

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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

In the Matter of)	PCH-2003-8
)	
MGD TECHNOLOGIES, INC.,)	FINAL ORDER GRANTING
Petitioner,)	RESPONDENT'S MOTION TO
)	DISMISS REQUEST FOR
vs.)	ADMINISTRATIVE REVIEW;
)	APPENDIX "A"
DEPARTMENT OF ENVIRONMENTAL)	
SERVICES, CITY & COUNTY OF)	
HONOLULU,)	
Respondent,)	
)	
And)	
)	
OCEANIT LABORATORIES, INC.,)	
)	
Intervenor.)	
)	

FINAL ORDER GRANTING RESPONDENT'S MOTION TO
DISMISS REQUEST FOR ADMINISTRATIVE REVIEW

I. INTRODUCTION

This matter having come before the undersigned Hearings Officer on May 19, 2003, for consideration of the Department of Environmental Services, City and County of Honolulu's ("Respondent") Motion to Dismiss Request for Administrative Review; with MGD Technologies, Inc. ("Petitioner") represented by James C. McWhinnie, Esq. and Anna H. Oshiro, Esq., Respondent represented by Amy R. Kondo, Esq., and Oceanit Laboratories, Inc. ("Intervenor") represented by Paul B.K. Wong, Esq., and after due consideration of the pleadings filed by the parties and their arguments in light of the entire record in this matter,

the Hearings Officer hereby sets forth the following Findings of Fact, Conclusions of Law and Final Order.

II. FINDINGS OF FACT

1. Respondent issued a Notice to Bidders and Proposal Document No. 14050 ("Proposal") on December 16, 2002 to solicit bid proposals for the furnishing and installation of a flow monitoring system for use by Respondent's Collection System Maintenance Division. The bid opening was scheduled for December 27, 2003.

2. Pursuant to Section 1, Bidder's Questions, any "questions as to bid specifications must be submitted in writing or by facsimile machine and must be received by the Purchasing Administrator no later than five (5) working days prior to the bid due date." This section also provides that: [t]he City shall respond to the questions in a timely manner. The City shall not be obligated to respond to questions not received on a timely basis." Five working days prior to the bid due date (December 27, 2002) was December 19, 2002.

3. Petitioner submitted a letter dated December 20, 2002 to Respondent, attaching a list of questions regarding the Proposal. Between December 22 and 24, 2002, Respondent had discussions with Petitioner regarding its questions about the bid specifications.

4. On December 27, 2002, it was determined that Intervenor was the low bidder for the Proposal.

5. On January 6, 2003, Respondent received a written protest from Petitioner. This letter stated that the bid documents are "unclear, have many contradictions, lack specifics and definitions." Petitioner also stated that "we believe the bid documents to be materially flawed." Petitioner requested that Respondent disqualify all bids, clarify the bid documents and re-bid the project. A copy of this letter is attached hereto and incorporated herein by reference as Appendix "A".

6. On March 28, 2003, Respondent denied Petitioner's protest. One of the bases for the denial was that the protest was untimely.

7. On April 3, 2003, Petitioner filed a request for administrative review with the Department of Commerce and Consumer Affairs ("DCCA").

III. CONCLUSIONS OF LAW

A motion for dismissal or other summary disposition may be granted as a matter of law where the non-moving party cannot establish a material factual controversy when the motion is viewed in light most favorable to the non-moving party. *Brewer Environmental Industries v. County of Kauai*, PCH 96-9 (November 20, 1996).

Respondent's Motion to Dismiss is based on the assertion that the DCCA does not have jurisdiction to hear this matter because Petitioner did not file its protest, which was based on the content of the solicitation, prior to the date set for the receipt of offers, as required by Hawaii Revised Statutes ("HRS") § 103D-701(a).

Hawaii Revised Statutes § 103D-701(a) provides:

§ 103D-701 Authority to resolve protested solicitations and awards. (a) Any actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. A protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of the award of the contract either under section 103D-302 or 103D-303, as applicable; **provided further that no protest based on the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.** (Emphasis added.)

In *Clinical Laboratories of Hawaii v. City and County of Honolulu, Department of Budget and Fiscal Services*, PCH 2000-8 (October 17, 2000) the Hearings Officer granted the City's Motion to Dismiss Appeal where the protest, which was based on the content of the solicitation, was filed after the bid submission date. The Hearings Officer explained that HRS § 103D-701(a) was:

obviously designed to provide the government agency with the opportunity to correct deficiencies in the bid documents early in the solicitation process in order to 'minimize the disruption to procurements and contract performance.' Indeed, the possibility of having to reject all bids, cancel the solicitation and resolicit may be avoided by requiring the correction of such deficiencies prior to the bid submission date.

Id. at page 6. Based on the evidence presented, the Hearings Officer finds that Petitioner's protest was based on the content of the solicitation. Accordingly, the Hearings Officer concludes that Petitioner's protest was untimely, as the protest was filed on January 6, 2003, after the bid submission date of December 27, 2002.

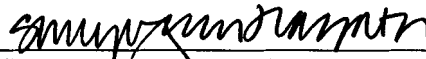
Petitioner alleged that Respondent waived the timeliness issue by providing oral clarification to Petitioner and "lulling Petitioner into inaction". The Hearings Officer finds Petitioner's argument to be without merit. HRS § 103D-701(a) clearly states that protests regarding the content of a solicitation must be filed prior to the bid submission date. If Petitioner believed that the Proposal was "unclear" and "materially flawed", it was required to submit its written protest prior to December 27, 2002.

IV. FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Motion to Dismiss is granted and.

IT IS HEREBY ORDERED that the above-entitled matter is dismissed.

DATED: Honolulu, Hawaii, JUN 20 2003.



SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs



MONITORING, GAUGING & DIAGNOSTIC TECHNOLOGIES & SERVICES

January 6, 2003

Mr. Charles Katsuyoshi
Purchasing Administrator
Purchasing Division
City & County of Honolulu
530 S. King Street, Room 115
Honolulu, HI 96813

RE: **BID NUMBER: 14050**

Dear Mr. Katsuyoshi:

This letter is to serve as a protest for Bid Number 14050 submitted on December 27, 2002.

You will note in your examination of the bid documents that they are unclear, have many contradictions, lack specifics and definition. We believe the bid documents to be materially flawed. MGD sought to have the City clarify the bid specifications by submitting a written list of questions seeking bid document clarification via fax to the City and County of Honolulu on December 20, 2002. This written list of questions seeking bid document clarification was submitted as specified in the "**General Instructions to Bidders**".

Item 1. Minimum Specifications, Page 2, Scope of Work

The bid document specifies, "**Provide and install 95 new "Windows based" flow monitors and rain gauges in accordance with the detailed specifications and requirements specified herein**".

The bid document instructs the bidder to "**Utiliz(e) the data provided in Attachment A**" to determine appropriate technology for the individual sites where meters and rain gauges are to be replaced. "**Attachment A**" only provides detail of 78 flow meters and 25 rain gauges (total of **103** meter and gauge units).

Item 14 states "**Review and replace rain gauges as necessary to allow remote data collection for telemetered sites and consistent data format for all sites**". There is no specification from the City as to who determines "as necessary".

It is unclear whether the City intended to have the bidder provide and install:

1. 78 flow meters and 25 rain gauges (103 total units), or;
2. 95 flow meters and 25 rain gauges, or;
3. 95 flow meters, or;
4. 95 flow meters and 95 rain gauges (190 total units).

Taken literally, the specification calls for the bidder to provide 190 total units and only specifies the location of 78 flow meters and 25 rain gauges and leaves it to the bidder to make assumptions as to the location of the remaining units. At a minimum, the specification calls for the provision and installation of a minimum of 95 flow meters.

The manner in which this portion of the specification was written materially affected MGD's bid

quotation. We also believe that this portion of the bid document will lend confusion in administering the contract if allowed to stand.

Item 2. Minimum Specifications, Page 2, Scope of Work, Item 9 & Page 3, Scope of Work, Item 16.

Bid document Item 9 specifies, ***"Calibration of monitor sensors shall be performed at installation and as necessary to ensure collection of valid data, or at a minimum of every three months thereafter where required for regulatory compliance."***

Bid document Item 16 specifies, ***"Contractor shall conduct all maintenance and calibration services as required on a minimum semi-annual basis. Each site field inspected and evaluated for reliable operation and calibration. Maintenance may include battery change, sensor cleaning and/or sensor replacement, or other equipment repair. The replacement parts will be supplied by the contractor during the first year warranty period."***

These two (2) items are contradictory.

- Item 9 specifies a minimum calibration interval of ***every three months***.
- Item 16 specifies a calibration interval of ***on a minimum semi-annual basis***.

MGD assumed that Item 9 was the valid requirement, and that Item 16 was contradictory. The manner in which this portion of the specification was written materially affected MGD's bid quotation. We also believe that this portion of the bid document will lend confusion in administering the contract if allowed to stand.

Item 3. Minimum Specifications, Page 3, Scope of Work, Item 12

Bid document Item 12 specifies, ***"Software will use empirically derived calibration curves or flow rates determined by an independent standard to adjust flow data from a particular meter where technology limitations do not allow for accurate direct measurement. This would not be the preferred method but typically used to patch data where data dropouts occurred due to loss of depth and/or velocity measurements."***

However, Item 8 of the bid document specifies ***"Accuracy of the monitors provided shall not be greater than +/-10% of actual flow rate"***.

MGD assumed that Item 8 was the valid requirement, and that Item 12 was contradictory. The result was that MGD's bid assumed that a more accurate meter at greater cost would be required to fulfill the specification. The manner in which this portion of the specification was written materially affected MGD's bid quotation. We also believe that this portion of the bid document will lend confusion in administering the contract if allowed to stand.

Item 4. Minimum Specifications, Page 3, Scope of Work, Item 13

Item 13 states ***"Provide evaluation of the existing metering equipment data. Include an audit of the prior data provided; a statistical evaluation of the accuracy of flow data being measured and recommendations for the meter to be installed."***

There is no clear definition of what type or how much data will be provided. The manner in which this portion of the specification was written materially affected MGD's bid quotation. We also believe that this portion of the bid document will lend confusion in administering the contract if allowed to stand.

MGD attempted to clarify these above delineated bid document discrepancies prior to the bid date. We submitted questions in what we believe to be a timely fashion. The bid documents are unclear, contradictory and ambiguous. From the experience we have on flow meter projects around the world, the

vagary of the bid documents produced by the City will have negative impacts on the final product the City will eventually receive under these specifications.

We request that the City disqualify all bids submitted for Bid 14050 on December 27, 2002, clarify the bid documents for all potential bidders, and re-bid the project in accordance with the City's documented bid process and procedures.

Sincerely,
MGD Technologies Inc.

A handwritten signature in black ink, appearing to read 'MAG', with a long horizontal flourish extending to the right.

Mark A. Goodrowe
Vice President