



Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

**Matter of:** Honolulu Marine, Inc.  
**File:** B-248380  
**Date:** August 6, 1992

Ann B. Axelrod, Esq., Lyons, Brandt, Cook & Hiramatsu, for the protester.  
R.W. Hickman, Esq., Susan S. Grooms, Esq., and Thomas H. Peters, Esq., Department of the Navy, for the agency.  
Behn Miller Moe, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Protest challenging propriety of award under solicitation for ship repair services on the basis that the awardee did not, prior to award, demonstrate its compliance with a solicitation requirement that offerors meet state regulations in their performance of these services is dismissed since this requirement was not a precondition to award, but rather a contract performance requirement, which the General Accounting Office has no basis to review absent allegations of bad faith.

## DECISION

Honolulu Marine, Inc. (HMI) protests the award of a contract to Marisco, Ltd., under request for proposals (RFP) No. N47456-92-R-0005, issued by the Department of the Navy for repairs on the ILIWAI, located in Pearl Harbor, Hawaii. In its protest, HMI claims that the awardee's proposal should have been rejected as technically unacceptable since at the time of contract award, Marisco did not meet two solicitation provisions requiring compliance with state regulations pertaining to the removal and disposal of hazardous waste.

We dismiss the protest.

The RFP was issued on March 4, 1992, and sought offers for 26 items of ship repair, which were to be completed by June 25, 1992; each item of repair was to be accomplished in accordance with the instructions set forth in military specification No. 3DPH-022-92, which was incorporated by reference into the RFP.

Offerors were required to complete and submit the solicitation's 5-column "DESCRIPTION OF WORK AND PRICES" schedule; for each of the 26 work items, the schedule required offerors to insert a manhours estimate (Column 1); a materials cost estimate (Column 2); a subcontractor cost estimate, if applicable (Column 3); the name of the prospective subcontractor (Column 4); and a total amount price figure for that line item (Column 5). Offerors were also required to complete and submit several standard certifications set forth in section K of the solicitation, "ANNUAL REPRESENTATIONS AND CERTIFICATIONS-NEGOTIATION," as well as a Certificate of Indirect Costs and a Certificate of Procurement Integrity. Finally, at section G of the solicitation, offerors were required to list the name and function of the key contractor personnel for project management, safety, quality control, administration and negotiation. No separate technical proposals or submissions were required.

With regard to contract award, section M of the solicitation, "EVALUATION FACTORS FOR AWARD," provided:

"Award shall be made to the responsible offeror whose proposal is determined to be technically acceptable and who has submitted the lowest evaluated price. For a proposal to be considered technically acceptable, all factors must be technically acceptable i.e., must meet the requirements of the . . . [RFP]."

Section H of the RFP, "SPECIAL CONTRACT REQUIREMENTS," contained the following two provisions, at issue in this protest:

**"H-19 HAZARDOUS WASTE MATERIAL**

Contractors are directed to the Hawaii Hazardous Waste Control Laws Health and Safety Codes. Performance of the Job Order must be in accordance with the applicable requirements of the law and regulations. This is to be considered in the bid/proposal preparation. Removal of wastes is to be in accordance with the requirements of the contract. . . .

**"H-25 DISPOSAL OF HAZARDOUS WASTES**

1. The contractor shall comply with the Resource Conservation and Recovery Act (RCRA) and all other applicable Federal, State and local laws, codes, ordinances and regulations for the management and disposal of hazardous waste."

By the April 2 closing date, proposals were received from Marisco, Honolulu Shipyard, Inc. (HSI), and the protester. Two of the offerors took exception to several of the schedule's work items; accordingly, in the April 3 request for best and final offers (BAFO), the contracting officer identified these proposal "qualifications" as "not acceptable" and requested that offerors submit "unqualified" BAFOs by April 6.

At the April 6 BAFO closing date, each offeror submitted an "unqualified" BAFO. After determining that each proposal was technically acceptable--based on the data set forth in each offeror's pricing schedule--the contracting officer made award to Marisco as the lowest priced offeror.

On April 7, after learning of the contract award to Marisco, HMI filed an agency-level protest with the contracting officer challenging the proposal submitted by Marisco as technically unacceptable. Apparently, many of the ship repairs required under this solicitation involve the removal of organotin paint from the ship's hull; organotin--also known as tributyltin (TBT)--is a toxic pesticide and is therefore classified as a hazardous waste material. In this regard, the state of Hawaii--which is the site of contract performance--requires that all disposal and application of paint containing TBT be done at a state-certified facility by a licensed technician. Because Marisco did not have a certified facility or a TBT-licensed technician at the time of contract award, HMI argued that Marisco should have been rejected as technically unacceptable.

On April 16, before a decision was issued on its agency-level protest, HMI filed this protest with our Office, reiterating its agency-level protest. In its protest, HMI asserts that clauses H-19 and H-25, set forth above, require all offerors to obtain state certification and licenses to perform the organotin paint removal by the time of contract award.

Although clause H-19 requires compliance with the Hawaii state code, it does not identify any specific Hawaii state license; similarly, clause H-25 contains only a general requirement that the contractor comply with all federal, state and local codes. Contrary to HMI's assertions, these clauses impose no conditions that must be satisfied prior to award since they do not provide that offerors must address these requirements in their proposals. Rather, by their terms, these clauses contain only a general requirement that the contractor have all necessary licenses and permits to perform the contract. See Career Consultants, Inc., B-195913, Mar. 25, 1980, 80-1 CPD ¶ 215. As such, these provisions impose a performance obligation rather than a prerequisite to award such as a definitive responsibility

criterion or a matter to be considered as part of a technical evaluation,<sup>1</sup> White Water Assocs., Inc., B-244467, Oct. 22, 1991, 91-2 CPD ¶ 356.

In its comments on the agency report, HMI argues that the contracting officer's statement in the April 3 BAFO request letter that "[o]fferors must meet federal and state regulations as stated for removal of TBT paint." confirmed that compliance with the state licensing regulations was a prerequisite for contract award; according to HMI, the use of the word "offerors" placed potential contractors on notice that compliance with the Hawaii state TBT regulations was mandated at the time of contract award.

In our view, the use of the word "offerors" simply was not sufficient to convert compliance with the general licensing requirements in the RFP into a prerequisite for award. The contracting officer's statement in the BAFO request was a response to one offeror's proposal qualification, which provided:

"Proposal is based upon removal [of] the existing TBT paint system in accordance with federal and state regulations which requires this to be accomplished by a certified facility and under the direction of a licensed technician."

Reasonably interpreted, the contracting officer's response was intended merely to inform the other offerors that other applicable licenses and permits--not just the Hawaii TBT state licensing requirements--would be enforced in the performance of this contract. In any event, the use of the word "offerors" in a licensing provision does not by itself establish a precondition to award; rather, the provision must also specify that the offeror possess a specific

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<sup>1</sup>As noted above, the solicitation did not require any technical submissions or proposals; the RFP also did not contain any technical evaluation criteria. With respect to the technical evaluation, the contracting officer essentially was to verify--based on each offeror's completion of the pricing schedule--that the proposal took no exception to any of the 26 contract work items, and that the offeror understood the requirement. In this regard, since Marisco's offer did not take exception to any of the 26 work items, and since the awardee did not otherwise qualify its offer, Marisco offered to perform the ship repairs in conformity with the solicitation requirements and its offer was therefore technically acceptable. See Louisville Cooler Mfg. Co., B-243546, June 13, 1991, 91-1 CPD ¶ 568.

license before award. See Restec Contractors, Inc., B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154; Cumberland Sound Pilots Assoc.--Recon., B-229642.2, June 14, 1988, 88-1 CPD ¶ 567. As explained above, clauses H-19 and H-25 did not require the submission of any specific license prior to award.

Where, as here, a solicitation contains only a general state licensing requirement--i.e., the licensing requirement in question does not require the bidder or offeror to possess, or show the ability to obtain, a specific license before award--a contracting officer generally is not charged with considering an offeror's compliance with those requirements in awarding a contract. IBI Sec. Serv., Inc., B-240495.2, Feb. 28, 1991, 91-1 CPD ¶ 241; Rowe Contracting Serv., Inc., B-228647, Oct. 29, 1987, 87-2 CPD ¶ 416. Accordingly, the fact that HMI did not have the requisite state certification and licensed technician to perform this contract at the time of contract award does not provide a basis for objecting to the award. Central Virginia Ambulance Serv., Inc., B-225530, Dec. 5, 1986, 86-2 CPD ¶ 651.

Contracting officers may consider the lack of a state or local license where they determine that enforcement attempts by the state or local authority are a reasonable possibility and such enforcement attempts could interrupt and delay contract performance. Mid-America Mgmt. Servs., Inc., B-244103, June 5, 1991, 91-1 CPD ¶ 537. In such cases, the licensing issue is considered as part of the contracting officer's determination of the offeror's responsibility.<sup>2</sup> Id. Because a responsibility determination--i.e., whether a bidder or offeror is capable of performing a contract--is based in large measure on subjective judgments, which are generally not readily susceptible of reasoned review, an agency's affirmative determination of

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<sup>2</sup>In this case, the record shows that on April 6, the contracting officer contacted the Hawaii State Department of Agriculture--who is responsible for implementing the state's TBT certification and licensing requirements--and learned that if approved, Marisco could become certified and licensed to perform TBT removal procedures within 3 weeks. By letter dated April 6, Marisco also informed the contracting officer that it intended to perform this contract in accordance with the requisite state TBT certification and licensing requirements. In this regard, the record shows that even if Marisco does not become certified or licensed to perform the TBT-removal portion of this requirement, there is another certified and licensed contractor--besides the protester--located within the state of Hawaii with whom Marisco could subcontract its TBT-removal needs.

responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1992); Mid-America Mgmt. Servs., Inc., supra. Here, since HMI has not alleged, and there is no evidence in the record of, fraud or bad faith, and because a general license compliance provision is not a definitive responsibility criterion, see IBI Sec. Serv., Inc., supra, we have no basis to review the contracting officer's affirmative responsibility determination.

The protest is dismissed.

*Christine S. Melody*  
Christine S. Melody  
Assistant General Counsel