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

In the Matter of)	PCH-2005-3
)	
JOHN B. HINTON, dba J.B.H.,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND DECISION
vs.)	
)	
PETER T. YOUNG, in his capacity)	
as Chief Procurement Officer,)	
STATE OF HAWAII, DEPARTMENT OF)	
LAND AND NATURAL RESOURCES,)	
)	
Respondent.)	

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

I. INTRODUCTION

On March 31, 2005, John B. Hinton, dba J.B.H. ("Petitioner"), filed a request for administrative review of Respondent Department of Land and Natural Resources, State of Hawaii's ("Respondent") denial of Petitioner's protest in connection with Respondent's Invitation for Bids designated as IFB-DOFAW-05-K1. The matter was thereafter set for hearing on April 12, 2005 and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

Petitioner's request for administrative review charged that the C-32 contractor's license requirement in the solicitation was unduly restrictive (Count I), arbitrary and capricious (Count II), and in violation of "Federal Grant Conditions" (Count III). On April 11, 2005, Respondent filed a motion to dismiss Counts II and III of Petitioner's request for administrative review.

On April 12, 2005, the matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii Revised Statutes (“HRS”) Chapter 103D. Petitioner was present and was represented by his attorney, John G. Horak, Esq.; Respondent was represented by its attorneys, Vince S. Kanemoto, Esq. and Julie H. China, Esq.

At the commencement of the hearing, Petitioner agreed to the dismissal of Counts II and III. Accordingly, Respondent’s motion to dismiss Counts II and III was granted and the hearing proceeded as to Count I.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing arguments and proposed findings of fact and conclusions of law. Accordingly, on April 29, 2005, Petitioner filed his closing arguments and proposed findings and conclusions and on May 13, 2005, Respondent filed its closing arguments and proposed findings and conclusions. A reply memorandum was filed by Petitioner on May 20, 2005.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, 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

1. On or about January 25, 2005, Respondent issued an Invitation for Bids designated as IFB-DOFAW-05-K1 and entitled, “Sealed Offers to Furnish, Deliver and Install Ungulate-Proof Fencing in Kuia Natural Area Reserve and Na Pali-Kona Forest Reserve, Kauai for Department of Land and Natural Resources Division of Forestry and Wildlife.” (“IFB”).

2. Bids were due on or before February 18, 2005.

3. The IFB was issued to retain a contractor “to provide fencing materials, labor and equipment for constructing and installing fencing designed to exclude feral pigs, goats and deer from the enclosed units.”

4. Among other things, the IFB required that the “[o]fferor shall be a licensed contractor to construct and install fences in the State of Hawaii.” The IFB also stated that, “[b]ased on the specific circumstances and requirements of this fencing project, [Respondent] has decided to require a C-32 license as a requirement to bid on this particular IFB.”

5. The Contractors License Board has previously determined that Hawaii Revised Statutes (“HRS”) Chapter 444 does not require a contractor to hold a C-32 contractor’s license in order to engage in the type of fencing work required by the IFB.

6. According to the terms of the IFB, the contractor would be responsible for transporting the fencing material from the contractor’s facility to the State storage site, and from the storage site to the staging area for helicopter transport to the installation site. Specifically, the IFB provided that:

[Respondent] will provide transport of fencing materials to the installation site by contracting with an independent helicopter company (“Helicopter Contractor”).

[Respondent] will provide helicopter transport for fencing materials only. The Contractor shall be responsible for all other aspects of transport of fencing materials from the staging area to the installation site by coordinating with the helicopter personnel, and by providing labor and necessary arrangements for binding and dropping of materials to ensure adequate transport and delivery. The Contractor will be responsible to ensure that the materials are dropped at the appropriate locations by coordinating the drops with the pilot.

* * * *

7. The IFB also included the following requirements:

a. Bidder shall have performed at least two (2) ungulate-proof fencing installations in remote and rough terrain in the State of Hawaii of similar size and complexity as specified herein.

b. Pursuant to §103D-328, HRS, lowest responsive offeror shall be required to submit a tax clearance certificate issued by the Hawaii State Department of Taxation (DOTAX) and the Internal Revenue Service (IRS).

c. The Contractor shall maintain in full force and effect during the life of this contract, liability and property damage insurance to protect the Contractor and his subcontractors, if any, from claims for damages for personal injury, accidental death and property damage which may arise from operations under this contract, whether such operations be by himself or by an subcontractor or anyone directly or indirectly employed by either of them.¹

8. The IFB also required the contractor to submit proof of compliance with the requirements of HRS §103D-310(c).²

9. On February 17, 2005, Petitioner filed a protest with Respondent over the C-32 licensure requirement of the IFB.

10. By letter dated March 24, 2005, Respondent denied the protest. The denial cited the following reasons for the C-32 licensure requirement in the IFB:

a) The Department requires a C-32 license for the protection of the public health, safety, and general welfare, in dealing with persons engaged in this project, and to ensure effective and practical protection against incompetent, inexperienced, unlawful, and unfair practices of contractors with whom the Department contracts for the use of public funds. As outlined in the IFB to construct ungulate proof fencing in Kuia Natural Area Reserve (NAR) and the Na-Pali-Kona Forest Reserve, this job is complex and uses significant public funds. The specifications, among other things, require the winning bidder to i) order all fencing materials necessary for the job; ii) arrange and coordinate transportation of the fencing materials to the staging area adjacent to Puu Hinahina Lookout within Kokee State Park; iii) arrange and coordinate helicopter transport for the fencing materials from the staging area to the installation sites, located in Kuia NAR and Na Pali-Kona Forest Reserve. The Department believes that there is a potential danger to public health, safety and welfare in the work requested, due

¹ According to the terms of the IFB, the contractor was required to maintain the following minimum coverages: Commercial General Liability - \$2,000,000 combined single limit per occurrence for bodily injury and property damage; Basic Motor Vehicle Insurance and Liability Policies - \$1,000,000 per accident or BI: \$1,000,000 per occurrence, PD: \$1,000,000 per occurrence.

² HRS §103D-310(c) requires all offerors, upon award of the contract, to comply with “all laws governing entities doing business in the State, including chapters 237 [tax clearance], 383 [unemployment insurance], 386 [workers compensation], 392 [temporary disability insurance], and 393 [prepaid health care] . . .”

to the number of visitors to Kokee State Park each year [e.g. 225,000 visitors per year in 2003; 2003 State of Hawaii Data Book Table 7.43] and the helicopter transport of materials over the State Park, including over the roadway and accessible hiking trails. While the contractor's license requirement does not necessarily mean the contractor will have experience in the safe handling of materials over remote locations, it does ensure the contractor has construction experience and financial integrity. By financial integrity we mean that the contractor is in sound financial condition and carries current liability and workers' compensation insurance, to provide fiscal protection for its workers and the public. A contractor's license also provides the Department of Commerce and Consumer Affairs with jurisdiction to discipline a contractor if anything goes wrong.

* * * *

c) The IFB that was reviewed by the CLB in CLB-DR-2003-4 is not identical to the current IFB. As an example, the IFB reviewed by the CLB required the Bidder to transport fencing material to the designated staging site for helicopter transport from the staging site to the installation site. The current IFB specifically adds that the Contractor will be responsible for all other aspects of transporting fencing materials to the installation site, including providing the labor and necessary arrangements for binding and dropping of materials to ensure adequate transport and delivery. This addition was made because the Department does not currently have sufficient trained personnel to coordinate the safe delivery of fence materials by helicopter sling load from the staging site to the installation site. Again, our goal is to protect the public interest.

d) The C-32 license was selected as a requirement because it most closely resembles the scope of work required. The Department does not believe that requiring a C-32 license unduly restricts the number of potential bidders for the project.

11. On March 31, 2005, 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 the determinations 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, *de novo*. In doing so, the Hearings Officer has the authority to act on a protested solicitation or award in the same manner and to the same extent as contracting officials authorized to resolve protests under HRS §103D-701. *Carl Corp. v. State Dept. of Educ.*, 85 Hawaii 431 (1997). And in reviewing the contracting officer's determinations, 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).

HRS §103D-405, entitled "**Maximum practicable competition**", states in relevant part:

(a) All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the State's needs, and shall not be unduly restrictive.

Additionally, Hawaii Administrative Rules ("HAR") §§3-122-10 and 3-122-13 provide in part:

§3-122-10 Purpose. A specification is the basis for procuring a good, service, or construction item adequate and suitable for the State's needs in a cost effective manner. . . . All specifications shall seek to promote overall competition, shall not be unduly restrictive, and provide a fair and equal opportunity for every supplier that is able to meet the State's needs. In developing specifications, unique requirements should be avoided.

§3-122-13 Development of specifications. (a) A specification should provide for the following:

(1) Identify minimum requirements;

(2) Allow for competition;

* * * *

The foregoing provisions require that specifications be written in such a manner as to balance the minimum needs of the State against the goal of obtaining maximum practicable competition. As such, a specification may be restrictive as long as it is not unduly so and the preclusion of one or more potential bidders from a particular competition does not render a specification unduly restrictive if the specification is *reasonably related to the minimum needs of the agency*. Moreover, the drafting of specifications to reflect the minimum needs of the agency is a matter primarily left to the discretion of the procurement officials. Generally, these officials are most familiar with the conditions under which similar services have been procured in the past and are in the best position to know the government's needs. Consequently, a protestor who challenges a specification as unduly restrictive of competition has a heavy burden to establish that the restriction is unreasonable.

In its March 24, 2005 denial of Petitioner's protest, Respondent explained that the inclusion of the C-32 licensure requirement in the IFB was "for the protection of the public health, safety, and general welfare, . . . and to ensure effective and practical protection against incompetent, inexperienced, unlawful, and unfair practices of contractors . . ." The letter clarified that the "Department believes that there is a potential danger to public health, safety and welfare in the work requested, due to the number of visitors to Kokee State Park each year [e.g. 225, 000 visitors per year in 2003; 2003 State of Hawaii Data Book Table 7.43] and the helicopter transport of materials over the State Park, including over the roadway and accessible hiking trails." Respondent, in an effort to address this "potential danger", included the licensure requirement in the IFB to "ensure the contractor has construction experience and financial integrity."

In response, Petitioner points out that the bundling and transporting of the fencing materials is the responsibility of and remains within the control of the helicopter contractor rather than the fence contractor. Petitioner also contends, and Respondent

apparently agrees, that a C-32 license “does not necessarily mean the contractor will have experience in the safe handling of materials over remote locations.”³

Furthermore, the IFB specifically requires that bidders shall have performed at least two ungulate-proof fencing installations in remote and rough terrain. The winning bidder is also required to submit a tax clearance certificate, maintain liability and property damage insurance, and comply with the applicable laws governing unemployment insurance, worker’s compensation, temporary disability, and prepaid health care. The Hearings Officer finds that a requirement for a C-32 license in light of and in addition to these requirements is superfluous and consequently, not reasonably related to Respondent’s stated objective of protecting the public⁴. On the contrary, on this record, the Hearings Officer must conclude that Petitioner has proven by a preponderance of the evidence that the C-32 licensure requirement in the IFB is unreasonable and unduly restrictive.

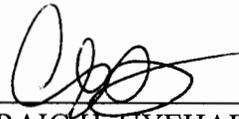
IV. DECISION

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

1. That Respondent’s March 24, 2005 denial of Petitioner’s protest is hereby vacated;
2. That this matter is remanded to Respondent for revision of the IFB consistent with this decision; and
3. That each party shall bear his/its own attorney’s fees, costs, and expenses.

JUN 22 2005

Dated at Honolulu, Hawaii: _____



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

³ Respondent acknowledges that HRS Chapter 444 does not require that a contractor hold a C-32 license in order to engage in the type of work involved here.

⁴ According to Respondent, a licensed contractor is more likely than an unlicensed contractor to conduct a safer operation and have greater experience and financial integrity. While this may be *generally* true, the IFB involved here already provides separate and specific experiential and financial responsibility requirements.