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BEFORE THE PUBLIC AUDITOR OF GUAM

HAGÁTÑA, GUAM

FAR EAST EQUIPMENT COMPANY, LLC,)	Appeal No.: OPA-PA-06-002
)	
Appellant,)	FAR EAST EQUIPMENT
)	COMPANY LLC'S COMMENTS
v.)	ON AGENCY REPORT
)	
PORT AUTHORITY OF GUAM,)	
)	
Purchasing Agency.)	

INTRODUCTION

Pursuant to 2 G.A.R. Section 12104(c)(4) and the Amended Scheduling Order, **FAR EAST COMPANY, LLC** ("Far East") hereby submits its comments, and thus responds to, the Agency Report filed on December 12, 2006 by the Jose D. Leon Guerrero Commercial Port ("PAG"), and particularly in PAG's Answering Statement.¹ Far East will address each

¹ Jose D. Leon Guerrero Commercial Port Agency Report – Answering Statement at Tab G on p. 2, fn. 1 (OPA Dec. 12, 2006).

COPY

of PAG's arguments as to why PAG believes that Far East was not entitled to a continuance of the November 3, 2006, Phase I bid opening deadline. However, as a threshold matter, it is worthwhile to focus first on what PAG chose *not* to disclose in its Agency Report.

Specifically, the Agency Report is completely silent as to why PAG waited until four days before the bid opening deadline to respond to Far East's technical questions. The Report is also silent as to how PAG can justify making amendments and changes to the bid specifications without extending the bid opening deadline or otherwise violating the Procurement Regulations.

In pursuing this appeal and in submitting these comments, Far East is not, and has not, requested that it be declared the winner of the gantry crane bid or that it be awarded the contract. Rather, based on the applicable law and circumstances, Far East seeks only to have the Phase I bid opening deadline extended for no more than seven (7) days so that it and others similarly situated may have a chance to compete in the procurement and to submit a bid.

It is difficult to imagine why PAG so strenuously objects to such a short extension of time. An extension of one week after November 3 would not have prejudiced PAG or the people of Guam in the least. On the contrary, instead of having only two bidders competing in a multi-million dollar procurement, PAG would have had up to six bidders competing.

Competition is the heart of government procurement. Indeed, one of the stated policies of the Guam Procurement Law and its regulations is to encourage and "foster effective broad-based competition within the free enterprise system." 5 G.C.A. § 5001(b)(6); 2 G.A.R.

§ 1102(5). To this end, Guam law repeatedly mandates that all government procurement be planned in such a way as to “*promote maximum competition*” without being “unduly restrictive.” 5 G.C.A. §§ 5010, 5265, 5001(b)(6); 2 G.A.R. § 1102.03. Only through competition can the Territory obtain the best value at the lowest price.

LEGAL DISCUSSION

I.

THE JUNE 2006 GANTRY CRANE PROCUREMENT WAS ILLEGAL AND COULD NOT PROPERLY SERVE AS A BASIS FOR FAR EAST’S TECHNICAL QUESTIONS TO PAG

Among other things, PAG responds to Far East’s appeal with the argument that Far East should easily have been able to submit its bid before November 3, 2006, because the instant disputed gantry crane procurement contained the “*very same technical specifications issued in conjunction with Port RFP PAG 06-009 which was later withdrawn and replaced several months later by the subject solicitation.*”² In other words, PAG argues that since Far East obtained in June 2006, a copy of RFP PAG 006-009 (which was later withdrawn), Far East should have used the specifications in *that* procurement to formulate its technical questions to the *current* procurement. According to PAG’s logic, had this been done, Far East would have been able to submit its technical questions to PAG much earlier than three weeks after September 21, 2006, which was the date that Far East picked up the current solicitation.

² Jose D. Leon Guerrero Commercial Port Agency Report – Answering Statement at Tab G on p. 2, fn. 1.

PAG's argument and logic borders on the ridiculous. First of all, RFP PAG 006-009 was an *illegal procurement* based upon the holding of the Guam Supreme Court earlier this year in the case of Fleet Services Inc. v. Dept. Of Admins. et. al., 2006 Guam 6. In the Fleet Services case, the Supreme Court unanimously and unambiguously held that the Request for Proposals ("RFP") method of source selection can only be used for the procurement of professional services, such as those of a technical and scientific nature as contemplated by 5 G.C.A. Section 5121 (*e.g.* architects, engineers, attorneys, accountants, etc.). Fleet Services, 2006 Guam 6 at ¶¶ 35, 37. Where a procurement is for other than professional services, then a competitive sealed bidding process must be used. Fleet Services, 2006 Guam 6 at ¶ 35.

As indicated by its own procurement number, the June 2006 Port RFP PAG 06-009 was an RFP for a new gantry crane. Because a gantry crane is not a "professional service," but rather a highly specialized piece of machinery, under the Guam Supreme Court's holding in the case of Fleet Services, the use by PAG of the RFP process was an invalid method of source selection.

This was pointed out to PAG by Far East. In a letter dated June 28, 2006 from Far East Managing Partner John A. Limtiaco to former Port General Manager Joseph F. Mesa, Far East brought PAG's attention to the fact that the RFP process could not be legally used to procure a gantry crane.³ Shortly after receiving Far East's letter, PAG agreed that the

³ Declaration of John A. Limtiaco in Support of Far East's Comments to PAG's Agency Report, at ¶ 3 and Exhibit 1 (OPA Dec. 18, 2006).

RFP process could not be used and the RFP PAG 06-009 procurement was cancelled in its entirety.⁴ Upon cancelling the RFP, PAG told Far East that a “new bid will be issued at a later time.”⁵

At no time, however, did Mr. Mesa or current PAG General Manager Joseph W. Duenas ever tell Far East that the June 2006 RFP PAG 06-009 and the current Multi-Step Sealed Bid No. PAG 06-001 contained the “very same technical specifications.”⁶ Indeed, the first time such a representation was ever made by PAG was on December 6, 2006, when PAG submitted the Declaration of Joseph W. Duenas to the OPA in support of its Motion to Dismiss this appeal.⁷

As can be seen by PAG’s Agency Report, Multi-Step Sealed Bid No. PAG 06-001 consists of no less than 187 pages, *plus* appendices consisting of technical drawings and plans. Short of comparing the two solicitations page by page, and line by line, Far East had no way of knowing whether or not Multi-Step Sealed Bid No. PAG 06-001 was identical to cancelled RFP 06-009.

It is simply unreasonable for PAG to insinuate to the Hearing Officer that Far East should have wasted its time and precious resources drafting technical questions based upon an illegal and cancelled RFP. By choosing instead to focus its efforts and questions on

⁴ Declaration of John A. Limtiaco, at ¶ 4 and Exhibit 2.

⁵ Declaration of John A. Limtiaco, at ¶ 4 and Exhibit 2.

⁶ Declaration of John A. Limtiaco, at ¶ 5.

⁷ Declaration of John A. Limtiaco, at ¶ 5.

the most recent and up-to-date solicitation issued by PAG, Far East acted reasonably and with justification.

II.

FAR EAST SUBMITTED ITS TECHNICAL QUESTIONS A FULL THREE (3) DAYS AHEAD OF THE OCTOBER 16, 2006, DEADLINE ESTABLISHED BY PAG FOR THE SUBMISSION OF QUESTIONS

In addition to contending that Far East should have been able to complete and submit its technical questions to PAG earlier based upon cancelled RFP 06-009, PAG also implies that by taking “three weeks and a day”⁸ to submit its questions after picking up the crane solicitation on September 21, 2006, Far East is somehow responsible for its inability to meet PAG’s November 3 Phase I bid opening deadline.

Putting aside for a moment the voluminous and detailed specifications contained in the 187-plus page gantry crane solicitation, what PAG conveniently fails to mention, is that the deadline for submitting technical questions was established by none other than PAG, and that Far East submitted its technical questions a whole three (3) days *in advance* of the deadline.

As indicated on the cover page to the gantry crane solicitation, PAG scheduled and held a Pre-Bid Conference on October 6, 2006.⁹ By law, the Pre-Bid Conference is open

⁸ Jose D. Leon Guerrero Commercial Port Agency Report – Answering Statement at Tab G on p. 2.

⁹ Jose D. Leon Guerrero Commercial Port Agency Report at Tab C; Declaration of John A. Limtiaco, at ¶ 6.

to all bidders who have received a bid package, and its purpose is to explain the procurement requirements. 2 G.A.R. § 3109(g)(4). At the Pre-Bid Conference on October 6, PAG established October 16, 2006, as the deadline for bidders to submit their technical questions.¹⁰ The following week on October 13, 2006, and *a full three (3) days in advance of PAG's deadline of October 16*, Far East completed its exhaustive review of the gantry crane bid specifications and submitted its questions.¹¹

It is absurd for PAG to complain that Far East took until October 13 to submit its technical questions when PAG itself established the deadline for submitting questions as being October 16. After receiving Far East's questions on October 13, PAG then took until October 30, 2006 (or two weeks and four days) to respond. Even then, however, and as discussed further below, PAG's answers were incomplete and at times inconsistent. Most importantly, however, a number of PAG's answers included *changes* to the bid specifications.

Far East submitted its questions well within PAG's deadline and in plenty of time for the agency to provide its responses before November 3. The burden was on PAG to provide responses to bidders' questions in a timely manner. If PAG could not do so, or if amendments or changes to the bid specifications had to be made, then under the Procurement Regulations (2 G.A.R. § 3109(d) and § 3109(i)(3)), PAG was obligated to extend the bidding deadline for a reasonable period of time.

¹⁰ Declaration of John A. Limtiaco, at ¶ 7.

¹¹ Declaration of John A. Limtiaco, at ¶ 8.

III.

PHASE 1 OF THE MULTI-STEP BID PROCESS IS MORE THAN JUST A MERE QUALIFICATION ROUND

PAG argues that the questions submitted by Far East were “unnecessary” for the “submittal of its Phase One bid . . .” PAG’s argument is incorrect.

Under both the Procurement Regulations and the solicitation itself, Far East, as part of its Phase One bid was *required* to submit a “project plan” and to explain how the “scope of work” was to be completed.¹² Any bidder submitting a Technical Offer in Phase One was *required* to submit a “scope of work.”¹³ As part of this scope of work the bidders in Phase One were *required* to submit “Gantry Crane Specifications for one (1) each new dockside container handling gantry crane.”¹⁴ In contrast to the detailed plans, specifications, and scope of work required during Phase 1, qualified bidders in Phase 2 need only submit “a price in a sealed envelope.”¹⁵

¹² Jose D. Leon Guerrero Commercial Port Agency Report at Tab C; MULTI-STEP SEALED BID No.: PAG 06-001, § II(I)(4) at pp. 4-5.

¹³ Jose D. Leon Guerrero Commercial Port Agency Report at Tab C; MULTI-STEP SEALED BID No.: PAG 06-001, § II(I)(6) at 5; *See also*, § V(5)(c)(3)(h) at 10.

¹⁴ Jose D. Leon Guerrero Commercial Port Agency Report at Tab C; MULTI-STEP SEALED BID No.: PAG 06-001, § III at p. 7.

¹⁵ Jose D. Leon Guerrero Commercial Port Agency Report at Tab C; MULTI-STEP SEALED BID No.: PAG 06-001, § V(A)(2) at pp. 8-9.

The information sought by Far East's technical questions during Phase 1 were essential to the development of a project plan, scope of work and the specifications for the gantry crane sought by PAG. For instance, in these questions, Far East pointed out errors, inconsistencies, and conflicts in the technical information provided by PAG.¹⁶ By the time PAG acknowledged these technical problems on October 30, 2006, it was too late for Far East to prepare by November 3, 2006, the comprehensive and detailed plans, specifications and scope of work that were required to be submitted.

In addition, when responding to the questions of Far East, PAG clarified numerous matters that had been left unclear in the bid specifications, including, but not limited to the following: the control panel,¹⁷ operator console,¹⁸ rain shield,¹⁹ and wire ladders.²⁰ Other examples of clarifications and explanations of what PAG really "intended" are evidenced throughout PAG's response to Far East's questions.

¹⁶ Far East Appendix of Exhibits (OPA Nov. 24, 2006); PAG COMMENTS, TECHNICAL CLARIFICATIONS, NOS. 1-4 at 6; *See also*, TECHNICAL CLARIFICATION NO. 6 at pp. 2-3.

¹⁷ Far East Appendix of Exhibits (OPA Nov. 24, 2006); PAG COMMENTS TECHNICAL CLARIFICATIONS NO. 1 at p. 2.

¹⁸ Far East Appendix of Exhibits (OPA Nov. 24, 2006); PAG COMMENTS TECHNICAL CLARIFICATIONS NO. 5 at p. 2.

¹⁹ Far East Appendix of Exhibits (OPA Nov. 24, 2006); PAG COMMENTS TECHNICAL CLARIFICATIONS NO. 7 at p. 3.

²⁰ Far East Appendix of Exhibits (OPA Nov. 24, 2006); PAG COMMENTS TECHNICAL CLARIFICATIONS NO. 11 at p. 3.

Additionally, PAG also deleted the requirement of a chassis position system from the specifications.²¹ Far East was advised of this change in the “specifications” only four days before the plans were to be submitted. Needless to say, this type late notice can hardly be considered “reasonable” when one considers the complexities involved in preparing plans for a multi-million dollar gantry crane.

PAG also never responded to Far East’s request for certain information which PAG represented it would provide. Specifically, in both the specifications and in PAG’s responses to Far East’s questions, PAG said that it would provide “Appendix C (Crane Logo & Color Scheme).” PAG, however, never provided Appendix C.²² Although it may seem that the failure to provide a logo and color scheme is of little consequence, in reality, the painting and customizing of a gantry crane can add approximately \$200,000 to the crane’s price.²³

The bottom line is that despite what PAG would have the Hearing Officer believe, in a multi-step bid procurement, Phase I is more than just a qualification round. By law and by the plain language of the specifications, it is not enough that a bidder submit nothing more than its qualifications to do the job. Rather, 2 G.A.R. Section 3109(t)(1)(g) specifically requires that the item being procured “*be furnished generally in accordance with*

²¹ Far East Appendix of Exhibits (OPA Nov. 24, 2006); PAG COMMENTS TECHNICAL CLARIFICATIONS NO. 14 at p. 4.

²² Declaration of John A. Limtiaco, at ¶ 10.

²³ Declaration of John A. Limtiaco, at ¶ 10.

the bidder's technical offer." This technical offer "shall meet the requirements of the *Invitation for Bids.*" Id. (emphasis added).

A review of the requirements that PAG set forth in its bid solicitation reveals that PAG *required* all bid packages to be "*comprehensive and sufficiently detailed for the financing and delivery of one (1) dockside container handling gantry crane.*"²⁴ Except for the final price (which was to be submitted in Phase 2), this included, amongst other things, a development scheme and schedule of manufacture, a summary of work activities, a project budget, a project schedule, and a project engineer.²⁵ Based the language used by PAG in its solicitation, anything less than a "comprehensive and sufficiently detailed" offer in response to the gantry crane solicitation have rendered Far East's bid as being unresponsive and would have subjected the company to disqualification.

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²⁴ Jose D. Leon Guerrero Commercial Port Agency Report at Tab C; MULTI-STEP SEALED BID NO.: PAG 06-001, § III(A) at p. 7 (Preliminary Scope of Work/Services).

²⁵ Jose D. Leon Guerrero Commercial Port Agency Report at Tab C; MULTI-STEP SEALED BID No.: PAG 06-001, § III(A)(1) at p. 7.

IV.

EXTENSIONS OF THE PHASE 1 DEADLINE ARE ROUTINELY GRANTED IN PROCUREMENTS THAT ARE LESS COMPLEX AND LESS EXPENSIVE THAN WHAT IS INVOLVED IN A NEW GANTRY CRANE

Of the bidders who picked up a bid package, no less than four (4) companies requested that the Phase 1 bid opening deadline be extended. These four were: Far East, Temes, Mid Pac Far East; and JRN A/C.²⁶

Asking for an extension of time after the question and answer period is not unusual. In fact, the Procurement Regulations anticipate that an extension will be necessary.²⁷ In previous procurements, PAG has itself extended the bid deadlines for procurements which are nowhere as complex or expensive as the gantry crane procurement.

For example, earlier this year on June 26, 2006, PAG issued a procurement for five fork [lift] trucks.²⁸ The original due date for submission of the bids was July 10, 2006. After four bid amendments and three extensions, the bid submission date was eventually moved to July 27, 2006. The total extension of the Phase 1 bid deadline was *17 days*.

²⁶ Declaration of John A. Limtiaco in Support of Far East's Comments to PAG's Agency Report, at ¶ 9 and Exhibit 3.

²⁷ 2 G.A.R. § 3109(i)(3).

²⁸ Declaration of John A. Limtiaco, at ¶ 11 and Exhibit 4 (PAG BID INVITATION NO. 06-016, "Five (5) Each 10,000 lbs. To 11,000 lbs. Fork Trucks, One (1) Each 20,000 lbs. Fork Truck and one (1) each 40,000 lbs. To 55,000 lbs. Fork Truck.")

The fork truck procurement was subsequently re-bid out again as PAG No. 06-020.²⁹ This time, the due date for submission of the bids was set for September 26, 2006. After three amendments and two extensions, the due date was extended to October 10, 2006, or a total extension of *14 days*.

Similarly, in a PAG procurement for a *used* gantry crane (PAG No. 06-017),³⁰ a bid opening deadline was set for July 13, 2006. The deadline was ultimately extended to July 24, 2006, which is an extension of *11 days*.

However, unlike in this appeal where four bidders have separately requested for an extension due to the complexity of the new crane specifications, in the procurement for a used crane, PAG agreed to grant an extension at the request of a single bidder.³¹ A careful review of the bidder's request for the extension reveals that the grounds for the extension had nothing to do with the technical complexity of the crane, but simply rather that the bidder wanted additional time to source a "competitive freight rate."³²

²⁹ Declaration of John A. Limtiaco, at ¶ 12 and Exhibit 5 (PAG BID INVITATION NO. 06-020, "Five (5) Each 10,000 lbs. To 11,000 lbs. Fork Trucks, One (1) Each 20,000 lbs. Fork Truck and one (1) each 40,000 lbs. To 55,000 lbs. Fork Truck.")

³⁰ Declaration of John A. Limtiaco, at ¶ 13 and Exhibit 6 (PAG BID INVITATION NO. 06-017, "One (1) Used Gantry Crane, Capacity 40 Long Ton.")

³¹ Declaration of John A. Limtiaco, at ¶ 13 and Exhibits 6 and 7.

³² Declaration of John A. Limtiaco, at ¶ 13 and Exhibit 7.

Extensions of the bid opening deadline are routine with other government agencies, including the General Services Agency (“GSA”). For instance, in August of this year, GSA issued a procurement for two fire trucks.³³ A bid opening deadline for the fire trucks was set for September 11, 2006. Eventually, after a question and answer period between the bidders and GSA, and after several bid amendments, the deadline was extended from September 11 to November 21, 2006, which is an extension of *71 days*.

In the instant procurement appeal between Far East and PAG, the original Phase 1 bid opening deadline is set by the solicitation as being October 27, 2006. In its previous solicitations for the fork trucks and for the used gantry crane (which, because of its used nature, does not come customized), PAG agreed to extend the bid opening deadlines for up to 2 weeks.

CONCLUSION

The gantry crane procurement at issue potentially involves a public expenditure of over \$10 million dollars. The significance of this expense and the best interests of Guam demand strict adherence to the Procurement Law and Regulations so as to ensure that the Territory and its people receive the best value for their money.


Had PAG abided by the Procurement Law and Regulations and extended the Phase I bid opening deadline for just one week beyond November 3, up to four additional bidders would have been able to compete in the procurement. A one week extension is less

³³ GSA INVITATION TO BID NO. 065-06, “*Custom Fire Trucks 4-door Rescue Style Pumper.*”

than half of the time of the extensions that PAG granted in other less complex procurements. In this one week, more bidders, including Far East, would have had a chance to participate. The Territory would have a greater selection of vendors and a better chance of fulfilling its public policy goal of obtaining the best value and the best price for the people of Guam.

Respectfully submitted, this 18th day of December, 2006.

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By 

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