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HEARINGS OFFICE



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

In the Matter of

PDH-2021-007

MEI CORPORATION,

Petitioner

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

vs.

BOARD OF WATER SUPPLY,

Respondent.

Hearing Dates: July 15, and 16, 2021
Hearings Officer: Richard A. Young

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

I. INTRODUCTION:

On June 18, 2021, MEI Corporation ("Petitioner"), filed a request for administrative hearing to contest the Board of Water Supply's ("Respondent" or "BWS") June 15, 2021 determination that Petitioner is a non-responsible bidder regarding Job 21-042A, Security Fencing at Honolulu Well II, Kunia Well III, Waipahu Wells IV, Nuuanu Nursery, and Wilhelmena Rise 405 ("Project").

After Petitioner filed its June 18, 2021 Petition for Administrative Review and Hearing Relief, the matter was set for a June 29, 2021 Pre-Hearing Conference and July 7, 2021 hearing. At the June 29, 2021 Pre-Hearing Conference, a motions deadline, a response to motions deadline, a hearing on motions, and hearing and further hearing dates were scheduled.

On June 30, 2021, Respondent filed Board of Water Supply's Motion to Dismiss or, in the Alternative, for Summary Judgment. On July 6, 2021, Petitioner filed its Memorandum in Opposition to this Motion. On July 7, 2021, a hearing on the motion was heard. On July 13, 2021, an Order Denying Respondent's Motion to Dismiss or, in the Alternative, for Summary Judgment

was filed.

A Zoom hearing on this matter was conducted by the undersigned Hearings Officer on July 15, and 16, 2021 in accordance with the provisions of Hawaii Revised Statutes (“HRS”) Chapter 103D. Petitioner was represented by Carl Osaki, Esq. and Kivalu Ramanlal. Respondent was represented by Ryan Ota, Esq., Moana Yost, Esq., and Jadine Urasaki.

Having reviewed and considered the testimony of witnesses and the exhibits, and declarations attached thereto, and the written arguments of the parties, together with the entire record of this proceeding, the Hearings Officer renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT:

1. On April 8, 2021, Respondent had posted an Invitation for Bids on the Project. The scope of the work involved demolition and removal of existing fence, gates, and appurtenances; and installation of a 6 ft. high chain link fence and 8 ft. high expanded metal fencing system, including posts, post extensions, barbed wire, gates, and appurtenances at the 5 sites listed in the Project.

2. The estimated cost of the construction listed in the Invitation for Bids was \$1.6 M. According to Jason Takaki, the head of the BWS’s Capital Projects Division, this amount was determined by outside consultants.

3. Bidders were required to complete the BWS’s Contractor Questionnaire (not the Sample Standard Qualification Questionnaire issued by the Policy Board); to be submitted along with their bids. The Contractor Questionnaire requested that the bidders list 3 to 5 relevant contracts within the last 7 years of bid opening. A relevant contract was defined as one of equivalent value as the Project, which had the bidder as the primary contractor, and that the contract be with a government entity. The Invitation for Bids did not make it a requirement that the bidder have a previous contract of \$1.6 M or more.

4. The Invitation encouraged bidders to attend a pre-bid conference and send written e-mails for any clarification of terms.

5. Petitioner did not attend the site visit on April 13, 2021. Further, none of the written e-mails for any clarification of terms concerned the solicitation requirements for BWS’s responsibility determination.

6. Bids were opened on May 19, 2021.

7. Petitioner submitted the low bid on the Project of \$1,687,631.80. There were 2 other bidders on the Project: Elite Pacific Construction, Inc., with a bid of \$3,038,956.00; and Star/Com Builders, with a bid of \$3,623,575.00.

8. Petitioner submitted its Contractor Questionnaire with its bid. Petitioner listed 3 prior contracts which all involved fencing work and were for the following amounts:

1. Security Fencing at Waihee Tunnel, with a final contract price of \$163,295.77;
2. Pohakupu Security Fencing Improvement Project, involving graded fencing and gate work, at a cost of \$1,028,293.40; and
3. Lihue Management Unit Development Plan Phase A Schofield Barracks, at a final cost of \$1.2 M. *See, Respondent's Exhibit I.*

9. None of prior projects listed in the Contractor Questionnaire submitted by Petitioner were valued at \$1.6 M or more.

10. A review of the Contractor Questionnaire submitted by Petitioner shows that the 3 projects it listed involved chain link fencing work. Further, the evaluation grades Petitioner received for these 3 prior projects were either satisfactory or above average. *See, Respondent's Exhibit I.*

11. On May 21, 2021, Respondent sent a letter to Petitioner, asking MEI Corporation to submit an additional relevant contract valued over \$1.6 M. by May 26, 2021.

12. On May 28, 2021, Petitioner, through its attorney, Carl Osaki, Esq., responded that MEI Corporation does not have a contract valued at over \$1.6 M. The letter further states that such a contract is not needed, and that Petitioner should be awarded the Project as it was the low bidder.

13. In the May 28, 2021 letter, Petitioner further asserts that the Contractor Questionnaire was not necessary and should only be used if a contractor's responsibility cannot be determined with available information. Citing MEI Corporation's prior contracts with Respondent, Petitioner asserts that Respondent had available information to determine that Petitioner is a responsible contractor.

14. Further, Petitioner's May 28, 2021 letter pointed out that the Contractor Questionnaire did not follow the guidelines under HAR Section 3-122-109, which lists identified factors as:

1. Financial ability;

2. Material/expertise available or obtainable;
3. and 4. References; and
5. Legal qualifications.

Petitioner noted that prior contract value was not an identified factor under the rules.

15. Jadine Urasaki, the BWS's assistant program administrator, drafted a June 15, 2021 internal memo regarding the BWS's determination that MEI Corporation was not a responsible contractor. This internal memo was reviewed by BWS's procurement office and Corporation Counsel. The June 15, 2021 internal memo was signed by Ms. Urasaki and forwarded to Kathryn Hoffman of the BWS's procurement office for approval before being signed by Mr. Ernest Lau, the BWS's chief engineer and chief procurement officer.

16. Mr. Lau signed the June 15, 2021 internal office memo regarding MEI Corporation's non-responsibility determination after it was signed by Ms. Hoffman and Ms. Urasaki. Above the signature line, Mr. Lau underlined the words "Approved as Recommended". *See, Respondent's Exhibit L.*

17. On June 15, 2021, Respondent sent a letter to Petitioner, noting that under HAR Sections 3-122-108 and 3-122-109 the BWS has the authority to use a Contractor Questionnaire to determine responsibility. *See, Respondent's Exhibit M.*

18. Respondent's June 15, 2021 letter further states that because of the Project's large size and cost, the contractor is required to meet the requirements in the Contractor Questionnaire to demonstrate he has the experience and capability to perform fully, efficiently, timely, and on budget. The BWS determined that MEI Corporation was a non-responsible bidder and rejected Petitioner's bid.

19. Specifically, Respondent's June 15, 2021 letter concludes that, "Based upon BWS's review and evaluation of the projects that MEI submitted for the Contractor Questionnaire, MEI's failure to provide a relevant contract equal or greater than the solicitation amount by May 26, 2021, and Mr. Osaki's admission that MEI does not have a contract that meets the requirements of the solicitation to determine contractor responsibility for this Project, renders MEI non-responsible. Pursuant to HAR Sections 3-122-97 and 3-127-108, MEI's bid is rejected."

20. On June 18, 2021, MEI Corporation filed a request for administrative hearing to contest the Board of Water Supply's June 15, 2021 determination that Petitioner is a non-responsible offeror regarding the Project. Petitioner posted a procurement protest bond of \$8,438.16 and a \$1,000.00 filing fee with DCCA.

21. In its Response to the Petition, Respondent notes that the contract on the Project has already been awarded. Respondent further notes that Petitioner's request to be awarded the contract is improper, and that remedies, if any, would be pursuant to HRS Section 103D-707.

22. On June 16, 2021, Respondent issued a Notice of Contract Award, awarding the Project to Elite Pacific Construction, Inc., with a bid of \$3,038.956.00.

23. At the hearing, Petitioner's requested remedy is that the contract award to Elite Pacific Construction be terminated, and that the case be remanded to the parties to award the contract on the Project to the low responsible contractor, MEI Corporation.

24. Kivalu Ramanlal is employed by MEI Corporation as a vice-president and has the tasks of overseeing bids, reviewing contracts, and the overall running of the company.

25. Mr. Ramanlal testified that MEI Corporation has had 14 prior contracts with the BWS. The work done on prior contracts involved, among other things, waterlines, excavation, connection to homes, and traffic control. Previous projects also included the installation of chain-link fencing for security, as well as installing fire hydrants and man-hole work. The cost of the projects ranged from over a hundred thousand dollars to over \$7 million dollars.

26. Mr. Ramanlal testified that in previous projects, the BWS had never determined that MEI Corporation was a non-responsible bidder. However, once, the BWS had disqualified MEI Corporation for listing only 2 prior projects, when it had asked that 3 be listed.

27. Mr. Ramanlal testified that previously, the BWS had changed the form of its contractor questionnaire, but he could not say when this occurred. Further, Mr. Ramanlal testified that a previous contractor questionnaire by the BWS did not require MEI Corporation to show the value of its prior projects.

28. Ernest Lau, the BWS's chief engineer and chief procurement officer since 2012, testified that it is his duty to ensure that the contractors bidding on a solicitation are qualified. The contractor questionnaire is used by the BWS to help determine if a contractor can do the work. The contractor questionnaire form is developed by the BWS's Capital Projects Division, which uses BWS engineers and outside consultants.

29. The contractor questionnaire used for the instant Project was revised in February 2021. Mr. Lau admitted that the BWS's contractor questionnaire deviates from the Policy Board's sample contractor questionnaire. According to Mr. Lau, the Policy Board's sample contractor questionnaire was cumbersome and required the disclosure of confidential information.

30. Mr. Lau testified that in 2018, the BWS started to use its own contractor questionnaire as it had been having problems with the quality of construction work done by other contractors. Mr. Lau was unsure how many versions of the contractor questionnaire had been made.

31. However, Kathryn Hoffman, a procurement specification specialist with the BWS, believed that there have been 4 versions of the contractor questionnaire since 2018. Michael Domion, branch head of BWS's Support Division, verified that there have been 4 versions of the contractor questionnaire since 2018. Ms. Hoffman testified that the most current form of the contractor questionnaire was used in the solicitation of the Project. Ms. Hoffman and Mr. Takaki added that each version of the contractor questionnaire is approved by Corporation Counsel.

32. Mr. Takaki, the BWS's head of Capital Projects Division, stated that the contractor questionnaire used by the BWS is an evolving document, which has changed over the years.

33. Mr. Lau testified that he signed the BWS's June 15, 2021 letter to MEI Corporation in which the BWS determined that MEI Corporation was a non-responsible offeror. *See, Respondent's Exhibit M.*

34. Mr. Lau testified that in making it a requirement that the winning bidder had a prior contract of equal scope of work that was \$1.6 M or greater, the BWS was trying to use clear guidelines to determine if a contractor is qualified. According to Mr. Lau, this was done to treat all contractors fairly. Mr. Lau added that it would be unfair to other bidders to award a contract to a bidder who does not comply with the terms of the solicitation. The contractor questionnaire was a part of the solicitation. Mr. Takaki and Ms. Urasaki testified similarly to Mr. Lau's testimony in this regard.

35. Mr. Lau testified that if the contractor's prior project was even 1 cent less than the \$1.6 M estimated value of the Project, then the contractor would be non-responsible. Mr. Lau added that if MEI Corporation had provided a contract for similar work that was \$1.6 M or more, it would have been deemed a responsible offeror and would have been awarded the contract as the low bidder.

36. Mr. Domion opined that the current contractor questionnaire was better at assisting the BWS to obtain a contractor who is familiar with the type of work the BWS does. However, under cross-examination, it was shown that under an older version of the contractor questionnaire, MEI Corporation would have qualified as a qualified contractor for the Project.

37. Raelynn Nakabayashi is an executive assistant to Ernest Lau, the BWS's chief engineer and chief procurement officer. Ms. Nakabayashi testified that the BWS uses its own contractor questionnaire, not the sample questionnaire issued by the Policy Board.

38. Ms. Nakabayashi further testified that she believes that the budget for this fiscal year (FY 2021-2022) has \$1.5 M allocated for security fencing. Therefore, if the contract award to Elite Pacific is voided, there is not enough funds to do the Project as it was solicited.

39. However, Mr. Lau testified that if the contract is rescinded, it may be possible to unbundle the Project; that is, incrementally do the work at the 5 locations listed.

III. CONCLUSIONS OF LAW:

The issue in this case is whether the BWS's June 15, 2021 determination that MEI Corporation was a non-responsible offeror was proper.

Respondent's Procurement Officer has the responsibility to determine whether Petitioner is a responsible offeror; that is, whether Petitioner has the financial ability, resources, skills, capability, and business integrity necessary to perform the work.

Under HRS Section 103D-310(b), "Whether or not an intention to bid is required, the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board."

Responsibility may be determined at any time prior to award.

In this case, the BWS had requested that bidders submit a completed Contractor Questionnaire along with their bids. Petitioner submitted 3 prior projects in which MEI Corporation performed chain link fencing work for the BWS. Although it is true that none of these projects was for an amount greater than the \$1.6M amount requested in the Contractor Questionnaire; as noted by Petitioner's counsel, MEI Corporation did not have such a contract.

Further, as noted above, the Invitation for Bids did not make it a requirement that the bidder have a previous contract of \$1.6 M or more. The Invitation for Bids did not state that if a prior project of similar work did not meet a threshold amount of \$1.6 M or more, the offeror would be deemed non-responsible.

As asserted in its May 28, 2021 letter to the BWS, such a contract is not needed, and that Petitioner should be awarded the Project as it was the low bidder. In the May 28, 2021 letter,

Petitioner argues that the Contractor Questionnaire was not necessary, and should only be used if a contractor's responsibility cannot be determined with available information. Citing MEI Corporation's prior contracts with Respondent, Petitioner asserts that Respondent had available information to determine that Petitioner is a responsible contractor.

A review of MEI Corporation's Contractor Questionnaire shows that the 3 projects it listed involved chain link fencing work. Further, the evaluation grades Petitioner received for these 3 prior projects were either satisfactory or above average.

Additionally, as noted in Mr. Osaki's letter, the Contractor Questionnaire did not follow the guidelines under HAR Section 3-122-109, which lists identified factors as:

1. Financial ability;
2. Material/expertise available or obtainable;
3. and 4. References; and
5. Legal qualifications.

Mr. Osaki noted that prior contract value was not an identified factor under the rules.

However, a review of HAR Section 3-122-109 shows that in addition to the 5 factors listed, the rule also provides that the questionnaire shall request information for:

6. Additional information necessary for a determination of responsibility.

The Board of Water Supply argues that determining if a contractor has a prior contract for the same scope of work and at the same or greater price than was estimated for the instant project, is additional information necessary for a determination of responsibility.

However, as admitted by BWS's chief engineer and procurement officer, Mr. Lau, the BWS did not follow the Policy Board's sample contractor questionnaire as it was cumbersome and required the disclosure of confidential information. According to Mr. Lau, in 2018, the BWS started to use its own contractor questionnaire as it had been having problems with the quality of construction work done by other contractors. Mr. Lau was unsure how many versions of the contractor questionnaire had been made.

The testimony of Raelynn Nakabayashi, an executive assistant to Mr. Lau, verified that the BWS uses its own contractor questionnaire, not the sample questionnaire issued by the Policy Board.

The BWS's witnesses testified that in using the contractor questionnaire and making it a requirement that the winning bidder had a prior contract of equal scope of work that was \$1.6 M or greater, the BWS was trying to use clear guidelines to determine if a contractor is qualified. According to Mr. Lau, this was done to treat all contractors fairly. Mr. Lau added that it would be

unfair to other bidders to award a contract to a bidder who does not comply with the terms of the solicitation. The contractor questionnaire was a part of the solicitation. Both Mr. Takaki and Ms. Urasaki testified similarly to Mr. Lau regarding this. Mr. Domion opined that the current contractor questionnaire was better at assisting the BWS to obtain a contractor who is familiar with the type of work the BWS does.

Although the BWS's stated goal to make the bidding process fair to all bidders is laudable, the criteria used to accomplish this (that is, the questions in the contractor questionnaire) must still follow common sense and reason. Requiring the low bidder to have a prior project of similar work that is of a certain dollar amount, in this case, \$1.6 M, should not have been made a factor in the BWS's contractor questionnaire. This is contrary to HRS Section 103D-405, entitled "Maximum practicable competition". Under subsection (a) "All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the State's needs, and shall not be unduly restrictive."

As argued by Petitioner, under HAR Section 3-122-109, the rules states that the identified factors are:

1. Financial ability;
2. Material/expertise available or obtainable;
3. and 4. References;
5. Legal qualifications; and
6. Additional information necessary for a determination of responsibility.

Prior contract value is not an identified factor under the rules. As Petitioner argues in its closing brief, the BWS's contractor questionnaire "creates a "thumbs up/thumbs down" or disqualifying criteria based on a singular point." *Petitioner's Closing Brief at page 12*. The guidelines of Section 3-122-109 are designed to assess contractor responsibility, not to function as a disqualifying standard on a singular point." *Petitioner's Closing Brief at page 22*.

The BWS argues that determining if a contractor has a prior contract for the same scope of work at an equal or greater price as the instant contract is additional information necessary for a determination of responsibility. However, given the facts of this case - where a contractor who has had 14 prior projects with the BWS over the last 7 years and has not been previously determined non-responsible; and who lists 3 prior projects for the same type of security fencing work for which it was evaluated as either satisfactory or above average; and whose prior projects were in some cases for even larger amounts than the estimated \$1.6 M value of the current Project; the need to have a

prior contract of equal scope and at least the value of the current Project is an improper criteria to deem MEI Corporation non-responsible.

Additionally, the type of work being solicited, providing security fencing, although needing some level of expertise, is not the type of work which requires specialty knowledge or equipment, as may be needed for a project dealing with such things as tunneling or blasting or explosives.

Further, as admitted by BWS's chief engineer and procurement officer, Mr. Lau, the BWS did not follow the Policy Board's sample contractor questionnaire as it was cumbersome and required the disclosure of confidential information. According to Mr. Lau, in 2018, the BWS started to use its own contractor questionnaire as it had been having problems with the quality of construction work done by other contractors. Although Mr. Lau was unsure how many versions of the contractor questionnaire had been made, the testimony of Ms. Hoffman and Mr. Domion verified that there have been 4 versions of the contractor questionnaire since 2018.

The testimony of Raelynn Nakabayashi, an executive assistant to Mr. Lau, verified that the BWS uses its own contractor questionnaire, not the sample questionnaire issued by the Policy Board.

Mr. Takaki, the BWS's head of Capital Projects Division, stated that the contractor questionnaire used by the BWS is an evolving document, which has changed over the years. The fact that there have been 4 versions of the contractor questionnaire since 2018, shows that this evolving document may not be the best method to assist the BWS to determine if a contractor is qualified.

The BWS's witnesses testified that the BWS used the contractor questionnaire and by making it a requirement that the winning bidder had a prior contract of equal scope of work that was \$1.6 M or greater, the BWS was trying to use clear guidelines to determine if a contractor is qualified. According to Mr. Lau, this was done to treat all contractors fairly. Mr. Lau added that it would be unfair to other bidders to award a contract to a bidder who does not comply with the terms of the solicitation. The contractor questionnaire was a part of the solicitation. Both Mr. Takaki and Ms. Urasaki testified similarly to Mr. Lau regarding this. Mr. Domion opined that the current contractor questionnaire was better at assisting the BWS to obtain a contractor who is familiar with the type of work the BWS does.

However, as admitted by Mr. Lau, the BWS's contractor questionnaire deviates from the Standard Qualification Questionnaire, which is constructed to be fair to all bidders by asking the same basic questions. While asserting that it wants to be fair to all bidders, deviating from HAR 3-

122-109 does not accomplish this. The BWS's changing of its own contractor questionnaire 4 times since 2018 illustrates this.

Mr. Lau even testified that if the contractor's prior project was even 1 cent less than \$1.6 M, then the contractor would not be qualified. This is contrary to common sense, as to use such a criteria under the instant circumstances where the BWS has been involved in many prior and similar projects with MEI Corporation, always deeming MEI Corporation responsible, and previously evaluating MEI Corporation's work as satisfactory or better, is not reasonable.

Even Mr. Lau admitted that if MEI Corporation had provided a contract for similar work that was \$1.6 M or more, it would have been deemed a responsible offeror and awarded the contract as the lowest bidder. Further, Mr. Domion indicated that under an older version of the BWS's contractor questionnaire, MEI Corporation would have qualified as a qualified contractor for the Project.

Although the evidence and testimony at the hearing focused on the BWS's Contractor Questionnaire that bidders were required to submit with their bids, the primary issue in this case, as noted above, is whether the BWS's determination that MEI Corporation was a non-responsible bidder was proper. In its Request for Administrative Hearing, Petitioner is challenging Respondent's determination that MEI Corporation was a non-responsible bidder.

Respondent's June 15, 2021 letter states that because of the Project's large size and cost, the contractor is required to meet the requirements in the Contractor Questionnaire to demonstrate he has the experience and capability to perform fully, efficiently, timely, and on budget. The BWS determined that MEI Corporation was a non-responsible bidder and rejected Petitioner's bid.

Specifically, in its June 15, 2021 letter to MEI Corporation, Respondent writes: "Based upon BWS's review and evaluation of the projects that MEI submitted for the Contractor Questionnaire, MEI's failure to provide a relevant contract equal or greater than the solicitation amount by May 26, 2021, and Mr. Osaki's admission that MEI does not have a contract that meets the requirements of the solicitation to determine contractor responsibility for this Project, renders MEI non-responsible. Pursuant to HAR Sections 3-122-97 and 3-127-108, MEI's bid is rejected."

Under HAR Sections 3-122-108 and 3-122-109 the BWS has the authority to use a Contractor Questionnaire to determine responsibility.

However, HAR Section 3-122-108(a) states, "...a determination of responsibility or no responsibility 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.*" *Emphasis added.*

Further, under HAR Section 3-122-108(b): "*If the procurement officer requires additional information, the offeror or prospective offeror may be required to answer questions contained in the sample questionnaire provided by the policy board.*" *Emphasis added.*

As was argued in Petitioner's closing argument and at the motion to dismiss, the administrative rules call for a 2-step process in determining whether a Contractor's Questionnaire is necessary. If, based upon available information, Respondent can determine that a contractor is responsible, then there is no need to request a Contractor Questionnaire; and the procurement officer shall make a determination of responsibility or no responsibility of an offeror or prospective offeror to perform the work called for in the solicitation on the basis of available information.

As Petitioner had previously stated in its May 28, 2021 letter, the Contractor Questionnaire was not necessary and should only be used if a contractor's responsibility cannot be determined with available information. Considering MEI Corporation's prior contracts with Respondent, Respondent had available information to determine that Petitioner is a responsible contractor. The prior contracts MEI Corporation had with Respondent included chain-link fencing work, similar to the work called for in the instant project. As noted above, the evaluation grades MEI Corporation received from the BWS for these projects were either satisfactory or above average.

Additionally, the BWS's Contractor Questionnaire did not follow the guidelines under HAR Section 3-122-109, which lists identified factors as:

1. Financial ability;
2. Material/expertise available or obtainable;
3. and 4. References;
5. Legal qualifications; and
6. Additional evidence to show responsibility.

Respondent argues that the requirement of having a previous contract of \$1.6 M or more demonstrates that a contractor has the experience and capability to perform fully, efficiently, timely, and on budget. Respondent asserts that this should be included as a part of an identified factor as it is additional evidence to show responsibility. As noted in the BWS's June 15, 2021 letter to MEI Corporation, based upon the fact that Petitioner did not have such a contract, the BWS determined that MEI Corporation was a non-responsible bidder and rejected Petitioner's bid.

However, as Petitioner argues, prior contract value was not an identified factor under the rules. Further, Respondent takes the position that having anything less than a \$1.6 M prior contract, even a \$1.599999 M. contract (1 cent less than \$1.6 M), is not sufficient to show a contractor is able to perform the Project. As Petitioner argues, this shows that the criteria of a \$1.6 M prior contract should not have been used as a factor in the BWS's contractor questionnaire.

The Hearings Officer agrees with Petitioner that based upon the available information, Respondent should have determined that Petitioner was a qualified contractor, without the need for a Contractor Questionnaire. Further, even though Respondent had the discretion to use a Contractor Questionnaire, the questionnaire asked whether Petitioner had prior contracts exceeding a certain amount, and this is not an identified factor under the rules. Additionally, the value of prior contracts regarding similar work is not appropriately a factor to be considered under the category of "Additional evidence to show responsibility."

Therefore, based upon its prior contracts with the BWS, and the performance quality and size of Petitioner's prior contracts with Respondent, MEI Corporation has shown that it is a responsible offeror. The BWS's determination that MEI Corporation was not a responsible offeror based upon its failure to have a prior contract of equal or greater value as the estimated \$1.6 M value of the Project in the instant case was not properly decided.

REMEDIES

HRS Section 103D-707 is entitled "Remedies after an award". According to this statute: If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

- (1) If the person awarded the contract has not acted fraudulently or in bad faith:
 - (A) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interests of the State; or
 - (B) The contract may be terminated and the person awarded the contact shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination.
- (2) If the person awarded the contract has acted fraudulently or in bad faith:
 - (A) The contract may be declared null and void; or
 - (B) The contract may be ratified and affirmed, or modified, if the action is in the best interests of the State, without prejudice to the State's rights to such damages as may be

appropriate.

In this case, the Hearings Officer finds and concludes that there has been no showing that Elite Pacific Construction, Inc. acted fraudulently or in bad faith. Therefore, the remedies under HRS Section 103D-707 (2) do not apply. Although Petitioner's closing brief asserts that the BWS acted recklessly and in bad faith, the Hearings Officer disagrees. HRS Section 103D-707 (2) concerns whether the person awarded the contract has acted fraudulently or in bad faith. Although Petitioner argues in its closing brief that the BWS acted in bad faith, this statute considers the actions of the person awarded the contract, Elite Pacific Construction, Inc. Regardless, the Hearings Officer finds and concludes that there has been no showing that the BWS acted fraudulently or in bad faith.

Petitioner seeks \$49,172.76 in attorney's fees and general excise tax. However, no statutory provision in the Procurement Code is cited under which attorney's fees can be granted in this situation. Further, because there has been no showing of bad faith, the Hearings Officer does not grant the request for attorney's fees. *See, Carl Corp. v. State, Dept. of Educ., 946 P.2d 1, 85 Hawaii 431 (1997).*

Under HRS Section 103D-707(1), the Hearings Officer has 2 options after an award has been made where the person awarded the contract has not acted fraudulently or in bad faith:

- (A) Ratify and affirm, or modify the contract to Elite Pacific Construction, Inc., provided it is determined that doing so is in the best interest of the State; or
- (B) Terminate the contract and the person awarded the contract shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract, but only to the point of termination.

In this case, where the BWS improperly determined that MEI Corporation was non-responsible, it is only fair that Petitioner should be given the opportunity to have its bid properly re-evaluated by Respondent.

Under HAR Section 3-126-38(a)(4), in making the determination whether ratification of the contract is in the best interests of the State, the following factors are among those considered:

- A. The costs to the State in terminating and resoliciting;
- B. The possibility of returning goods delivered under the contract and thus decreasing the costs of termination;
- C. The progress made toward performing the whole contract; and
- D. The possibility of obtaining a more advantageous contract by resoliciting.

The Hearings Officer determines that it is not in the best interests of the State to ratify and affirm, or modify the contract with Elite Pacific Construction, Inc., at a cost of \$3,038,956.00; as this would cost the State an additional \$1,351,324.20 (the difference between Elite Pacific Construction, Inc.'s bid of \$3,038,956.00 and MEI Corporation's bid of \$1,687,631.80).

Rather, it is in the public's interest to award the contract to the lowest responsible bidder. Doing otherwise, raises questions as to the fairness of the procurement process.

Therefore, the contract that the BWS awarded Elite Pacific Construction, Inc., at a cost of \$3,038,956.00, should be terminated. Although the Hearings Officer does not have the authority to remand this matter to the parties, it is determined that Petitioner is a responsible offeror for the Project.

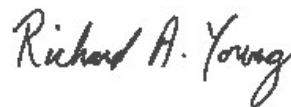
IV. ORDER:

The Hearings Officer terminates the award of Job 21-042A, Security Fencing at Honolulu Well II, Kunia Well III, Waipahu Wells IV, Nuuanu Nursery, and Wilhelmena Rise 405 Project to Elite Pacific Construction, Inc.

The Hearings Officer upholds Petitioner's protest, and Petitioner is found to be a responsible offeror for the Project.

The procurement protest bond of \$8,438.16 shall be returned to Petitioner upon Petitioner's filing of a declaration stating that no appeal has been filed and the time period for filing an appeal has expired.

DATED: Honolulu, Hawaii, July 30, 2021.



RICHARD A. YOUNG
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs