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

In the Matter of)	PCH-2008-8
)	
SEA ENGINEERING, INC.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
Petitioner,)	DECISION
)	
vs.)	
)	
DEPARTMENT OF BUSINESS,)	
ECONOMIC DEVELOPMENT AND)	
TOURISM, STATE OF HAWAII,)	
)	
Respondent.)	

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

I. INTRODUCTION

On June 3, 2008, Sea Engineering, Inc. ("Petitioner") filed its request for administrative hearing to contest the Department of Business Economic Development and Tourism, State of Hawaii's ("Respondent") decision to deny Petitioner's protest. The Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On June 18, 2008, the hearing was conducted by the undersigned Hearings Officer. Petitioner was represented by its Vice President, W. Patrick Ross. Respondent was represented by Bryan C. Yee, Esq. At the end of Petitioner's presentation, Respondent orally moved to dismiss this matter. Respondent's motion was denied.

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

1. Respondent issued a Notice to Offerors soliciting proposals for repair to the Natural Energy Laboratory of Hawai'i Authority's ("NELHA") 18" and 40" deep seawater pipelines which were damaged by the October 15, 2006 earthquake and subsequent aftershocks in the near shore area. The request for proposals ("RFP") is entitled Repair to Deep Sea Water Pipelines, Solicitation No. RFP-08-07-NELHA ("Project").

2. Special Conditions number 9 of the RFP required that a contractor be licensed in the State of Hawai'i as a general contractor License Type A or C-43.

3. General Conditions section 2.11(f) of the RFP provides:

2.11 DISQUALIFICATION OF BIDDERS—Any one or more of the following causes will be considered as sufficient for disqualification of a bidder and the rejection of his proposal or proposals:

. . .

(f)

No contractor's license or a contractor's license which does not cover type of work contemplated.

4. The RFP's Qualification Criteria section does not ask prospective contractors whether they are licensed in the State of Hawai'i as an A or a C-43 contractor.

5. In response to a question at a pre-proposal conference, Respondent's representative stated that a contractor's license was not required to submit a proposal, but proof of licensure would be required at the time a contract is executed. Respondent's representative answered that question after calling the State Procurement Office to verify that her response was acceptable. Addenda 2 and 3 to the RFP do not address this issue. Attendance at the pre-proposal conference was not mandatory and Petitioner did not attend this pre-proposal conference.

6. Section A of the Special Provisions section of the RFP provides that preference shall be given to offerors within the State of Hawai'i. Prices from offerors who do not select or qualify under the in-state contractor preference shall be increased by 5% for evaluation purposes only.

7. The RFP provides that damage to the 40" pipeline is at a depth of 55 to 60 feet.

8. For surface supplied air diving, the Occupational Safety and Health Administration (“OSHA”) regulations require that a decompression chamber be ready for use at the dive location for any dive outside the no-decompression limits or deeper than 100 fsw.

9. OSHA regulations require that a decompression chamber be ready for use for SCUBA dives at depths deeper than 100 fsw or outside the no-decompression limits.

10. The Association of Diving Contractors International’s Consensus Standards for Commercial Diving and Underwater Operations, Fifth Edition, states that a decompression chamber shall be available and ready for use at the dive site for any dive in excess of 80 fsw, dives deeper than 60 fsw when liveboating, or where dives require decompression.

11. Three proposals were submitted in response to the RFP. Harbor Offshore, Inc. submitted the lowest price proposal (\$245,732) and Petitioner submitted the next lowest price proposal (\$350,366). Harbor Offshore, Inc. did not request an in-state contractor preference so their cost was increased by 5% resulting in an “evaluation only cost of \$258,018.60.

12. After evaluation by three evaluators, Harbor Offshore, Inc.’s total score was 258 and Petitioner’s score was 253.7. Harbor Offshore, Inc. was determined to be the winning proposer and on April 11, 2008, Petitioner was informed that it was not selected.

13. The three evaluators noted that Petitioner did not list mobilization and demobilization costs on the worksheet (Task #11 on page 51 and Task #8 on page 52) included with the RFP. Offerors were instructed to complete and submit the worksheet as part of their proposal.

14. Petitioner filed a protest with Respondent and it was denied by a letter dated May 22, 2008. The letter was mailed to Petitioner on May 27, 2008.

III. CONCLUSIONS OF LAW

Petitioner argued that Harbor Offshore, Inc. should not have been allowed to bid because it was not licensed as a contractor at the time it submitted its bid. Petitioner also argued that the evaluation criteria did not adequately consider safety because a decompression chamber should have been required on site, and that Respondent should not award the contract to a mainland company over a Hawai’i company. 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.

With respect to Petitioner's arguments that a decompression chamber should have been required on site and that a Hawai'i company should have preference over a mainland company, the Hearings Officer finds that those issues relate to the content of the proposal. Because Hawai'i Revised Statutes ("HRS") § 103D-701(a) states that protests based on the content of the solicitation shall not be considered unless it is submitted in writing prior to the date of receipt of offers, the Hearings Officer concludes that Petitioner's protest of those issues was untimely, and the Hearings Officer does not have jurisdiction to address those arguments.

With respect to Petitioner's argument that Harbor Offshore, Inc.'s proposal should be rejected because it did not have the proper license at the time it submitted its proposal, the Hearings Officer finds that Petitioner did not present any evidence to show that Harbor Offshore, Inc. did not have an A or C-43 license at the time it submitted its proposal. Accordingly the Hearings Officer concludes that Petitioner failed to prove by a preponderance of the evidence that Harbor Offshore, Inc.'s proposal should have been rejected.

However, the evidence presented showed that the RFP required that offerors possess an A or C-43 Hawaii contractor's license. The RFP also provided that a bidder could be disqualified and its proposal rejected if it did not have a contractor's license that covered the work contemplated. The evidence presented also showed that Respondent represented to prospective offerors at a pre-proposal conference that a contractor's license would not be required at the time the proposal was submitted. Respondent's statement might have changed the RFP if it was followed up by a written addendum. However, there was no written addendum to reflect this change so pursuant to Hawai'i Administrative Rules § 3-122-16.05(e), which provides that nothing stated at the pre-proposal conference shall change the solicitation unless the change is made by written addendum, the Hearings Officer concludes that prospective offerors were required to have an A or C-43 license at the time it submitted

its proposal.¹ It is unknown whether the three offerors who submitted proposals had the required contractor's licenses at the time they submitted their proposals because they were not required to submit that information.

IV. DECISION

Based on the foregoing Findings of Fact and Conclusion of Law, the Hearings Officer orders that this matter be remanded to Respondent for reevaluation of the proposals to determine whether the offerors were properly licensed at the time they submitted their proposals. As to all other issues, the Hearings Officer finds that Petitioner failed to show that Respondent's conduct was improper and not in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation.

JUN 27 2008

DATED: Honolulu, Hawaii, _____.

/s/ SHERYL LEE A. NAGATA

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

¹Whether Respondent can waive the requirement that offerors possess the required contractor's license at the time a proposal is submitted is not an issue before the Hearings Officer, but the Hearings Officer would note that HRS Chapter 444, which governs contractors, requires licensure even when contractors offer to perform contracting work.