



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

In the Matter of	)	PCH-2006-3
	)	
STONERIDGE RECOVERIES, LLC,	)	HEARINGS OFFICER'S FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW AND
Petitioner,	)	DECISION; APPENDIX "A"
	)	
vs.	)	
	)	
DEPARTMENT OF TRANSPORTATION,	)	
STATE OF HAWAII,	)	
	)	
Respondent.	)	
	)	
	)	

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

I. INTRODUCTION

On June 14, 2006, Stoneridge Recoveries, LLC ("Petitioner") filed its request for administrative hearing to contest the Department of Transportation, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The matter was assigned case number PCH-2006-3 and set for hearing. The Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On June 16, 2006, Respondent filed a Motion to Dismiss Petitioner's Request for Administrative Review filed on June 14, 2006 ("Motion"). A hearing on the Motion was scheduled for June 22, 2006. On June 21, 2006, Petitioner filed a memorandum in opposition to the Motion. Oral arguments on Respondent's Motion were heard on June 22, 2006. The Hearings Officer issued an order denying the Motion on June 28, 2006.

At the pre-hearing conference which was also held on June 22, 2006, Petitioner requested that the hearing be rescheduled. Respondent, while objecting for the record, agreed to waive the statutory requirement that the hearing begin within 21 days from receipt of the request for hearing and the hearing was rescheduled from June 29, 2006 to August 17, 2006. On August 11, 2006, Respondent filed a Motion in Limine. On August 16, 2006, Respondent filed a Motion to Quash Subpoena of Lester Lau.

On August 17, 2006, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by Mark S. Kawata, Esq. Respondent was represented by Wayne A. Matsuura, Esq. The parties presented oral arguments on Respondent's Motion in Limine and Motion to Quash and after considering the arguments presented, the Hearings Officer denied the motions. At the end of the hearing, the parties agreed to submit written closing arguments and proposed findings of fact and conclusions of law. Petitioner's Written Final Argument and Proposed Findings of Fact and Conclusions of Law and Decision were filed on September 11, 2006. Petitioner filed an Errata to its Written Final Argument on September 12, 2006. Respondent's Written Closing Argument and Proposed Findings of Fact and Conclusions of Law were filed on September 29, 2006. Petitioner's Reply Final Argument was filed on October 6, 2006.

Having reviewed and considered the evidence and arguments presented, 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

As a preliminary matter, the proposed findings of fact and conclusions of law filed by the parties have been considered. To the extent that the proposed findings and conclusions submitted are in accordance with the findings and conclusions stated herein, they have been accepted, and to the extent they are inconsistent, they have been rejected. Certain proposed findings and conclusions have been omitted as the Hearings Officer determined them to be not relevant or necessary to a proper determination of the material issues presented.

1. On February 22, 2005, Respondent issued a Request for Proposals ("RFP") entitled "Request for Proposals for Demonstration Freeway Service Patrols Interstate Route H-1 and Moanalua Freeway", Federal Aid Project No. NH-0300(84) ("Project"). Proposals

were due on March 29, 2005. However, due to a protest filed by Petitioner, on March 28, 2005, Respondent issued Addendum No. 1, postponing the receipt of sealed proposals until further notice. By a letter dated October 17, 2005, Respondent denied Petitioner's protest. Petitioner did not request an administrative review of the denial of this protest.

2. On January 12, 2006, Respondent issued Addendum No. 2, which rescheduled receipt of sealed proposals to February 3, 2006 and made a number of amendments to the RFP. One of the amendments was to the criteria to be used to evaluate the proposals. The evaluation criteria provide:

Qualifications of Firm: (35 maximum points)

Qualifications of key personnel committed to the program with regard to experience in successfully and professionally developing and managing a freeway service patrol program; experience working with public agencies; strength and financial stability of the firm; strength, financial stability, experience and technical competence of subcontractors; assessment by client references.

Work Plan: (25 maximum points)

Depth of Offeror's understanding of DOT's requirements and overall quality of work plan; logic, clarity and specificity of work plan; personnel recruiting, requirements, training, testing; appropriateness of labor distribution among tasks; appropriateness of equipment; ability to meet the project schedule; reasonableness of proposed schedule; utility of suggested technical or procedural innovations.

Staffing and Project Organization: (20 maximum points)

Qualifications of project staff, particularly the Project Manager and key personnel committed to the program with regard to day-to-day operational experience on freeway service patrols or related work; key personnel's level of involvement in performing related work cited in 'Qualifications of the Firm' section; logic of project organization; adequacy of labor commitment; concurrence in the restrictions on changes in key personnel.

Project Management and Quality Control Measures: (10 maximum points)

A clear and concise plan that describes how the project is managed, including quality control measures; procedures to address public complaints; management guidelines for ensuring promptness in responding to State and City requests for information and mitigation of problems.

Cost and Price: (10 maximum points)

Reasonableness of the Vehicle Service Hour (VSH) rate and competitiveness of this amount with other offers received; adequacy of data in support of figures quoted; reasonableness of individual task budgets.

3. On February 1, 2006, Petitioner filed a protest with Respondent. By a letter dated June 8, 2006, Respondent denied Petitioner's protest. With respect to Petitioner's protest regarding the evaluation criteria, Respondent stated:

Your concern regarding the new evaluation criteria is unfounded. Because this Project will require a Contractor to implement a new program to this State, the DOT has determined that the qualifications of the firm (including any and all subcontractors) and the Offeror's work plan would be crucial to the success of the Project. In light of this determination of the DOT, we believe that the evaluation criteria properly reflects our concerns.

4. On June 14, 2006, Petitioner filed its request for hearing to contest the denial of its protest.

5. The RFP states that Respondent is seeking offerors with demonstrated experience in the development and implementation of a turnkey Demonstration Freeway Service Patrol (FSP) Program. The program will cover Interstate Route H-1 and Moanalua Freeway on Oahu from 5:00 a.m. to 7:00 p.m., Monday through Friday, excluding certain non-patrol days. The services to be provided include, but are not limited to:

...training of personnel, towing of disabled vehicles, removing debris, providing basic fire extinguisher use, deploying traffic control devices, assisting enforcement and emergency response personnel (i.e., fire, police, medical) at crash scenes and other incidents, assisting sick or injured motorists with basic first aid, notifying local emergency agencies of incidents and conducting promotional activities.

Respondent believes that a FSP Program will assist motorists by alleviating heavy traffic congestion on Oahu's freeways by responding to minor incidents (flat tire, out of gas, dead battery, etc.) in a way which would decrease the delay usually caused by those types of incidents and would also lower the chance of secondary crashes.

6. The Scope of Work section of the RFP states that the selected offeror will develop, operate and maintain the FSP Program, and sets out in more detail what Respondent expects from the selected offeror. A copy of this section is attached hereto and incorporated herein by reference as Appendix "A".

7. The Project is a federal aid project so "nondiscriminatory bidding procedures shall be afforded to all qualified bidders regardless of National, State or local boundaries and without regard to race, color, religion, sex, national origin, age, or handicap."

8. "Freeway Service Patrol Program" is a term of art, identifiable by the federal government and recommended by the Federal Highways Administration as a means to reduce traffic congestion. There are FSP Programs in other jurisdictions, and Respondent consulted with those jurisdictions when it drafted the RFP for the Project.

9. The State of Hawaii does not now and has never had a FSP Program. This is the reason that the Project was done pursuant to a RFP as opposed to an invitation for bids. Respondent believes that successful prior experience in operating and managing a FSP Program will be crucial to the Project's success, and that an offeror's successful experience is a consideration over price in awarding the contract.

10. Although Respondent would prefer that the offeror's local project manager have FSP Program experience, the lack of FSP Program experience, in and of itself will not result in an offeror being deemed non-responsive.

11. An offeror can still receive points under the "Qualifications of Firm" and/or "Staffing and Organization" categories of the evaluation even though the offeror does not have any key personnel with FSP Program experience.

12. The RFP allows offerors to hire or subcontract with persons or firms who have FSP Program experience.

13. Petitioner does not have prior FSP Program experience, but believes that it can provide all the items in the Scope of Work section of the RFP.

14. Petitioner has an agreement with a California FSP Program provider to be a consultant and to use that company's video training program for its drivers.

### III. CONCLUSIONS OF LAW

Petitioner argued that the evaluation criteria do not provide a fair and equitable treatment of prospective offerors who are Hawaii-based and do not have prior FSP Program experience, that the evaluation criteria, as written, do not foster competition among vendors, and that giving an advantage to mainland-based contractors with prior FSP Program experience does not increase public confidence in the system. Specifically, Petitioner argues that 55 of the 100 points in the evaluation criteria can only be allocated to an offeror with FSP Program experience and accordingly, a Hawaii-based offeror, who would have no prior FSP Program experience, has no chance of being awarded the contract. Respondent argued that the evaluation criteria are reasonably related to its needs and are crucial to the success of the Project. Petitioner has the burden of proving by a preponderance of the evidence that Respondent's determinations were not in accordance with the Constitution, statutes, regulations and terms and conditions of the solicitation or contract.

Respondent chose to use the competitive sealed proposal process instead of the competitive sealed bidding process. The procurement statute and rules allow for this when competitive sealed bidding is not practicable or advantageous. *See*, Hawaii Revised Statutes ("HRS") § 103D-303. Hawaii Administrative Rules ("HAR") § 3-122-43(b) lists factors to be considered when competitive sealed bidding is not practicable, and HAR § 3-122-43(b)(6) provides that competitive sealed bidding may not be practicable when:

...the award may need to be based upon a request for proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State. **Quality factors include technical and performance capability and the content of the technical proposal.** (Emphasis added.)

Respondent's choice of the competitive sealed proposal process has not been questioned. However, Petitioner has alleged that the evaluation criteria are too restrictive. Respondent justified its evaluation criteria by citing *Hinton v. Peter T. Young, State of Hawaii, Department of Land and Natural Resources*, PCH 2005-3 (June 22, 2005). The *Hinton* case

involved a competitive sealed **bid** and as such is not really applicable to the case at bar. However, the *Hinton* case discussed the development of specifications, which can be analogized to the development of the evaluation criteria in a RFP. The *Hinton* case provides in part:

...a specification can 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*. (Emphasis in original.) 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.

Respondent justified its inclusion of prior FSP Program experience in the evaluation criteria by emphasizing that the FSP concept is new to Hawaii and because this will be implemented as a demonstration project, the successful experience of an offeror in operating a FSP Program is considered to be crucial to the success of the Project.

The evaluation criteria allocate 35 points to "Qualifications of Firm". Petitioner interprets this section to mean that an offeror would not get any points if it did not have key personnel with experience in successfully developing and managing a FSP program. However, under this section, the offeror should also get points for (1) experience with working with public agencies, (2) the strength and financial ability of the offeror and its subcontractors and (3) assessments by client references. These factors are not related to FSP Program experience. By the same token, Petitioner believes that an offeror would not get any of the 20 points allocated to "Staffing and Project Organization" because it evaluates the offeror's qualifications of the project manager and key staff with regard to "day-to-day operational experience on FSP". However, in addition to FSP Program experience, this section also provides for consideration of "related work", as well as logic of project

organization, adequacy of labor commitment and concurrence in the restrictions on changes in key personnel.

Based on the evidence presented, the Hearings Officer finds that a Hawaii-based offeror, who does not have key personnel or a project manager with prior FSP experience, can be awarded points under these sections of the evaluation criteria. Although Respondent has indicated that it would prefer an offeror with FSP Program experience,<sup>1</sup> the Hearings Officer concludes that the evaluation criteria does not place an unreasonable emphasis on that preference, given the fact that the FSP Program concept is new to Hawaii and Respondent's stated objective that this demonstration project be successful. In addition, Respondent has indicated that an offeror will not be deemed non-responsive if it does not have FSP Program experience. Accordingly, the Hearings Officer concludes that Petitioner has not shown by a preponderance of the evidence that, as written, the evaluation criteria are unreasonable and unduly restrictive.

#### IV. DECISION

Based on the foregoing considerations, the Hearings Officer finds and concludes that Petitioner failed to prove by a preponderance of the evidence that the evaluation criteria, as written, were unreasonable and unduly restrictive and not in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation. Accordingly, Respondent's denial of Petitioner's protest is affirmed.<sup>2</sup> The parties will bear their own attorney's fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawaii, [ November 15, 2006 ].

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

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<sup>1</sup> Petitioner requested that Respondent be ordered to "further delineate the permissible use of a subcontractor or employee who has prior experience." The Hearings Officer finds this to be unnecessary as this is an RFP and it is up to the offeror to submit a proposal explaining how it proposes to use a subcontractor to satisfy the requirements of the RFP.

<sup>2</sup> However, the RFP should be amended if Respondent determines that other offerors should have the benefit of any information contained in this decision.



Completion of Contract

Two (2) Years from the Notice to Proceed with an optional third year and an optional fourth year

## 5 SCOPE OF WORK

The scope of work is to provide a fully operational Demonstration Freeway Service Patrol Program. The selected offeror will develop, operate and maintain the Program, and will provide all related equipment, material, training, services and personnel necessary for turnkey operations. All program operations will be conducted in the State of Hawaii on the island of Oahu.

The scope of work for the Demonstration Freeway Service Patrol Program is as follows:

- 1) Develop and implement a promotional campaign, including press releases, brochures, public service announcements and an Internet web page. Attend community meetings, such as neighborhood board meetings, as directed by the State.
- 2) Furnish and maintain all service patrol vehicles, including equipment and supplies.
- 3) Obtain permits and approvals for all service patrol vehicles; including road use permits to operate in State and City rights-of-way.
- 4) Follow all applicable Federal, State, and County safety and health laws, regulations, and standards and be in compliance with the latest Manual of Uniform Traffic Control Devices for Streets and Highways (MUTCD).
- 5) Provide cost-free assistance to motorists, including but not limited to the following:
  - a) Towing services to designated drop-off locations for:
    - i) Occupied disabled vehicles with a GVW less than 6,000 pounds and
    - ii) Unoccupied vehicles with a GVW less than 6,000 pounds within a traffic lane or other potentially hazardous location;
  - b) Debris removal including:
    - i) General debris and

- ii) Spill cleanup of everyday materials, such as motor oil;
  - c) Crash scene and vehicular fire support to enforcement and/or emergency response personnel including:
    - i) Traffic control support,
    - ii) Communicating incident information to 911,
    - iii) Providing basic first aid, such as CPR, and
    - iv) Providing basic fire extinguisher use;
  - d) Motorist assistance services including:
    - i) Providing sufficient gasoline or diesel fuel to a vehicle to ensure that vehicle can be operated to the nearest gas station,
    - ii) Taping of leaking radiator hoses, providing water/coolant,
    - iii) Providing compressed air for flat tires, replacing a flat tire with the motorist's spare tire,
    - iv) Jump starting a dead battery with a battery booster,
    - v) Transporting pedestrians to designated drop-off locations, and
    - vi) Providing a cellular phone for motorist use.
- 6) Establish, operate and maintain a Dispatch Center for program operations, maintenance, and patrol vehicle storage.
  - 7) Design, procure, install, integrate, operate, maintain and repair any required communications and computer hardware and software.
  - 8) Provide training program for patrol drivers.
  - 9) Collect, maintain and analyze information created by the Demonstration Freeway Service Patrol Program to evaluate the costs, benefits, and effectiveness of the program.
  - 10) Prepare and furnish monthly, quarterly and yearly program performance and assessment reports.

- 11) Provide any other services, activities, or equipment deemed necessary or desirable for a turnkey Demonstration Freeway Service Patrol Program.

## **6 PROGRAM REQUIREMENTS**

### **6.1 Introduction**

The requirements described herein are minimum requirements desired by the DOT and should not be considered as comprehensive. The offeror may provide additional or alternative approaches or methods for implementing the program. If the proposal recommends alternatives which do not meet the requirements described herein, the offeror shall provide a brief summary identifying each alternative, its benefits, and why it is more beneficial than the specified requirement.

In situations where the requirement can be met by either the offeror or the State of Hawaii, the offeror shall state the following:

- 1) Recommendation as to which of the two parties (the offeror or the State of Hawaii) should be responsible for meeting the requirement.
- 2) The reasons why they are recommending one party over the other party.
- 3) The estimated cost and time for both options.

All data, images and reports produced from the Demonstration Freeway Service Patrol (FSP) Program will become the property of the State of Hawaii.

All equipment and services shall comply with applicable Hawaii Laws.

### **6.2 Standard Operating Procedures**

#### **6.2.1 General**

All services and materials will be provided at no cost to the motorist. The Contractor shall not accept or solicit gratuities or favors of any sort. The Contractor shall not recommend a private tow, repair or body shop business. The Contractor shall not call a private tow, repair or body shop business on behalf of a motorist.