. Respondent does not dispute that EPR's proposal and subsequent "clarification" failed to meet the management fee requirement. Instead, Respondent contends that "it appears that Ewa Pointe clarified its proposal after submission to comply with the RFP's criteria of a management fee of only \$25 per unit" and, that in any event, because no contract has been executed, Respondent can still contractually hold EPR to a \$25 per unit management fee during any contractual term¹.

Hawaii Revised Statutes ("HRS") §103D-303 and Hawaii Administrative Rule ("HAR") §3-122-53 provide in relevant part:

¹ Aside from the fact that Respondent has shown little interest in holding EPR to the \$25 maximum management fee requirement in the RFP, this argument flies directly in the face of the Procurement Code's purposes of providing for fair and equitable treatment of all persons dealing with the procurement system and increasing confidence in the integrity of the system.

§103D-303. Competitive sealed proposals.

* * * *

(f) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure a full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(Emphasis added).

§3-122-53. Discussions with offerors. (a) Before conducting discussions, a “priority list” shall be generated by the procurement officer or evaluation committee.

- (1) In order to generate a priority list, proposals shall be classified initially as acceptable, potentially acceptable, or unacceptable.
- (2) All responsible offerors who submit acceptable or potentially acceptable proposals are eligible for the priority list.

* * * *

(b) Discussions will be limited to only “priority-listed offerors” and are held to:

- (1) Promote understanding of a state agency’s requirements and priority-listed offerors’ proposals; and
- (2) Facilitate arriving at a contract that will provide the best value to the State, taking into consideration the evaluation factors set forth in the request for proposals.

* * * *

(d) Priority-listed offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals.

* * * *

Once proposals have been submitted, the foregoing provisions limit discussions to those offerors whose proposals are deemed to be *reasonably susceptible* of being selected for award. Here, the record established, and Respondent does not dispute, that a maximum management fee of \$25 per occupied unit per month for the first year of the contract and each of the four option years was required by, and was a material term of, the RFP. The evidence also established that the management fee offered in EPR's proposal did not meet that requirement. Notwithstanding EPR's failure to comply with a material term of the RFP, however, Respondent determined EPR's proposal to be potentially acceptable and, consequently, provided EPR with an opportunity to "clarify" its proposal. Respondent's determination was wrong. Because EPR's proposal failed to meet a threshold requirement of the RFP by failing to provide for a maximum management fee of \$25, it was not reasonably susceptible of being selected for award. Accordingly, EPR was not entitled to engage in *any* discussion with Respondent for the purpose of clarifying its proposal and its proposal should have been rejected as nonresponsive to the RFP.

Even if discussions were permitted between Respondent and EPR, EPR's subsequent "clarification" and lowering of its management fee to \$34 per occupied unit per month was still nonresponsive to the RFP. If EPR's initial management fee proposal of \$37 was somehow not clear to Respondent, certainly its subsequent "clarification" made crystal clear that EPR was unable or unwilling to meet that requirement. In any event, Petitioner correctly points out that HAR §3-122-97(b)(2)(B) requires the rejection of a proposal where "*[t]he proposal, after any opportunity has passed for modification or clarification, fails to meet the announced requirements of the agency in some material respect.*" Thus, Respondent's failure to reject EPR's proposal following its receipt of EPR's apparent agreement to lower its proposed management fee to \$34 was contrary to law.

The evidence also established that the offerors' responses to Respondent's request for clarification and additional information were treated by the Evaluation Committee

as EPR's and Petitioner's BAFOs. However, when EPR's BAFO still did not meet the RFP's requirement for a \$25 maximum management fee, Respondent proceeded to engage EPR in yet another discussion regarding that issue. HAR §3-122-54 provides in pertinent part:

Best and final offers. (a) The procurement officer shall establish a date and time for the priority-listed offerors to submit their best and final offers.

(b) Best and final offers shall be submitted only once, unless the chief procurement officer or the head of a purchasing agency or a designee of either officer above the level of procurement officer determines in writing that it is in the State's best interest to conduct additional discussions or change the State's requirements by an addendum distributed only to priority-listed offerors and require another submission of best and final offers. *Otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award.*

* * * *

(Emphasis added).

Respondent's discussion with EPR following the Evaluation Committee's final evaluation of the BAFOs and prior to the awarding of the contract to EPR clearly violated the foregoing rule. Interestingly, even though EPR apparently agreed to lower its management fee to the required \$25 per occupied unit per month, the "modified management fee worksheet" it provided to Respondent on or about July 20, 2010 still reflected a fee for the 4 option years in excess of the \$25 maximum management fee permitted by the RFP.


For all of these reasons, the Hearings Officer finds and concludes that EPR's proposal was nonresponsive to the RFP. EPR's inability or unwillingness to meet a material term of the RFP was clearly shown by the evidence presented here. Having arrived at this conclusion, the Hearings Officer need not address the remaining arguments advanced by Petitioner.

IV. DECISION

Based upon the foregoing findings and conclusions and pursuant to HRS §103D-707(1)², the Hearings Officer orders as follows:

1. Respondent's July 6, 2011 denial of Petitioner's protest is vacated;
2. the contract awarded to EPR is terminated; and
3. the parties shall bear their own attorneys' fees and costs incurred in this matter.

Dated at Honolulu, Hawaii: NOV 18 2011


CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

²Even where the solicitation or award is determined to be in violation of the law, HRS §103D-707(1) authorizes the ratification or modification of the contract if it is determined that doing so would be in the State's best interest. HRS §103D-707(1) also permits the Hearings Officer to terminate the contract. In this case, no evidence was presented to show that ratification or modification of the contract would be in the State's best interest. On the contrary, ratification would unfairly deny the successful protestor any meaningful relief. Moreover, ratification of an illegally awarded contract can only undermine the public's confidence in the integrity of the procurement system and, in the long run, discourage competition. *Environmental Recycling v. County of Hawaii, PCH 98-1 (July 2, 1998).*