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THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Procurement Appeal of)
)
MORRICO EQUIPMENT, LLC,)
)
Appellant.)
_____)

**APPELLANT'S HEARING
BRIEF**

Docket No. OPA-PA-14-010

Morrigo Equipment, LLC ("Morrigo"), hereby submits its hearing brief with respect to this appeal.

INTRODUCTION

Morrigo has filed this appeal with respect to the Guam Solid Waste Authority's ("GSWA") procurement of refuse trucks, identified as GSWA 001-15. The GSWA has specified that it will only accept a cab forward design of refuse truck. However, the Freightliner refuse truck to be offered by Morrigo meets the substantive requirements of the GSWA, but not the cab forward design specification. This is essentially a dispute over the proper formulation of product specifications.

I. The GSWA Specified a Particular Design of Refuse Truck and Relies on Unstated Performance Characteristics.

The GSWA has repeatedly emphasized, improperly, that it is the cab forward “design” it seeks in this procurement. Further, in its decision denying the Morrico protest and in its filings on appeal herein, the GSWA has often referenced its belief that the cab forward design provides better maneuverability and visibility. However, the specifications for the refuse trucks nowhere reference the now desired characteristics of maneuverability and visibility.

What the specifications do reference is a 31’ turning radius, which the Freightliner product to be offered by Morrico meets. The specifications also dictate a windshield size of 2033 square inches. Again, however, the Freightliner truck that Morrico will offer meets this specification with a 2500 square inch windshield. Knowing this, the GSWA tries to veer away from these actual specifications and argues, without support, that “[t]he greater maneuverability and visibility justifications for a cab forward truck versus a conventional cab do not stem from the turning radius or windshield size. They are advantages of the *design* of cab forward trucks.” See, December 12, 2014, GSWA Rebuttal to Appellant’s Comments, p. 5 (emphasis in original).

However, bids can only be analyzed against criteria expressly stated in an IFB. 2 GAR § 3019(n)(1) provides that “[t]he Invitation for Bids shall set forth the requirements and criteria which will be used to determine the lowest responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids.” 2 GAR § 3019(n)(3) further clarifies that “[t]he Invitation for Bids shall set forth any evaluation criterion to be used in determining product acceptability.” Finally, 2 GAR § 3019(n)(4) provides that “[o]nly objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder.”

The IFB specifications here at issue said nothing about maneuverability or visibility and, therefore, the bids to be submitted for this IFB cannot be judged against those unstated and

undefined criteria. And, the GSWA concedes that a cab forward model is not synonymous with maneuverability. *See*, GSWA November 24, 2014, Motion to Dismiss & Memorandum of Points and Authorities, p. 6 (“a conventional cab may satisfy the turning radius requirement, [while] a cab forward design can conceivably *not* meet the turning radius requirement.”)(emphasis in original). Accordingly, the GSWA’s hindsight reliance on unspecified characteristics is unjustified and improper.

The reliance on strict design criteria like the cab forward model of refuse truck also violates the provisions of Guam’s procurement code and regulations governing the development of specifications. For example, 2 GAR § 4102(a)(2) provides that:

Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the territory. To facilitate the use of such criteria, using agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met.

Here, the GSWA did not emphasize, or even include, a functional or performance criteria regarding maneuverability or visibility. Instead, it has repeatedly emphasized that it wants a particular design in the form of a cab forward model of refuse truck. This is not allowed. The main specification contained in the GSWA IFB regarding maneuverability was a requirement for a “turning radius of ... 31 ft. maximum.” And, with respect to visibility, the IFB also required a 2033 square inch windshield. These specifications are met by the Freightliner refuse trucks that Morrico intends to bid.

In addition, there is no information in the GSWA’s procurement record with respect to the development of specifications, as also required by the Guam procurement code and regulations. For example, 5 GCA § 5267 provides that “[t]he specifications contained in any invitation for bids ...

for the procurement of supplies shall identify the person responsible for drafting the specifications and any persons, technical literature or manufacturer's brochures relied upon by the responsible person in drafting the specifications." The information utilized by an agency in the development of specifications must be made a part of the procurement record. 5 GCA § 5249(d) provides that the procurement record shall contain "brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications."

There is no document in the GSWA procurement record which discloses this required information with respect to the development of a specification allowing only a cab forward design. We have no idea who drafted the specifications or what technical literature or manufacturer's brochures they relied on in coming up with their restrictive cab forward specification. Since the GSWA decided to ignore the mandatory requirements of the Guam procurement code regarding the justification for specifications included in an IFB, it should not be allowed to reach outside of its own procurement record to now come up with reasons for a restrictive specification in hindsight.

Accordingly, there is no justification for the GSWA's rejection of a conventional cab design based on any maneuverability or visibility issues.

II. A Conventional Cab is Less Expensive to Purchase and is Easier and Less Expensive to Maintain.

The GSWA also argues that the cab forward model of refuse truck provides for easier and less expensive maintenance. *See*, October 22, 2014, GSWA Denial of Morrico Protest, p. 2; GSWA November 24, 2014 Agency Statement, p. 6. However, the specifications created by GSWA nowhere reference any criteria for ease and expense of maintenance. Nonetheless, as illustrated by the Freightliner brochure for the refuse trucks Morrico will offer, the Freightliner engine is much

easier to access than a cab forward model. Instead of jacking up the entire cab to get at the engine of a cab forward model, a conventional cab engine is accessed by flipping a lock on each side of the hood and pulling the hood forward and down away from the engine. The engine is not only accessible from the top, but from the sides as well. Further, Freightliner has located important engine parts to the side for the express purpose of making access to those critical parts much easier, all as shown in its manufacturer's brochure.

GSWA also ignores that a conventional cab is less expensive to purchase. As Morrigo pointed out in its protest, the cab forward specification drove the requirement for more expensive specifications for other truck components. The GSWA has stated that "Morrigo's insistence that the cab forward axle is more expensive is also a red herring. Even if presumed true, the increased cost of one aspect of the trucks does not override a concern for public safety." *See*, December 15, 2014, GSWA Rebuttal to Appellant's Comments, p. 5.

However, it is not just the 20,000 pound front axle capacity specification that costs more money, but also larger and more expensive tires and wheels, as well as greater horsepower. The specification for a 20,000 pound front axle capacity is necessary because the engine sits over the axle in a cab forward design and must support more direct weight. The tires and wheels must also be larger and more expensive to support the increased axle weight. The Freightliner conventional cab vehicle does not require a 20,000 pound front axle, larger wheels and tires or excessive horsepower. The reduction in the size of these components reduces the cost of purchasing a conventional cab versus a cab forward and lessens the wear and tear on engine components. The GSWA has also specified a steel cab that must be treated with rust proofing. The Freightliner truck Morrigo will offer has an aluminum cab that is anti-corrosive to begin with and is ideal in a tropical climate.

III. The Cab Forward Model Restricts Competition.

The GSWA also argues that the cab forward specification does not restrict competition. *See*, October 22, 2014, GSWA Denial of Morrico Protest, p. 2; December 15, 2014, GSWA Rebuttal to Appellant's Comments, p. 5. GSWA argues that there are a number of manufacturers that provide a cab forward model. However, only three potential vendors appeared at the mandatory pre-bid conference. *See*, November 19, 2014, Submission of Procurement Record, Tab 5. Accordingly, at most, there will only be vehicles of three manufacturers competing for an award. And, by specifying only a cab forward model, the GSWA has eliminated one-third of the competition; assuming both Mid-Pac Far East and Far East Equipment Company can offer a cab forward model. Further, the other manufacturers referenced by GSWA are not represented on Guam and do not have certified service personnel to perform the required warranty maintenance on the vehicles which is also a condition of the bid. The elimination of conventional cabs absolutely restricts competition.

CONCLUSION

The GSWA must be ordered to amend their competition restricting cab forward specification to allow for vendors to bid conventional cab models of refuse trucks, which will be less expensive for the GSWA to purchase and maintain.

Dated this 12th day of January, 2015.

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