



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

In the Matter of:	)	PCX-2010-7
	)	
MAT HAWAII, INC.,	)	HEARINGS OFFICER'S FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,	)	ORDER GRANTING RESPONDENTS'
vs.	)	MOTION FOR SUMMARY
	)	JUDGMENT
MICHAEL R. HANSEN, ACTING	)	
DIRECTOR OF BUDGET AND FISCAL	)	
SERVICES, AND CITY AND COUNTY	)	
OF HONOLULU,	)	
	)	
Respondents,	)	
_____	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
FINAL ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On October 19, 2010, MAT Hawaii, Inc. ("Petitioner"), filed a request for administrative review to contest Michael R. Hansen, Acting Director of Budget and Fiscal Services, and the City and County of Honolulu's ("Respondents") October 12, 2010 denial of its protests in connection with a proposal for the furnishing of all necessary labor, materials, equipment, tools and appurtenances to provide beach cleaning services on Oahu for the Department of Parks and Recreation, Proposal Document No. RFB-DPR-247004 ("IFB"). Petitioner's request for hearing was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On October 27, 2010, Respondents filed the instant motion for summary judgment. On November 1, 2010, Petitioner filed a memorandum in opposition to the motion and, on November 3, 2010, Respondents filed its reply.

The motion came before the undersigned Hearings Officer on November 4, 2010. Amy R. Kondo, Esq. and Nicole R. Chapman, Esq. appeared for Respondents; Derek T. Mayeshiro, Esq. appeared on behalf of Petitioner.

Having heard the argument of counsel, and having considered the motion, memoranda, exhibits and declarations attached thereto, along with the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law and order granting Respondents' motion for summary judgment.

II. FINDINGS OF FACT

1. On December 7, 2009, Respondent City issued the IFB.

2. The Minimum Specifications ("Specifications") of the IFB included the following minimum requirements in Section 3:

3. WORK REQUIREMENTS.

\* \* \* \*

A. The Contractor's Responsibility.

\* \* \* \*

(9) Disposal of all debris, trash, rubbish, etc. The Contractor shall collect all trash, rubbish, debris and other matter from the sand and haul them away from the beach areas. *Only trash and debris shall be removed from the beach. No inordinate amount of sand shall be removed from the beach.*

(Emphasis added).

\* \* \* \*

(15) Equipment and Equipment Standards.

All equipment that shall be used for providing beach cleaning services as specified herein shall be listed in the appropriate spaces in the Questionnaire. Failure to comply with this requirement may be sufficient cause for the rejection of the bid.

(a) Inspection and Demonstration

If requested by the City, the successful bidder shall be required to have its beach cleaning equipment inspected by the City and shall provide a demonstration for compliance with the City's specifications. Only the equipment listed in the Questionnaire shall be inspected and allowed to be demonstrated for compliance. The inspection and demonstration of the beach cleaning machine only, is tentatively scheduled for January 19-21, 2010 at 8:00 a.m. at the Ala Moana Beach Park or at another location as designated by the City. The City reserves the right to postpone the date of inspection/demonstration. Exact details of the demonstration will be provided to the successful bidder. The City reserves the right to inspect the remainder of the equipment.

If the successful bidder's equipment is not available for inspection and demonstration by the specified date or approved date, or if after inspection and demonstration, the City determines that the equipment does not meet specifications, the City may reject bidder's offer.

\* \* \* \*

(c) Beach Cleaning Machine

The beach cleaning machine shall be capable of performing the following requirements:

\* \* \* \*

(ii) *The beach cleaning machine shall be capable of picking debris the size of 3/8 of an inch or greater to include, but not limited to, cigarette butts, bottle caps, can pop-tops, drinking straws, bottles, and glass items.*

(Emphasis added).

\* \* \* \*

(iv) *The beach cleaning machine shall be capable of returning virtually all of the sand that was picked up with the debris back onto the beach.*

(v) *The beach cleaning machine shall be able to clean wet and dry sand areas.*

(Emphasis added).

Each prospective bidder shall submit with the bid, the current manufacturer's brochures and specifications for each equipment listed in the Questionnaire, substantiating that the beach cleaning equipment to be used for the services as specified herein shall be capable of providing the requirements as listed in Section 3.A.(15)(c).i-v. Each prospective bidder shall list the names and addresses of other municipalities or firms that are currently using the type of appropriate spaces on the Questionnaire. Failure to comply with these requirements may be sufficient cause for the rejection of the bid.

Each prospective bidder shall also submit with the bid, a description of the equipment to be used in providing the beach cleaning machine services as specified herein.

\* \* \* \*

(Emphasis in original).

3. The IFB required all bidders to complete a Questionnaire and submit the completed Questionnaire along with its bid. Among other things, the Questionnaire required the bidder to provide various information regarding the equipment it intended to use, including but not limited to, its beach cleaning machines.

4. The Questionnaire also presented a number of questions each bidder was required to respond to, including "[s]hall the beach cleaning machine be able to clean wet and dry sand areas?" Petitioner's response consisted of the following: "Yes / Dry Sand, Heavy Saturation, NO / Sand is hand raked."

5. The bids were opened on January 13, 2010. H.T.M. Contractors, Inc. (“HTM”) submitted the apparent low bid.

6. On or about February 10, 2010, HTM’s bid was rejected as nonresponsive by Respondent City.

7. Petitioner did not submit with its bid the current manufacturer’s brochures and specifications for its beach cleaning equipment substantiating that its equipment was capable of meeting the requirements listed in Section 3(A)(15)(c)(i)-(iv) of the Specifications, including the capability to clean dry and wet sand.

8. Petitioner’s bid stated that its beach cleaning machine’s sifting mesh screen was: “Heavy duty type. Nine gauge steel, 9/16” square, capable of picking up and removing small objects including cigarette butts, bottle caps, pop top, straws, etc.”

9. By letter dated February 12, 2010, Respondent City informed Petitioner that Respondent City was rejecting Petitioner’s bid as nonresponsive. The letter stated in pertinent part:

\* \* \* \*

The submitted brochures for the beach cleaning machine could not substantiate the requirement of the beach cleaning machine being able to clean wet and dry sand areas as called for in Section 3.A.(15)(c)v of the Minimum Specifications.

\* \* \* \*

Furthermore, the answer listed in the *questionnaire* portion of your bid stated that the beach cleaning machine is able to clean dry sand areas and for heavy saturation, sand is raked. The beach cleaning machine to be used does not meet above stated specification. Since your bid has been determined to be non-responsive, we are rejecting your bid.

10. On February 23, 2010, Respondent City, through Addendum 4 to the IFB, cancelled the solicitation “due to no responsible and responsive bidders.”

11. By letter dated February 24, 2010, Petitioner protested the rejection of its bid by Respondent City.

12. By letter dated February 26, 2010, Petitioner again protested the rejection of its bid by Respondent City.

13. By letter dated August 13, 2010, Respondent City responded to Petitioner's February 24 and 26 protests. The letter stated in part:

\* \* \* \*

*Without waiving any rights to reject MAT's bid protest on the basis in which MAT submitted its proposal as set forth in the City's letter to MAT dated February 12, 2010, the City agrees to evaluate MAT's beach cleaning equipment at a predetermined location within Ala Moana Regional Park on Monday, August 23, 2010 at 9:00 a.m. Vehicles and equipment should be onsite and ready to start the evaluations at 9:00 a.m. The performance evaluation will be based on the specifications set forth in the solicitation, to include evaluations of the equipment's ability to operate on wet sand.*

\* \* \* \*

(Emphasis added).

14. The demonstration was held on August 23, 2010 at the Ala Moana Beach Park.

15. On October 12, 2010, following the demonstration, Respondent City issued its determination that Petitioner's beach cleaning equipment was nonresponsive to the IFB:

\* \* \* \*

For the subject solicitation, the City reviewed the bid proposal documents and brochures submitted by MAT. As stated in the City's letter dated February 12, 2010, the brochures that MAT submitted did not substantiate that the beach cleaning machine is capable of cleaning wet sand.

(See Section 3(A)(15)(c) of the Minimum Specifications, which states, “Each prospective bidder shall submit with its bid, the current manufacturer’s brochures and specifications for each equipment listed in the Questionnaire, substantiating that the beach cleaning equipment to be used for the services as specified herein shall be capable of providing the requirements as listed in Section 3.A.(15)(c).i-v.”)

Furthermore, in response to the question in the Questionnaire included in the solicitation, “Shall the beach cleaning machine be able to clean wet and dry sand areas?” MAT responded, “Yes/Dry Sand, Heavy Saturation, NO/Sand is hand raked.” This response was further clarified verbally by MAT on August 23, 2010 that its machine was capable of cleaning dry sand, but could not clean the wet sand at the water mark; the debris on the wet sand at the water mark needed to be hand-raked to the dry sand area. (See Section 3(A)(1) of the Minimum Specifications, which states, “Sand areas, from the water line at time of cleaning to vertical boundaries for all beaches. The Contractor shall clean sand areas of all rubbish and debris including, but not limited to, bottles, cans, paper, drinking straws, bottle caps, food items, to a depth of four (4) inches by sand cleaning machine.” Emphasis added.)

Because MAT’s cleaning machine can only clean dry sand above the water mark, and not wet sand at the water line, it did not meet the minimum specification of cleaning wet sand.

\* \* \* \*

Finally, Section 3(A)(15)(c)(ii) of the Minimum Specifications requires that “the beach cleaning machine shall be capable of picking debris the size of 3/8 of an inch or greater to include, but not limited to, cigarette butts, bottle caps, can pop-tops, drinking straws, bottles, and glass items.” MAT’s proposal stated that its screen was 9/16-inch square, and this was confirmed at the demonstration.

This does not meet the minimum specifications of picking up debris the size of 3/8 of an inch or greater. Because of the larger screen size, debris items measuring 3/8 of an inch would fall through the 9/16-inch square screen.

The beach cleaning equipment machine as presented in MAT's proposal failed to meet the written specifications set forth in the solicitation and, thus, is deemed nonresponsive.

\* \* \* \*

16. On October 19, 2010, Petitioner filed the instant Request for Hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs to review Respondent City's denial of its protests.

### 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.

In determining whether a bid is a responsive one, the Hearings Officer must ascertain whether the bid has promised in the precise manner requested by the government with respect to price, quantity, quality, and delivery. If this standard is satisfied, the bidder is effectively obligated to perform the exact thing called for in the solicitation. *Starcom Builders, Inc. v. Board of Water Supply; PCH-2003-18 (October 18, 2003)*. Moreover, it is well-settled that matters of responsiveness must be discerned solely by reference to materials submitted with the bid and facts available to the government at the time of the bid opening. *Blount, Inc. v. U.S.*, 22 Cl.Ct. 221 (1990)<sup>1</sup>; *Browning-Ferris Industries of Hawaii, Inc. v. State Dept. of Transportation, PCH 2000-4 (June 8, 2000)*, citing *Blount* with approval. See also, *Environmental Recycling v. County of Hawaii, PCH-98-1 (July 2, 1998)* (in a competitive bidding procurement, bids must be evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening).

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<sup>1</sup> The *Blount* court explained that, "[t]he rule is designed to . . . to assure that the government evaluates bids on an equal basis." *Blount, supra*, citing *Cibinic and Nash, Formation of Government Contracts (2<sup>nd</sup> Ed., 1986)* at p. 394.



The uncontroverted evidence presented here established that the IFB required, among other things, that the bidder's beach cleaning machine be able to clean wet as well as dry sand areas; that each bidder submit with its bid, the current manufacturer's brochures and specifications for each equipment listed in the Questionnaire substantiating that the equipment was capable of providing the requirements as listed in Section 3.A.(15)(c).i-v of the Specifications; that the beach cleaning machine be capable of picking debris the size of 3/8 of an inch; and that the beach cleaning machine be capable of returning virtually all of the sand that was picked up with the debris back onto the beach. Notwithstanding those requirements, however, Petitioner's bid provided that its equipment was not capable of cleaning wet sand, but only dry sand, and wet or "heavy saturation" sand would need to be hand-raked. The bid also indicated that the mesh screen on its beach cleaning machine was 9/16-inch square, which was inconsistent with the requirement in the IFB that the equipment be capable of picking up debris the size of 3/8 of an inch. Moreover, Petitioner did not submit the equipment manufacturer's brochures that substantiated that its equipment was capable of meeting the requirements of the IFB, including the capability to clean dry and wet sand.

Petitioner does not dispute that the required brochures and other information were not submitted with its bid, that its bid indicated that wet or "heavy saturation" sand would need to be hand-raked, or that the mesh screen on its equipment was 9/16-inch square. Instead, Petitioner argues that Respondent City waived its right to reject Petitioner's bid as nonresponsive based upon Petitioner's failure to provide the required information with its bid, when it subsequently agreed to evaluate Petitioner's beach cleaning equipment. By letter dated August 13, 2010 to Petitioner, Respondent City said in part:

Under Section 3.A.(15) of the Minimum Specifications of the subject solicitation, the City may request to inspect the beach cleaning equipment and to have the equipment demonstrated for compliance with the City's specifications.

\* \* \* \*

*Without waiving any rights to reject MAT's bid protest on the basis in which MAT submitted its proposal as set forth in the City's letter to MAT dated February 12, 2010, the City agrees to evaluate MAT's beach cleaning equipment at a predetermined location within Ala Moana Regional Park on Monday, August 23, 2010 at 9:00 a.m.*

\* \* \* \*

(Emphasis added).

Petitioner asserts that by agreeing to and conducting the performance evaluation, Respondent City is precluded from asserting that Petitioner's bid was nonresponsive at the time of bid opening and that "[s]uch a position would constitute an act of bad faith". According to the undisputed facts, however, Respondent City, in agreeing to conduct the evaluation, expressly reserved the right to reject Petitioner's bid as nonresponsive on the basis in which Petitioner submitted its bid. At a minimum, Respondent City's reservation of rights established that it did not intend to voluntarily relinquish its right to reject Petitioner's bid as nonresponsive as a result of Petitioner's failure to provide the necessary information and brochures with its bid or the answer in the bid that wet or "heavy saturation" sand would need to be hand-raked; *and*, at the same time, placed Petitioner on notice that its bid could still be rejected on that basis. These considerations lead the Hearings Officer to conclude that Respondent City's agreement to perform the evaluation did not constitute a waiver of its right to reject Petitioner's bid as nonresponsive as determined at bid opening<sup>2</sup>. Nor did it amount to an act of bad faith. In support of its claim of bad faith, Petitioner complains that it incurred costs and wasted its time in participating in the evaluation. Petitioner was certainly free to decline the opportunity to participate in the evaluation. However, Petitioner elected to do so even though it was aware that its bid might still be rejected because it had failed to provide the required information with its bid. Under these circumstances, the Hearings Officer finds Petitioner's complaint to be unpersuasive and its bad faith allegation to be without merit.

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<sup>2</sup> In view of this disposition, the Hearings Officer need not address the question whether a procuring agency has the discretion to waive the requirement that the responsiveness of bids must be determined solely by reference to materials submitted with the bid and the facts available to the agency at the time of bid opening.

There is no dispute that Petitioner failed to submit the required brochures and information with its bid that were necessary for Respondent City to determine whether the beach cleaning equipment met the applicable Specifications. The uncontroverted evidence also established that according to Petitioner's bid, its beach cleaning equipment was not capable of cleaning wet sand and the mesh screen on the equipment was 9/16-inch square. Petitioner's bid was therefore properly rejected as nonresponsive to the IFB.

IV. ORDER

Based on all of these considerations, the Hearings Officer concludes that there are no genuine issues of material fact left for determination at hearing and that Respondents are entitled, as a matter of law, to a ruling that Petitioner's bid is nonresponsive and therefore properly rejected. Accordingly, Respondents' motion for summary judgment is granted and this matter is hereby dismissed. The Hearings Officer further orders that each party shall bear its own attorney's fees and costs incurred in this matter.

Furthermore, having failed to prevail in this proceeding, Petitioner's cash bond in the sum of \$2,000.00 shall be deposited into the State of Hawaii's General Fund.

Dated at Honolulu, Hawaii: NOV - 9 2010



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