



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of)	PDH-2013-005
)	
AMEL TECHNOLOGIES, INC.,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND DECISION
vs.)	
)	
DEPARTMENT OF BUSINESS,)	
ECONOMIC DEVELOPMENT &)	
TOURISM, STATE OF HAWAII,)	
)	
Respondent,)	
_____)	

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

I. INTRODUCTION

On May 8, 2013, AMEL Technologies, Inc. ("Petitioner"), filed a request for administrative review of the Department of Business, Economic Development & Tourism, State of Hawaii's ("Respondent") decision denying Petitioner's protest in connection with Solicitation No. SID-PS-10-12-02, a solicitation for professional services for general engineering/technical assistance for high performance buildings ("Project"). Petitioner's request for administrative review was made pursuant to Hawaii Revised Statutes ("HRS") §103D-709. The matter was thereafter set for hearing on May 23, 2013, and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On May 23, 2013, this matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of HRS Chapter 103D. Dr. Melek Yalcintas appeared as the authorized representative for Petitioner and Gregg J. Kinkley, Esq. appeared for Respondent.

At the conclusion of the hearing, the Hearings Officer directed the parties to file proposed findings of fact and conclusions of law by May 31, 2013. By letter dated May 30, 2013, Petitioner requested an extension to June 3, 2013 to file its proposed findings and conclusions. On May 30, 2013, the Hearings Officer granted the request as to both parties but reminded Petitioner that “the record . . . has been closed but for the filing of the proposed findings and conclusions.”

On June 3, 2013, Petitioner and Respondent filed their proposed findings of fact and conclusions of law. In addition to its proposed findings and conclusions, Petitioner also submitted a number of documents which it identified as Exhibits 1 to 22. With the exception of the documents identified as Exhibits 3 and 6¹, none of the “exhibits” appeared to have been presented at the hearing. On June 3, 2013, Respondent submitted its objections to Petitioner’s proposed findings and conclusions and indicated that it had not received Petitioner’s additional exhibits. Having considered the additional exhibits along with Respondent’s objections thereto, those exhibits are refused. Additionally, all references to those exhibits as well as to any arguments, claims, and allegations, not presented at the hearing that Petitioner included in its proposed findings and conclusions shall not be considered.

Having reviewed and considered the evidence and arguments *presented 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. The parties’ proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

¹ Those exhibits were received into evidence at the hearing as Petitioner’s Exhibits “B” and “D”. Therefore, these exhibits are duplicative.

II. FINDINGS OF FACT

1. On October 5, 2012, Respondent, through its State Energy Office, a division of Respondent, (“SEO”), issued Solicitation No. SID-PS-10-12-02 seeking professional services for general engineering/technical assistance for high performance buildings (“Solicitation”). The Solicitation included the Notice to Providers of Professional Services for General Engineering and was posted by SEO on the Procurement Awards, Notices, and Solicitations system.

2. The Solicitation was issued pursuant to HRS §103D-304 (Procurement of Professional Services).

3. The Scope of Work described in the Solicitation generally included providing technical assistance and training to government, private, and non-profit sectors to implement high energy efficiency in buildings through energy savings performance contracting and other retrofit activities, providing technical assistance and training to implement Energy Code changes, conducting EnergyStar benchmarking and Professional Engineering walkthroughs to verify buildings for EnergyStar labels, providing technical assistance and training to encourage green building and sustainable development, providing project narrative, in-kind, technical, special, and financial status reports, and complying with all Energy Security Special Funds Reporting Requirements.

4. The Scope of Work was divided into 6 separate Tasks consisting of the following: Task 1: High Efficiency Buildings; Task 2: Energy Code Implementation; Task 3: Energy Star Building; Task 4: Green Buildings; Task 5: Reports; Task 6: Energy Security Special Funds (ESSF) Reporting.

5. The Solicitation provided that the estimated available funding for the Project “may be up to \$122,000.00 total.”

6. The Solicitation required prospective offerors to submit to Respondent a sealed submittal packet, including a Statement of Qualifications (“SOQ”), in order to be considered for the Project.

7. According to the Solicitation, the SOQ was to consist of:

* * * *

Statement of Qualifications – Statement of qualifications (SOQ) for each discipline listed in the first paragraph of the notice to professionals, highlighting the firm’s qualifications, expertise and experience (original + 5 copies = 1 CD with PDF file). SOQ must list licensed or certified personnel in each discipline. Include approach, work plan, and proposed budget by task. Additional material in support of the evaluation criteria may be included as an Appendix to the Statement of Qualifications (SOQ). Limit SOQ write-up to eight (8) pages. **(Mandatory).**

* * * *

(Emphasis in original).

8. The prospective offeror’s proposed budget by task required the prospective offeror to allocate funds for each of the 6 Tasks set forth in the Solicitation in relation to the estimated available funding for the Project.

9. The Solicitation required that the SOQs be evaluated by a review committee:

Evaluation

A review committee will evaluate SOQs received by the deadline to determine whether the Offeror(s) is/are qualified to provide the services described in the Scope of Services. Submittal requirements will be ranked on a pass/fail basis on the requirements 2-8 listed above.

* * * *

10. Once determined to be qualified by the review committee, the Qualified Offerors “will then be evaluated by a selection committee using the criteria attached as Exhibit 4A.”

11. The Solicitation also provided that, “[f]or any procedural questions regarding the submittal requirements, please contact Susan Gray-Ellis at ph. 587-9002 or email: sgray-ellis@dbedt.hawaii.gov.”

12. The submittal packet was due by October 19, 2012.

13. Submissions were received from 5 prospective offerors, including Petitioner.

14. At no time prior to the October 19, 2012 deadline for the submission of the packets, did Petitioner ask Respondent for clarification as to the “approach, work plan and proposed budget by task” required in the SOQ. At no time prior to the deadline did Petitioner complain to Respondent that there was insufficient information available to prepare a more detailed “approach, work plan and proposed budget by task.”

15. Petitioner’s approach, work plan and proposed budget consisted entirely of the following:

Approach, Work Plan and Proposed Budget

Each building and project is unique in terms of service type, age, facilities etc. Thus, approach, work plan and budget will vary with the building and scope of work. However, AMEL has developed a systematic approach to evaluate the building energy efficiency, implement energy codes etc based on previously conducted studies. AMEL applied procedures developed in-house for the 80 American Government Buildings very effectively. As one can imagine, some of 80 government buildings were government office buildings, whereas some others were server facilities, warehouses, clinics, hospital, etc. Despite its variations in type of occupancy, AMEL completed the energy study, retro-commissioning study within one year period.

As noted from the list of the NAVFAC Hawaii buildings, AMEL has experience to conduct studies on almost every type of the building occupancy types. AMEL has indicated to NAVFAC Hawaii, during project award process, that the cost of the

retro-commissioning varies with the occupancy type as well as complexity of the HVAC units in the building. If awarded, AMEL will visit potential sample buildings and propose unit prices by building occupancy type.

16. The SOQs were evaluated by a review committee designated by Respondent.

17. The review committee determined that Petitioner's "approach, work plan, and proposed budget by task" was deficient and that Petitioner was therefore not eligible to have its proposal considered by the selection committee. Petitioner's proposed budget by task was deemed deficient as it did not allocate the estimated available funding for each of the 6 Tasks.

18. The review committee also found the SOQ of another prospective offeror to be deficient. In that case, the prospective offeror failed to provide any information regarding its approach, work plan and proposed budget by task. The other 3 offerors were determined to be qualified.

19. On or about March 7, 2013, Respondent issued letters of non-selection to the four unsuccessful providers.

20. At the request of Petitioner, a debriefing was held on March 21, 2013.

21. Following the debriefing, Petitioner, by letter dated March 22, 2013 to Respondent, protested the review committee's determination that Petitioner's SOQ was deficient and that Petitioner was not eligible to have its proposal considered by the selection committee.

22. By letter dated May 3, 2013, Respondent denied Petitioner's protest.

23. On May 9, 2013, Petitioner filed the instant appeal.

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 Haw. 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).

Petitioner does not dispute that in order to be considered for the contract, each prospective offeror was required to include a sufficient approach, work plan and proposed budget by task in its SOQ. Instead, Petitioner asserts that it provided the requisite approach, work plan, and proposed budget by task in its SOQ and that it was sufficient given the dearth of available information. Respondent, on the other hand, contends that Petitioner's approach, work plan, and proposed budget by task was incomplete, that 3 other providers were able to provide the required information, and, that in any event, Petitioner never did ask for additional information or clarification in order to prepare its approach, work plan and proposed budget by task prior to the submission deadline. Respondent also explained that Petitioner's incomplete approach, work plan and proposed budget by task prevented the review committee from fully evaluating Petitioner's SOQ.

Petitioner's SOQ states that its approach "will vary with the building and the scope of the work" and that it has a "systematic approach to evaluate the building energy efficiency." Petitioner, however, did not provide *any* description as to how its approach might vary depending on the type of building involved or *any* details of its "systematic approach". Similarly, no details were provided as to Petitioner's work plan or proposed budget and Petitioner did not even attempt to provide a breakdown of the available funding in relation to the 6 Tasks identified in the Solicitation.

At the hearing, Petitioner contended that it lacked sufficient information to provide a more detailed response. Nevertheless, Petitioner chose to submit its packet rather than contact Respondent to request the additional information it deemed necessary to provide a more complete approach, work plan and proposed budget by task. For this reason, Petitioner's argument is unpersuasive.

