



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2004 SEP -2 P 4:14

HEARINGS OFFICE

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

In the Matter of)	PCH-2004-7
)	
GREENLEAF DISTRIBUTION)	HEARINGS OFFICER'S
SERVICES, INC. and INTERNATIONAL)	FINDINGS OF FACT,
RESOURCE RECOVERY, INC.,)	CONCLUSIONS OF LAW,
)	AND DECISION
Petitioners,)	
)	
vs.)	
)	
DEPARTMENT OF BUDGET AND)	
FISCAL SERVICES, CITY & COUNTY)	
OF HONOLULU,)	
)	
Respondent.)	
)	

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

I. INTRODUCTION

By letter dated May 20, 2004, Greenleaf Distribution Services, Inc. and International Resource Recovery, Inc. (hereinafter collectively referred to as "Petitioner"), filed a request for an administrative review of the Department of Budget and Fiscal Services, City & County of Honolulu's ("Respondent") decision denying Petitioner's protest dated May 13, 2004. Petitioner's request for administrative 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.

The matter came on for hearing before the undersigned Hearings Officer on June 8, 2004 in accordance with the provisions of HRS Chapter 103D. Petitioner was

represented by Thomas T. Watts, Esq., and Respondent was represented by Amy R. Kondo, Esq. Following the commencement of the hearing, the parties agreed to reconvene the hearing on July 6 and 7, 2004.

The hearing in this matter was reconvened on July 6, 2004 and was concluded on July 7, 2004. At the conclusion of the hearing, the Hearings Officer directed the parties to submit written proposed findings of fact and conclusions of law. Accordingly, on August 4, 2004, proposed findings and conclusions were filed by each of the parties. The parties' proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

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

II. FINDINGS OF FACT

1. On or about April 19, 2004, Respondent issued a public notice of an Invitation for Bids, entitled, "Notice to Bidders and Proposal Document No. 14362, Proposal for A Residential Curbside Recycling Collection and Processing Program for the Refuse Division, Department of Environmental Services, City & County of Honolulu." ("IFB").

2. The IFB sought services for the collection and recycling of recyclable refuse for approximately 140 residential households on the island of Oahu.

3. Notice of the IFB was published in the Honolulu Star Bulletin and posted on Respondent's internet website on April 19, 2004. The notice remained on Respondent's website until the date of the final submission of bids on May 25, 2004.

4. Among other things, the notice provided that bids would be received up to May 20, 2004, when the bids would be opened. The notice also stated that:

This bid solicitation is a two-step competitive bid. Bidders shall comply with the following:

1. Attend a mandatory pre-bid conference to be held on April 28, 2004, in the Kapolei Hale Conference Room, 1st Floor, 1000 Uluohia Street, at 10:00 a.m. local time. Failure to attend the mandatory pre-bid conference shall be sufficient cause for rejection of the bid.

* * * *

5. Section 2 of the Special Provisions of the IFB stated:

TWO-STEP COMPETITIVE SEALED BID. This Bid shall follow the procedures specified in Chapter 3-122-61.05, Subchapter 6.5 “Multi-step Competitive Sealed Bidding”, Hawaii Administrative Rules. Prior to being allowed to submit a bid, a prospective bidder shall: 1) attend the mandatory pre-bid meeting, 2) submit a “BIDDER’S PLANNING DOCUMENT” and receive the City’s acceptance of said document, and 3) comply with all requirements of these Bid documents.

6. Section 4 of the Special Provisions of the IFB stated:

MANDATORY PRE-BID CONFERENCE. A mandatory pre-bid conference will be held on April 28, 2004, in the Kapolei Hale Conference Room, 1st Floor, 1000 Uluohia Street, at 10:00 a.m. local time. Failure to attend the mandatory pre-bid conference shall be sufficient cause for rejection of bid.

7. Section 8 of the Special Provisions of the IFB, entitled “PRE-BID QUALIFICATIONS – BIDDER’S PLANNING DOCUMENT”, required that bidders submit a “Bidder’s Planning Document” by May 4, 2004 that described and explained the bidder’s comprehensive curbside recycling program. Section 8 also stated that:

The City shall review the “BIDDER’S PLANNING DOCUMENT” to determine whether the Bidder’s program is acceptable and meets the requirements and general intent of the bid documents.

* * * *

All Bidders shall be notified, by the City in writing, whether their planning document is acceptable or deficient. Deficient plans shall be returned to the Bidder with deficient areas indicated. Deficient plans may then be revised and resubmitted for review by the date indicated in the timetable. The Bidder shall then be re-informed, by the City in writing, whether their planning document is acceptable or not. The City reserves the right and is the final authority to determine whether a Bidder's comprehensive recycling program is acceptable to the City.

* * * *

8. On April 28, 2004, the pre-bid conference was held and was attended by approximately nine prospective bidders. Petitioner did not attend.

9. Following the pre-bid conference, Respondent issued an addendum designated as Addendum No. 1 to the IFB and dated April 29, 2004. The addendum set forth the changes made as a result of discussions held at the pre-bid conference.

10. Petitioner submitted a planning document to Respondent on May 4, 2004. The only other planning document submitted to Respondent by the May 4, 2004 deadline was from Honolulu Disposal Services, Inc.

11. By letter dated May 5, 2004, Respondent informed Petitioner that Petitioner was "considered to be a nonresponsive bidder for failing to attend the mandatory pre-bid conference on April 28, 2004 at the Kapolei Hale Conference Room as required by the subject bid proposal. Accordingly, your proposal for Material Recovery system is being returned without action."

12. On May 12, 2004, Petitioner submitted a written protest of Respondent's determination that Petitioner was a nonresponsive bidder.

13. On May 14, 2004, Respondent issued a letter dated May 13, 2004, denying Petitioner's protest and upholding its determination that Petitioner was a nonresponsive bidder as a result of its failure to attend the pre-bid conference.

14. On May 20, 2004, Petitioner filed its request for administrative review of Respondent's denial of Petitioner's protest.

15. On May 25, 2004,¹ Respondent proceeded to open the only bid it had received in response to the IFB. The lone bid was submitted by Honolulu Disposal Services, Inc.

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 this appeal, Petitioner contends that Respondent erred in determining Petitioner to be a nonresponsive bidder because it failed to attend the “mandatory” April 28, 2004 pre-bid conference. Respondent maintains that Petitioner’s attendance at the pre-bid conference was mandatory and a prerequisite to the submission of an offer. According to Respondent, the imposition of such a condition is authorized by and consistent with Hawaii Administrative Rules (“HAR”) §3-122-16.05, and the failure to meet that condition is a valid basis for a finding of nonreponsiveness. HAR §3-122-16.05 provides as follows:

§3-122-16.05 Pre-bid or pre-proposal conference.

(a) The purpose of a pre-bid or pre-proposal conference is to explain the procurement requirements and allow potential offerors to ask questions.

(1) An agency may hold a pre-bid or pre-proposal conference and require or not require attendance by all prospective bidders as a condition for submitting an offer for solicitations that have special or unusual requirements, e.g., requiring physical inspection.

(2) For construction, including design-build projects, pursuant to Act 52, section 2, SLH 2003, an agency shall hold a pre-bid or preproposal conference and invite all interested parties to attend.

¹ On May 13, 2004, Respondent issued an addendum delaying the bid opening date from May 20, 2004 to May 25, 2004.

(b) If conference attendance is mandatory for submission of an offer, the requirement:

- (1) Shall be stated in the public notice issued pursuant to section 3-122-16.02; and
- (2) Prominently in the solicitation or if the decision to hold a mandatory pre-bid or preproposal conference is made after the issuance of the solicitation, the mandatory requirement shall be announced in an addendum.

(c) A pre-bid or pre-proposal conference shall be announced to all prospective offerors in the public notice issued pursuant to section 3-122-16.02 and in the solicitation, or if the decision to hold a pre-bid or pre-proposal conference is made after the issuance of the solicitation, the conference shall be announced in an addendum.

(d) The conference should be held long enough after the solicitation has been issued to allow offerors to become familiar with the solicitation, but sufficiently before the deadline for receipt of offers to allow consideration of the conference results in preparing their offers.

(e) Unless a change is made by written addendum as provided in section 3-122-16.05, nothing stated at the pre-bid or pre-proposal conference shall change the solicitation.

(f) A summary of the conference, in addition to any changes to the solicitation, shall be issued by addendum and shall be supplied sufficiently before the deadline for receipt of offers to allow consideration of the summary results and changes to all those prospective offerors known to have received a solicitation.

At the outset, this controversy necessarily raises the question whether the failure to attend a pre-bid conference is a legitimate basis for a finding of nonresponsiveness. It is well-established that the standard to be applied in ascertaining the “responsiveness” of a bid is whether a bidder has promised in the precise manner requested by the government with

respect to price, quantity, quality, and delivery. If that standard is satisfied, the bidder is effectively obligated to perform the exact thing called for in the solicitation. *Hawaiian Dredging Construction Co. vs. City & County of Honolulu, PCH-99-6 (August 9, 1999)*; *Environmental Recycling vs. County of Hawaii, PCH-98-1 (July 2, 1998)*.

In *Starcom Builders, Inc. v. Board of Water Supply, PCH-2003-18 (October 18, 2003)*, the Hearings Officer held that the failure to attend a site visit was not a proper basis for a finding of bidder nonresponsiveness. In arriving at that conclusion, the Hearings Officer reasoned:

Regardless of its nonattendance at a site visit, a bidder who submits a bid after having been offered the opportunity to visit the job site, knowingly commits itself to perform the work at its bid price and assumes the risk of any unanticipated increased costs due to observable site conditions. Based on these considerations, the Hearings Officer concludes that the prebid site visit requirement provides no basis for disqualifying Petitioner from the solicitation.

The same rationale applies here. According to Respondent, the purpose of the conference was to provide clarification and answer bidder's questions to ensure that the proposal submitted would be acceptable. Thus, while a bidder who fails to attend the pre-bid conference runs the risk that its bid may not be responsive to the solicitation,² it nevertheless commits itself to perform the work according to its bid. For this reason, the Hearings Officer concludes that Petitioner's nonattendance at the pre-bid conference was not a proper basis for a finding of nonresponsiveness. Respondent's determination that Petitioner was not a responsive bidder was therefore erroneous.

Under the circumstances, the Hearings Officer need not address the arguments raised by Petitioner that Respondent failed to provide adequate notice of the conference and that the solicitation gave Respondent the discretion to waive the attendance requirement. Nor does this decision address the question whether HAR §3-122-16.05(a)(1), insofar as it allows

² Even that risk is minimized by the fact that any change to the solicitation resulting from the pre-bid conference must be made by written addendum. *HAR §3-122-16.05(e)*. According to the evidence in this case, all of the changes that resulted from the April 28, 2004 conference were incorporated in Addendum No. 1 to the bid documents and issued on April 29, 2004.

an agency to “require . . . attendance by all prospective bidders as a condition for submitting an offer for solicitations that have special or unusual requirements . . .”, is consistent with HRS Chapter 103D.³

IV. DECISION

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

1. Respondent’s May 14, 2004 denial is hereby vacated;
2. This solicitation shall be cancelled;⁴ and
3. Each party shall bear its own attorney’s fees and costs.⁵

Dated at Honolulu, Hawaii: SEP 2 2004



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

³ More specifically, there appears to be a question as to whether *HAR §3-122-16.05(a)(1)* improperly enlarges the provisions of §2, *Act 52 (SLH 2003)*. *HAR §3-122-16.05* was promulgated to implement *Act 52 (later codified as HRS §103D-303.5)*. There is also a question as to whether a mandatory attendance requirement is consistent with the procurement code’s underlying goal of fostering broad-based competition.

⁴ The record sufficiently established that Respondent violated the stay imposed by *HRS §103D-701(f)* and *§103D-709(e)* when it proceeded with the bid opening on May 25, 2004 even though Petitioner had filed a timely request for an administrative review on May 20, 2004. By opening and revealing the bid it had received in response to the solicitation, Respondent effectively eliminated the option of revising the solicitation “to comply with the law.” *HRS §103D-706*. For instance, had the bid not been opened, the Hearings Officer could have ordered that Petitioner be permitted to submit and Respondent be required to consider Petitioner’s planning document. Under the present circumstances, however, such an order would provide Petitioner with an unfair advantage and would therefore be inappropriate.

⁵ Notwithstanding Respondent’s violation of the stay, Petitioner did not assert and the record does not establish that the violation was in bad faith. Accordingly, Petitioner is not entitled to its attorney’s fees. See, *Carl Corp. v. State Dept. of Educ.*, 85 Haw. 431 (1997).