



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

2012 JAN 20 A 11: 47

HEARINGS OFFICE

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

In the Matter of	)	PCH-2011-7
	)	
HAWAII SPECIALTY VEHICLES, LLC	)	HEARINGS OFFICER'S FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,	)	DECISION
	)	
vs.	)	
	)	
WENDY K. IMAMURA, in her capacity as	)	
Purchasing Administrator, Department of	)	
Budget and Fiscal Services, City and County	)	
of Honolulu,	)	
Respondent.	)	

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

**I. INTRODUCTION**

On August 25, 2011, Hawaii Specialty Vehicles LLC ("HSV") filed its Request for Administrative Hearing ("RFAH") regarding a procurement conducted by the City and County of Honolulu ("City"). The matter was assigned case number PCH-2011-7.

On September 9, 2011, the City filed its Response to the RFAH.

The hearing in this matter was originally scheduled to be held on September 15, 2011. Through a series of stipulations between the parties, the hearing was continued to November 23, 2011.

At the hearing, HSV was represented by Mr. Nathan M. Reyes, a member of HSV. The City was represented by Amy R. Kondo, Esq., and Lynn Y. Wakatsuki, Esq.

Mr. Reyes testified at the hearing on behalf of HSV. HSV did not submit any exhibits and instead relied on its RFAH and the City's Exhibits.

Ms. Vicki Kitajima testified on behalf of the City. The City submitted into evidence its Exhibits A through J.

By a post-hearing stipulation of the parties, the date for submission of post-hearing briefs was continued to January 9, 2012.

## **II. FINDINGS OF FACT**

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

1. On May 27, 2011, the City issued an invitation to bid, RFB-HFD-336507, for the furnishing and delivery of five Fire Apparatus Vehicles (Triple Combination Pumper) to the Honolulu Fire Department.

2. The original bid opening date was June 16, 2011.

3. The procurement specifications accompanying the invitation to bid included the following Special Provision:

### **9. SUBMISSION OF CERTIFICATE OF INSURANCE**

The successful offeror must submit a certificate of insurance from the manufacturer's insurance company, indicating that the offeror is in compliance with the insurance requirements as set forth under Section 10, INSURANCE REQUIREMENTS, of these Special Provisions herein below, prior to the award of the contract at the City's request. Failure to comply shall be sufficient cause for the rejection of the bid and may be sufficient cause for the suspension of the offeror from participating in City bids for a period of three (3) years.

4. The procurement specifications accompanying the invitation to bid also included the following Special Provision:

10. INSURANCE REQUIREMENTS

a. At all times during the term of this contract, any extensions and the period of the warranties thereto, the Contractor or manufacturer shall, at their own expense, procure and maintain any and all insurance to cover the Contractor's business that may be required under any applicable federal, state or local law, statute, ordinance or regulation.

b. The Contractor or manufacturer shall, during the performance of the contract and for three (3) years following acceptance of the product, keep in force at least the following minimum limits of the insurances required herein:

(1) Commercial General Liability Insurance:

(a) Products/Completed Operations Aggregate	\$2,000,000
(b) Personal and Advertising Injury	\$2,000,000
(c) Each Occurrence	\$1,000,000

...

(3) Umbrella/Excess Liability Insurance:

(a) Aggregate	\$25,000,000
(b) Each Occurrence	\$25,000,000

c. The Contractor agrees to furnish the City and County of Honolulu with current Certificate of Insurances for the respective insurances listed above, in the coverages mentioned, along with its bid. (Emphasis supplied)

5. On June 6, 2011, the City issued Addendum No. 1 to the invitation for bids extending the bid opening date to June 22, 2011.

6. HSV intended to respond to the invitation for bids by proposing to supply fire trucks manufactured by Seagrave Fire Apparatus, LLC ("Seagrave"). On June 9, 2011, Seagrave prepared a letter to the City submitting a series of fourteen (14) questions referring to the bid specifications. One of the questions stated:

Question 13: Special Provisions / Page 4 / Item 10b(3)  
Umbrella/Excess Liability Insurance \$25,000,000

The prior bid for a pumper (RFB-HFD-330317 Triple Combination Pumper 11/29/2010) did not have this requirement. Why is an umbrella/excess liability policy required on this RFB?

7. This Seagrave letter was sent to HSV, and HSV in turn forwarded it to the City by means of an e-mail dated June 9, 2011.

8. On June 17, 2011, the City issued Addendum No. 6 to the invitation for bids extending the bid opening date to June 23, 2011.

9. Addendum No. 6 also amended the Special Provisions as follows:

a. Special Provisions Item 9, SUBMISSION OF CERTIFICATE OF INSURANCE, was deleted in its entirety.

b. Special Provisions Item 10, INSURANCE REQUIREMENTS was deleted in its entirety and replaced in relevant part by the following:

10. INSURANCE REQUIREMENTS

a. At all times during the term of this contract, any extensions and the period of the warranties thereto, the Contractor shall, at their own expense, procure and maintain any and all insurance to cover the Contractor's business that may be required under any applicable federal, state or local law, statute, ordinance or regulation.

b. The Contractor shall, during the performance of the contract keep in force at least the following minimum limits of the insurances required herein:

(1) Commercial General Liability Insurance with limit of not less than \$5,000,000 occurrence. . . .

c. The Contractor agrees to furnish the City and County of Honolulu with current Certificate of Insurances for the respective insurances listed above, in the coverages mentioned, along with its bid. All certificates shall be made out to the City and county [sic] of Honolulu.(Emphasis supplied)

10. The City received timely bid proposals from Hawthorne Pacific Corporation (“Hawthorne”) and HSV. At the time of the bid opening on June 23, 2011, Hawthorne was

the lowest bidder at \$2,967,450.00, and HSV was the second lowest bidder at \$3,167,535.00. There were no other bidders.

11. Mr. Nathan Reyes attended the bid opening on behalf of HSV. After the bids were opened, Mr. Reyes reviewed the Hawthorne bid and found that no Certificate of Insurances had been submitted with the Hawthorne bid. Mr. Reyes brought this omission to the attention of Ms. Vicki Kitajima, Procurement and Specification Specialist for the City.

12. Ms. Kitajima prepared a Memorandum dated June 23, 2011 entitled “Waiver of Minor Deviation.”

The Memorandum stated:

Pursuant to §3-122-3(c)(1)(B) of the Hawaii Administrative Rules, a mistake in a bid discovered after the deadline for receipt of bids but prior to award may be corrected or waived if the mistake is a minor informality which shall not affect price, quantity, quality, delivery, or contractual conditions. In addition §3-122-3(c)(1)(C) of the Hawaii Administrative Rules allows the procurement officer to waive the mistake if it is in the best interest of the purchasing agency and is fair to other bidders. The subject contract is to be awarded to the low bidder in this case based upon such a determination. The insurance requirements implied that the insurance certificate needed to be submitted with the bid. However, this was not the intent of the City since the ability of the Contractor to provide the insurance certificate is a matter of responsibility, rather than responsiveness. The low bidder did not submit the certificate of insurance but does have one on file with the City and will be submitting another copy.

13. The Waiver of Minor Deviation Memorandum was signed by Mr. Michael Hiu on behalf of Ms. Wendy K. Imamura, City Purchasing Administrator. Mr. Hiu had the authority to sign the Memorandum.

14. On June 23, 2011, Hawthorne had on file with the City a Certificate of Insurance it had submitted with respect to another procurement contract. The Certificate stated that Hawthorne’s commercial general liability policy was for \$1,000,000 for each

occurrence, with a general aggregate amount of \$2,000,000. It also stated that Hawthorne had an umbrella liability policy for \$5,000,000 per each occurrence, with an aggregate of \$5,000,000. Ms. Kitajima made the determination that the amounts of insurance set forth in this Certificate were sufficient to meet the requirements of the invitation for bids. Although the limit on the commercial general liability policy was \$1,000,000 instead of \$5,000,000 as set forth in Addendum 6, the excess liability policy of \$5,000,000 was the practical equivalent of \$5,000,000 commercial general liability policy.

15. After the Waiver of Minor Deviation Memorandum was signed, the City sent a letter to Hawthorne, dated June 23, 2011, informing Hawthorn that it had been awarded the contract.

16. On June 27, 2011, HSV submitted to the City its written protest of the award to Hawthorne. The protest asserted that Hawthorne's bid was "incomplete" because Hawthorne did not submit a Certificate of Insurances with its bid.

17. On August 22, 2011, the City sent HSV a letter rejecting HSV's procurement protest.

### **III. CONCLUSIONS OF LAW**

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

#### **A. Jurisdiction**

1. During the evidentiary hearing and in its post-hearing brief. HSV made several claims that were not raised in its written procurement protest submitted to the City on June 27, 2011.

2. The Hearings Officer's jurisdiction is limited by HRS §103D-709(h), which provides:

The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

In other words, the hearings officer can only make a decision about the "determinations" of the chief procurement officer, and the chief procurement officer can only make "determinations" about complaints brought before that officer. The statute literally leaves no room for the hearings officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer.

3. The only issues raised in HSV's written procurement protest letter of June 27, 2011, are that: (1) Hawthorne's bid was incomplete because it did not submit a Certificate of Insurances with its bid in accord with Special Provision Item 10, as amended by Addendum No. 6.; and (2) the Certificate of Insurances was a major component of the bid, and its absence cannot be overlooked as a minor or waiveable oversight.<sup>1</sup>

4. Accordingly, there is no jurisdiction in this proceeding to hear and determine any other claims by HSV. The Hearings Officer makes no ruling, one way or another, on the merits of any other claims HSV may have referred to.

**B. Submission of a Certificate of Insurance is a Matter of Responsibility, Not Responsiveness, Which May be Submitted After Bid Opening and Before Execution of the Contract**

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<sup>1</sup> These issues were also raised in HSV's RFAH.

5. Under HRS §103D-104, a responsible bidder is one who “has the ability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.”

6. In the usual case, submission of a certificate of insurance is a matter of responsibility. There is nothing in the procurement at issue that would make the insurability of the contractor anything other than a matter of responsibility. Requiring that the contractor in this procurement be able to obtain minimally acceptable levels of insurance is directed at the contractor’s ability to perform the contract and is a matter of responsibility.

7. Insofar as matters of responsibility are concerned, a bidder may supplement a bid after opening in order to satisfy responsibility requirements. In general, capability of performance is determined at the time of contract award. HAR §3-122-1. However, in several situations, documentation of a bidder’s responsibility can be submitted after a contract has been awarded. HRS §103D-310 (c); HAR §3-122-112.

8. As the City has asserted in its post-hearing brief, where a document required to be submitted with the bid pertains to the responsibility of the bidder, the bidder can supplement its bid by providing that document after bid opening. Arakaki v. State of Hawaii, Department of Accounting and General Services, PCH 96-8, reversed on other grounds, Arakaki v. State of Hawaii, Department of Accounting and General Services, 87 Haw. 147, 952 P.2d 1210 (1998); Standard Electric, Inc. v. City and County of Honolulu, Department of Finance, PCH 97-7.

9. HSV relies on the fact that the special provisions required bidders to submit a certificate of insurance with their bid. The City contends, and the Hearing Officer agrees, that this is not a standard requirement and the normal situation is to require submission of a certificate of insurance after bid opening. However, HSV correctly interprets the literal text



of the special provisions. Whether or not this was a mistake or a deliberate choice on the part of the City when drafting the special provisions and/or when revising them as part of Addendum No. 6 is irrelevant. There was nothing in the special provisions to put potential bidders on notice that the City had made a drafting mistake.

10. Nevertheless, when it comes to matters of responsibility, a bidder can supplement its bid after bid opening even when the invitation for bids requires, on its face, submission of the responsibility documentation with the bid. Only under exceptional circumstances does the requirement to submit a responsibility document with the bid turn that requirement into one of responsiveness. The absence of any evidence that the requirement of a certificate of insurance to be submitted with the bid in question here was a matter of important State social or economic policy, as well as the absence of a provision stating that failure to submit the document would lead to disqualification of the bid, leads to the conclusion that there is no responsiveness requirement in this case. Standard Electric, Inc. v. City and County of Honolulu, Department of Finance, PCH 97-7.<sup>2</sup>

**C. The Hearings Officer Need Not Reach HSV's Second Issue, i.e., the Failure to Submit a Certificate of Insurance was an Allegedly Major Deviation that Could Not be Waived by the City**

11. HSV's second assertion in its written procurement protest submitted to the City was that the failure to submit a certificate of insurance could not be waived by the City. HSV contests the City's determination that this failure was a minor deviation from the bid requirements and asserts, therefore, that it could not have been waived. In turn, the City

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<sup>2</sup> Because HSV's written procurement protest submitted to the City asserted only that Hawthorne's bid was "incomplete" due to the failure to submit a certificate of insurance at the time of the bid, HSV is not challenging the City's determination that Hawthorne was responsible. In addition, HSV did not submit any evidence that Hawthorne did not possess the ability to obtain the insurance necessary to perform its contractual obligations insofar as insurance was concerned.

asserts that this was a minor deviation that could be waived under the administrative regulations, HAR §3-122-31, and/or under the terms of the solicitation.

12. Because submission of the certificate of insurance was a responsibility requirement that could be satisfied after bid opening, the Hearings Officer need not reach the issue of whether the absence of that certification was a waiveable minor deviation from the requirements of the specifications. See Standard Electric, Inc., v. City and County of Honolulu, Department of Finance, *supra*, PCH 97-7 at page 12..

#### **IV. DECISION**

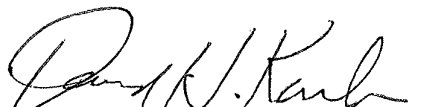
Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

a. All claims raised by HSV in this proceeding that were not contained in HSV's written procurement protest to the City dated June 27, 2011, are dismissed for lack of jurisdiction.

b. As set forth in detail above, HSV has failed to prove by a preponderance of the evidence that the City's denial of HSV's procurement protest was improper and not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation. Accordingly, the City's denial of HSV's procurement protest is affirmed.

c. The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawai'i, JAN 20 2012



DAVID H. KARLEN  
Senior Hearings Officer  
Department of Commerce  
and Consumer Affairs