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

In the Matter of	)	PDH-2020-001
	)	
ENVIROSERVICES & TRAINING	)	HEARINGS OFFICER'S FINDINGS
CENTER, LLC,	)	OF FACT, CONCLUSIONS OF LAW,
	)	AND DECISION
Petitioner,	)	
	)	
vs.	)	
	)	
DEPARTMENT OF ENVIRONMENTAL	)	
MANAGEMENT, COUNTY OF MAUI,	)	
	)	
Respondent.	)	

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

I. INTRODUCTION

On February 21, 2020, EnviroServices & Training Center, LLC ("Petitioner") filed a request for administrative review to contest Respondent Department of Environmental Management, County of Maui's ("Respondent") denial of Petitioner's protest in connection with the project designated as Household Hazardous Waste Collection and Disposal, RFP 19-20/P-76. The matter was thereafter set for a pre-hearing conference on February 28, 2020 and hearing on March 6, 2020. A Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

Respondent filed a response to the Petition on February 27, 2020. A pre-hearing conference was held on February 28, 2020, with Jeffrey M. Osterkamp, Esq. appearing for Petitioner and Thomas W. Kolbe, Esq. appearing via telephone for Respondent.

On March 6, 2020, the matter came on for hearing before the undersigned Hearings Officer in accordance with the provisions of Hawaii Revised Statutes ("HRS")

Chapter 103D. Mr. Osterkamp appeared on behalf of Petitioner and Mr. Kolbe appeared on behalf of Respondent. The parties stipulated to admission into evidence of the parties' Joint Exhibits 1-13 and Petitioner's Exhibit 14.

At the conclusion of the hearing, the Hearings Officer directed the parties to submit written closing briefs by March 13, 2020. Accordingly, both parties submitted their closing briefs on March 13, 2020.

Having considered the arguments of counsel and the records and files herein, the Hearings Officer hereby renders the following findings of fact, conclusions of law, and decision.

## II. FINDINGS OF FACT

1. On or about September 27, 2019, Respondent issued a Request for Proposals RFP 19-20/P-76 ("RFP") for the project designated as Household Hazardous Waste Collection and Disposal ("Project").

2. The Project involves the collection and disposal of household hazardous waste ("HHW") brought by Maui County residents to a planned annual collection event at the Central Maui Landfill or another permitted site approved by Respondent.

3. Residential customers call and schedule appointments with the contractor to drop off their HHW at the event, where the contractor will accept, quantify, properly package and dispose of the HHW.

4. The HHW accepted for the Project is detailed in Attachment A of the RFP entitled "Household Hazardous Waste to be Collected and Disposed."

5. Three companies submitted proposals: Petitioner, Cameron Chemical Corp. ("Cameron" or "CCC"), and ECycling Maui LLC.

6. Petitioner had been awarded the previous contract for the project in the prior year.

7. Petitioner's manager, Greg Perry, has significant experience in HHW collection events and has been providing those services for a number of years.

8. By letter dated January 9, 2020, and apparently received by Petitioner on January 16, 2020, Respondent informed Petitioner of its intent to award the contract for the Project to Cameron.



9. On or about January 23, 2020<sup>1</sup>, Petitioner sent a letter to Respondent protesting the decision to award the contract to Cameron:

The County's decision to award the Contract to Cameron is in violation of HRS § 103D-303, which provides that a contract awarded may be made only to a "responsible offeror." Cameron is not a responsible offeror for the Solicitation for at least three reasons:

First, Cameron does not have, as the Solicitation requires, "at least three years of operating experience with collecting and disposing of" hazardous household waste ("HHW"). See Solicitation at 00100-4, § 1.04(A). This is evident because (a) Cameron states that it operates only in Hawaii (see <http://hawaiiiccc.com/about-ccc/company-information/>); (b) with one exception, EnviroServices has held every HHW services contract, for each county in Hawaii, for more than 20 years; (c) Cameron has never, to the best of EnviroServices' belief, held a single HHW services contract; and (d) Cameron's own website states that it "customize[s] programs that fit your **companies** needs" (<http://hawaiiiccc.com/ccc-services/>; emphasis added), and describes various projects it has performed—without any indication that it has meaningful experience with the collection and disposal of HHW (<http://hawaiiiccc.com/projects/>).

Second, Cameron almost certainly lacks the permit envisioned by the Solicitation. Section 1.04(A)(1)(b), page 00100-4, requires a Hawaii State Department of Health Solid Waste Management Permit, which would be relevant to the content and purpose of the Solicitation only if the permit specifically allows its holder to collect and dispose of HHW. Cameron's website does not indicate that it has such a permit (<http://hawaiiiccc.com/about-ccc/company-information/>), nor is there any reason to believe that it has one.

Third, Cameron almost certainly was unable to provide "a minimum of three (3) references for customers for whom similar HHW collection and disposal was performed by the Contractor in a satisfactory manner," as required by the Solicitation at p. 00320-1, § 00320. Again, Cameron has not performed HHW services contracts in Hawaii, and does not operate in other states, so could not have had the ability to provide valid references for such work.

10. Section 1.04 of the RFP entitled "PROPOSER'S CERTIFICATIONS" provided in relevant part:

A. QUALIFICATIONS OF PROPOSER

The proposer certifies that the proposer is knowledgeable of the unusual and peculiar hazards associated with the general class and type

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<sup>1</sup> Having apparently received Respondent's January 9, 2020 letter on January 16, 2020, it appears that the protest was timely filed. Respondent acknowledged that the protest was timely.

of work required to execute the specified project within the terms given in this document. The proposer shall be competent and skilled in the protective measures necessary for the safe performance of the work with respect to such unusual and peculiar hazards. The proposer must demonstrate that the company has at least three years of operating experience with collecting and disposing of HHW as contemplated in this RFP.

1. The proposer shall provide to the County the information and copies of the following currently valid permits required as part of the bid package:

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b. Department of Health Solid Waste Management Permit #

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Failure to provide copies of all of the above permits concurrent with submission of a proposal will render a proposal being deemed unresponsive or unresponsive.

11. Section 00320 of the RFP entitled "REFERENCES" provided in relevant part:

The Contractor must provide a minimum of three (3) references for customers for whom similar HHW collection and disposal work was performed by the Contractor in a satisfactory manner. The name of the customer, contact, address, and phone number shall be provided for each reference. The County reserves the right to contact each reference to ensure satisfaction of prior service and to ensure the Contractor's proficiency in the project being contemplated.

Contractors shall include the following information for each reference:

- Start (and completion, if applicable) dates and locations of collection events
- Types and volume or tonnage of HHW materials collected
- Problems experienced and actions taken to resolve problems
- Evidence of customer satisfaction with service

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12. In its proposal, Cameron, described its experience in handling and disposing of HHW:



Cameron Chemical Corp (CCC) has over 50 years combined experience with all aspects of hazardous waste transportation and disposal in Hawaii. I can clearly state with confidence that CCC is fully capable to run an event and will exceed all requirements for this project. We are experts in collection, identification, documentation, transportation, and disposal of paints, oils, fuel, lab chemicals, HHW, contaminated soils, PCB's fluorescent lamps, batteries, aerosols, pesticides, cleaners, corrosives, oxidizers, and other hazardous and non hazardous waste products. CCC is reliable and a trustworthy company that prides itself on communication and customer service. We have a proven track record.

13. There is no material difference between the chemical properties of HHW and commercial hazardous waste.

14. Cameron has experience in collecting and disposing of the types of hazardous waste listed in Attachment A, "Household Hazardous Waste to be Collected and Disposed," of the RFP.

15. Cameron has a Department of Health Solid Waste Management Permit and listed Solid Waste Management Permit # RY-0010-18 in its proposal.

16. Cameron's Solid Waste Management Permit # RY-0010-18 is a recycling permit.

17. According to the RFP, Respondent may approve a location for the Project other than Central Maui Landfill, but that location must have its own Solid Waste Management Permit.

18. Central Maui Landfill has its own Solid Waste Management Permit.

19. Cecile Powell is Respondent's contract manager for the Project and drafted the RFP. Ms. Powell was one of the members of the four-member proposal review committee ("Review Committee") that evaluated the proposals.

20. Ms. Powell testified that a Solid Waste Management Permit is not required for the Project if the proposer utilizes Central Maui Landfill.

21. Ms. Powell agreed that the Qualifications of Proposer section of the RFP requires proposers to provide information and copies of a Department of Health Solid Waste Management Permit #. The Solid Waste Management Permit requirement was included in

the RFP in the event that the proposal called for another permitted site other than Central Maui Landfill. Ms. Powell admitted that she could have written the RFP differently.

22. Cameron did not submit as part of its proposal, a site other than Central Maui Landfill.

23. Mr. Perry testified about the stresses of serving hundreds of homeowners in a single day and opined that Cameron's experience in collection and disposal of commercial hazardous waste does not qualify it to run a collection event.

24. The RFP indicated that proposals will be evaluated based on three selection criteria and award of the contract "will go to the proposer whose proposal is most advantageous" to Respondent. The evaluation criteria was listed as follows:

<b>Evaluation Criteria</b>	<b>Weight</b>
Total Collection and Disposal Price	60%
Site and Operation Plan	30%
Proposer References, Qualifications, and Experience	10%
Total	100%

25. The proposals were evaluated by the Review Committee and on November 26, 2019, the Review Committee ranked the proposals based on the criteria specified in the RFP. ERecycling Maui LLC was disqualified because it did not meet the minimum qualifications for the Project. Cameron's proposal was ranked first and Petitioner's proposal was ranked second.<sup>2</sup>

26. Cameron submitted three references from customers it provided hazardous waste collection and disposal services with its proposal: Pacific Concrete & Coring, Hawaii Integrated, and Maui Electric Company-Molokai.

27. Ms. Powell testified that she personally contacted all three of the references provided by Cameron to ensure that Cameron was capable of handling the types of hazardous waste listed in Attachment A of the RFP. Ms. Powell testified that she described the Project to Cameron's references and asked if Cameron was capable of performing the contract. She testified that all three references recommended Cameron and that she received very positive comments regarding the quality of Cameron's work.

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<sup>2</sup> The Hearings Officer notes that although Cameron ranked highest overall for its proposal, Petitioner was ranked higher than Cameron by three of the four evaluators under the third criteria; references, qualifications and experience.



28. The Review Committee determined that Cameron had the required experience in handling and disposing of the types of HHW listed in the RFP.

29. By letter dated February 13, 2020, Respondent rejected Petitioner's protest<sup>3</sup> and addressed Petitioner's three bases for protesting the decision to award the contract to Cameron.

30. Respondent disagreed with Petitioner's first contention, that Cameron did not have the requisite experience. In its February 13, 2020 letter, Respondent replied that Cameron's proposal states it has "over 50 years combined field experience in Hazmat segregation requirements," and that after further investigation to confirm Cameron's proposal, the Review Committee determined that Cameron "exceeds the three year minimum experience requirement for household generated types of hazardous waste."

31. Respondent rejected Petitioner's second basis for protest, that Cameron lacks the permit envisioned by the solicitation, and replied, "The Environmental Protection & Sustainability Division Staff has verified Cameron Chemical Company does hold a Solid Waste Management Permit #RY-0010-18 and that it was submitted with their proposal." The letter further states, "The collection site will be located at the Central Maui Landfill which holds their own Solid Waste Management Permit for the event. Proposers were asked to provide their own SWMP should they choose a separate location for the collection event, as stated on page 00150-2 section 4-03 'A collection event shall be HHW acceptance at the Central Maui Landfill or at another permitted site, as approved by the County.' This gives the proposer an option of hosting the event on a different property, of which a SWMP would be required."

32. Respondent's response to Petitioner's third claim for protest, that Cameron was unable to provide a minimum of three references of customers for whom similar HHW collection and disposal work was performed by the contractor in satisfactory manner as required by the solicitation, was as follows: "The proposal review committee discussed and concluded that the three references of customers provided by Cameron Chemical Company were sufficient in that all three involved collection and disposal of materials and types of

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<sup>3</sup> The protest denial letter was dated February 13, 2020, but was not issued until February 14, 2020. There is no dispute that Petitioner's request for an administrative hearing filed on February 21, 2020 was timely.

hazardous waste generated by households including batteries, fuel, and contaminated oil/water.”

33. On February 21, 2020, Petitioner requested an administrative hearing of Respondent’s determination.

### 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.

#### A. JURISDICTION AND BURDEN OF PROOF

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 reviewing the contractor’s 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(i).

Petitioner has the burden of proof, including the burden of producing evidence and the burden of persuasion. The degree of proof shall be a preponderance of the evidence. HRS § 103D-709(c).

Petitioner contends that Cameron is not a responsible offeror and should therefore be disqualified. According to HRS § 103D-303(g), an “award shall be made to the responsible offeror whose proposal is determined to be in writing to be the most advantageous, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.” HRS § 103D-104 defines responsible offeror as “a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.” To prevail, Petitioner must prove by a preponderance of the evidence that Cameron (a) lacked the requisite experience, (b) failed to provide the required references, or (c) did not possess the required permit.

#### B. CAMERON’S EXPERIENCE AND CUSTOMER REFERENCES



Petitioner argues Cameron is not a responsible offeror alleging Cameron did not have the requisite experience to fulfill the contract as well as references that could attest to such work. Petitioner argues that the RFP requires offerors have at least three years of experience in HHW *collection events* and because Cameron's experience with the collection and disposal of hazardous waste was with commercial hazardous waste and not residential hazardous waste, Cameron is not responsible. Petitioner does not dispute that the types of household hazardous waste listed in Attachment A of the RFP fall within the types of commercial hazardous waste Cameron collected. Petitioner also acknowledges that there is no material difference between the chemical properties of household and commercial hazardous waste but argues that the distinction is between the *collection* of commercial hazardous waste and household hazardous waste. Instead, Petitioner's member, Greg Perry, testified about the stresses of serving hundreds of homeowners in a single day and, on that basis, concluded that Cameron's experience in collection of commercial hazardous waste must not meet the required qualifications to perform the Project.

In contrast, according to its proposal, Cameron "has over 50 years combined experience with all aspects of hazardous waste transportation and disposal in Hawaii" and has experience in the collection and disposal of the types of HHW listed in Attachment A of the RFP. The evidence also established that Cameron provided three customer references in its proposal, and all three references were customers for whom Cameron provided collection and disposal of hazardous waste services. Ms. Powell testified that she personally contacted all three of Cameron's references to determine if Cameron had the experience and capability to perform the work required in the RFP and was satisfied that Cameron could satisfactorily perform the contract. The Hearings Officer notes that although the Review Committee determined Cameron was a responsible offeror, Petitioner was rated higher under the "Proposer References, Qualifications, and Experience" evaluation criteria. This rating is consistent with the testimony provided by Mr. Perry regarding Petitioner's experience and qualifications and indicates that the Review Committee did consider the experience and qualifications of both Petitioner and Cameron. Nonetheless, Respondent determined that Cameron did have the experience and capability to perform the contract.

Pursuant to HRS § 103D-310(b), the procurement officer shall determine whether the prospective offeror has the financial ability, resources, capability and business

integrity necessary to perform the work. The determination of responsibility or nonresponsibility of an offeror or prospective offeror to perform the work called for in the solicitation shall be made by the procurement officer on the basis of available information. Hawaii Administrative Rules (“HAR”) § 3-122-108. Based on the information in Cameron’s proposal describing its experience with collecting and disposing of the types of HHW listed in the RFP, the references from customers who had received hazardous waste collection and disposal services from Cameron, and the Review Committee’s evaluation of those references confirming Cameron’s ability to complete the Project, the Hearings Officer concludes that Petitioner has failed to establish that Cameron is not a responsible offeror by virtue of its experience and references.

C. CAMERON’S SOLID WASTE MANAGEMENT PERMIT

In its protest, Petitioner also contends that Cameron is not a responsible offeror because it “almost certainly lacks the permit envisioned by the Solicitation.” Petitioner cites the RFP requirement that proposers have a Department of Health Solid Waste Management Permit, opining that the requirement “would be relevant to the content and purpose of the Solicitation only if the permit specifically allows its holder to collect and dispose of HHW. According to Petitioner, Cameron’s website does not indicate that it has a permit . . . nor is there any reason to believe it has one.” The RFP did require proposers to provide information of and a copy of a “Department of Health Solid Waste Management Permit #.” The evidence established that Cameron does have a Solid Waste Management Permit and listed Solid Waste Management Permit # RY-0010-18 in its proposal. Nevertheless, Petitioner provided evidence that the permit held by Cameron was a Solid Waste Management Permit for recycling. Ms. Powell, however, explained that the Solid Waste Management Permit requirement was included in the RFP in the event the proposer planned on using a location other than the planned Central Maui Landfill. In that case, a Solid Waste Management Permit would be required for the alternate location. Ms. Powell acknowledged that a Solid Waste Management Permit was not required to satisfy the contract and although she could have written the RFP better, Cameron did include a Solid Waste Management Permit number with its proposal and did not propose an alternate site other than Central Maui Landfill.



Additionally, Petitioner argues, for the first time in its closing brief, that Cameron failed to provide a copy of its permit with the proposal, and on that basis alone, Cameron is not a responsible offeror. Notwithstanding the untimely argument, the Hearings Officer concludes that rejecting an offer solely for failing to attach a permit, when a site was already properly permitted, and the requirement was applicable only if another site was proposed, is insufficient to warrant rejection of Cameron's proposal. Rejection under these circumstances and in the absence of any showing of unfair advantage would fly in the face of common-sense principles. *See, FV Coluccio Construction Co., Inc. v. City and County of Honolulu, Department of Environmental Services and Department of Budget and Fiscal Services, PDH-2018-005 (May 8, 2018) (Applying a common sense and flexible approach, a "technical" requirement should not stand in the way of the public saving millions in public funds, thereby fostering public confidence in the integrity of the procurement system.)*<sup>4</sup> Based on these considerations, the Hearings Officer concludes that Petitioner has not met its burden of proving Cameron "almost certainly lacks the permit envisioned by the Solicitation" and is not a responsible offeror on that basis.

#### IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that Petitioner's request for administrative review be and is hereby dismissed and that each party bear its own attorney's fees and costs.

DATED: Honolulu, Hawaii, APR - 6 2020



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DESIRÉE L. HIKIDA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs

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<sup>4</sup> The Hearings Officer notes that Petitioner included in its proposal, a letter from the Department of Health approving its application for a solid waste management permit by rule application for its facility located in Pearl City, Hawaii. The Hearings Officer further notes that Petitioner failed to attach a copy of its Solid Waste Management Permit to its proposal.