In the Appeal of

JONES & GUERRERO CO., INC., dba J&G CONSTRUCTION,

APPELLANT

DOCKET NO. OPA-PA-07-005

COMMENT ON AGENCY REPORT

Appellant comments on the Agency Report as follows, with particular reference to Appellee's Statement Answering Allegations of Appeal, Tab C of its Agency Report.

Appellee's Answer does nothing to change the arguments made by Appellant in its Notice of Appeal. Appellee continues to maintain that because the bid requires certain information to be included with the bid submission, even though the information required goes to the issue of Appellant's responsibility, failure to provide that information renders the bid non-responsive.[1] It compounds the confusion it has over the distinctions between responsiveness and responsibility with the audacious claim that the bid was *nonresponsive* because it failed to include **information that was material and necessary to determine Appellant's responsiblity**.[2] It denies that any determination of responsibility requires due process.[3]

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[1] "Appellant ... engages in a wholly irrelevant discussion about the differences between 'responsibility' and 'responsiveness.' ... In short, J&G's bid submittal was determined to be non-responsive *because* it failed to provide evidence of meeting the Standards of Responsibility sufficient to *whether* it was responsible." Answer, page 7.

[2] "Still, this provision [2 GAR §3116, which Appellee states is "not relevant here because GMHA has its own established Procurement Rules and Regulations"] provides no relief for Appellant because it clearly applies only in the instance that a bidder is determined to be ***nonresponsible***. GMHA made no such determination. The Bid Status sent to Appellant determined that its bid was ***nonresponsive*** because it failed to submit information that was *material* and necessary in order to determine bidder's responsibility." Answer, page 11.

[3] "Were GMHA to have provided Appellant with a second bite of the apple by allowing it to submit documents which were to have been submitted together with its bid would only have exposed the agency to protests by any or all of the bidders who fully complied with all the submittals required by the IFB." Answer, page 10.

The general notion that in competitive sealed bidding the award should go to the lowest responsive and responsible bidder is practically universal in the realm of public procurement, as are the general notions of what constitutes, respectively, "responsive" and "responsible". Appellant's discussion of these issues was germane and not, as Appellee argues, "wholly irrelevant." (Answer, page 7.) A succinct statement of the principles was made in a study prepared for the Sunnyvale, California municipal Council as follows:

> "One of the foundations of public purchasing is the principle that contracts are awarded to the lowest responsive and responsible bidder, based upon fair and open competition. Any bidder who believes that it has been disadvantaged due to the violation of this principle has the right to question the process.
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> "A finding that a bidder is not responsive simply means that a bid does not respond to all the required elements in the solicitation. It does not reflect on the overall suitability of the bidder and, as a result, does not trigger the need for due process procedures. In contrast, a finding that a bidder is not responsible does reflect on the suitability of the bidder and, therefore, requires an opportunity to present evidence of qualifications to do the job." (SUBJECT: Bid Protests Council Study Issue (RTC #99-463), http://www.sunnyvale.ca.gov/199910/rtcs/99-463.asp.)

Likewise with Federal Government procurement[4]:

> "C. Responsiveness Distinguished from Responsibility.
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> "*Data Express, Inc.*, B-234685, July 11, 1989, 89-2 CPD ¶ 28.
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> "1. Bid responsiveness concerns whether a bidder has offered *unequivocally* in its bid documents to provide supplies in conformity with all material terms and conditions of a solicitation for sealed bids, and is determined as of the time of opening bids.[5]

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[4] This material from *"Government Contract Law*, The Deskbook for Procurement Professionals", Second Edition, Section of Public Contract Law, American Bar Association, 1999, at page 65 and, as to A 4, page 72.

[5] Compare to 5 GCA §5211(e): "Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose. Those criteria that will affect the bid price an be considered in evaluation for award shall be **objectively measurable**, such as discounts, transportation costs, and total or life cycle costs. The Invitation for Bids shall set forth the evaluation criteria to be used.. .." [Emphasis added.]

"2. Responsibility refers to a bidder's apparent *ability* and *capacity* to perform, and it is determined any time prior to award. *Triton Marine Constr. Corp.*, B-255373, Oct. 20, 1993, 93-2 CPD ¶ 255 **(bidder's failure to submit with its bid preaward information to determine the bidder's ability to perform the work solicited does not render bid nonresponsive)**. [Emphasis added.]

....

"A. Evaluation of the Responsibility of the Successful Bidder.

"4. Responsibility is determined at any time prior to award. Therefore, the bidder may provide responsibility information to the contracting officer at any time before award.... (Bidder's failure to submit security clearance documentation with its bid is not a basis for rejection of bid)...."

Appellee attempts to bootstrap the responsibility determination into the responsiveness determination despite the clearly distinct processes applicable to each. This denies Appellant the due process rights to which it is entitled for determination of matters of responsibility, and is not simply "another bite of the apple".

In the" *Annotations to the Model Procurement Code* for State and Local Governments", Third Edition, Section of State and Local Government Law, American Bar Association1996, (herein, "Model Code Annotations") annotating the equivalent to GMHA's Section 3-401, quoted by Appellee in its Answer at page 11, having to do with the determination of nonresponsibility, it is noted:

> **"An IFB requirement to list elevator maintenance personnel and their type of experience raises a responsibility issue, even though the invitation for bids states that failure to provide the information at the time of bid opening will result in bid rejection as nonresponsive.** Appeal of the National Elevator Company, Inc., No. 1329 (MSBCA October 1, 1987)." (Emphasis added.)

Another apt example of the incorrectness of this bootstrap attempt is found in the Appeal of Asplundh Tree Expert Company, No. 2087 (MSBCA, http://www.msbca.state.md.us/decisions/pdf/2087asplundh.pdf). In this case, the award to the lowest bidder was protested by a higher bidder on the grounds that the low bidder's bid did not contain necessary information to conclude that it was qualified to do the work required by the bid. The bid's "Qualifications of Contractor" mandated that "Contractor must be able to demonstrate to the Administration satisfaction that he has the experience, technical knowledge, and ability to satisfactorily perform the necessary work while working in areas of electrified track live overhead wires and train traffic; further, that he has and will employ sufficient men and equipment to complete the work." The Board of Contract Appeals properly recognized this as a matter going to responsibility, not responsiveness.

Other examples that matters of responsibility are to be judged by a different process and standard than responsiveness are found in the Model Code Annotations:

> "Where the 'qualification of bidders' section of the specifications required bidders to have at least 5 years experience and to list both the experience of its personnel and any similar services it had provided upon request, the board held 'it would be improper for the procurement officer not to consider the prior work experience and references of the principals of the new corporation when evaluating the responsibility of a 'company' or 'bidder.' **"The board reasoned that such information 'relates to the determination of bidder responsibility or capability to perform the contract, and cannot be made into a question of responsiveness by the terms of the solicitations."** [Emphasis added] ... Appeal of Nat'l Elevator Co., No. 1251 (MSBCA Oct. 17, 1985)." (Model Code Annotations at page 41.)

> "Where the procurement officer awarded a contract to another after finding the low bidder nonresponsive due its failure to provide information concerning its qualifications and experience, the board held the officer erred in rejecting the otherwise low bid because the information requested related to responsibility (capacity to perform) and not to responsiveness.... Appeal of Nat'l Elevator Co., No. 1252 (MSBCA December 30, 1992)." (Model Code Annotations at page 40 and 44.)

In the Appeal of Jailcraft, Inc., No. 2147 (MSBCA Oct. 27, 1999, http://www.msbca.state.md.us/decisions/pdf/jailcraft.pdf), the facts were as follows:

> "The Invitation to Bid ("the ITB") contained definitive experience requirements in section 1.05(A) which said,
>
> 1.05 QUALIFICATIONS
> A. The Contractor shall submit with his bid the following:
> 1. Resumes of key personnel showing a minimum of 10 years experience in medium/maximum cell door repair and installation.
> 2. A statement of qualifications and list of projects performed within the last ten years with references.
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> Certified, however, did not submit that information with its bid."

A higher bidder challenged the award to Certified, even though, prior to award and in response to inquiry by the procurement officer, Certified had satisfied the procurement officer that it could meet the required qualifications. The decision of the Board included the following:

> "Although Certified failed to submit this information with its bid, such an omission may be considered a minor irregularity, and a procurement officer may accept, at any time prior to award, information necessary to establish the bidder's

responsibility. Covington Machine and Welding Company, MSBCA 2051, 5 MSBCA ¶436(1998); Peninsula General Hospital Medical Center, MSBCA 1248, 1 MSBCA ¶109(1985); Construction Management Associates, Inc. ("Construction Management"), MSBCA 1238, 1 MSBCA ¶108 (1985). This Board stated the rationale for this rule in Construction Management at page 4:

> Since an issue of responsibility does not affect the competitive position of the bidders, it is appropriate for the procurement officer to invite a bidder to cure an omission of information bearing on *responsibility* through receipt and *evaluation* of such information after bid opening.

Furthermore, such an omission may be cured after bid opening even when the solicitation purports to require that the information must be submitted with the bid. [Bold emphasis added.] Niedenthal Corp., MSBCA 1783, 4 MSBCA ¶353 (1994); Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA ¶82."

More recently, the MSBCA reiterated the distinction between matters pertaining to responsiveness vs. matters relating to responsibility, and the right to cure deficiencies relating to matters of responsibility. In the Appeal of Century Construction, Inc., MSBCA 2385, March 26, 2004, http://www.msbca.state.md.us/decisions/pdf/2385century.pdf, the IFB included a set of blank bid forms and affidavits which were to be filled in by the contractors submitting their bids. The Contract bid forms included eight separately priced bid items, six pre-priced allowance items, and five add-alternate items. The low bidder failed to properly complete the forms and provide the required information. The Board's decision stated:

"We have observed that, in contrast to matters of responsiveness, which concerns a bidder's "legal obligation to perform the required services in exact conformity with the IFB specifications,"responsibility concerns "a bidder's capability to perform a contract," and information concerning a bidder's responsibility may be submitted after bid opening. National Elevator, MSBCA 1252, 2 MSBCA ¶114 (1985) citing Carpet Land, Inc., MSBCA 1093, 1 MSBCA ¶34 (1983). So long as the bid unequivocally demonstrates the bidder's intent to pursue the requirements of the contract, affidavits accompanying a bid that pertain to such requirements will relate to the issue of responsibility, not responsiveness. Where matters of responsibility are concerned, "even where solicitation documents mandate submission of an item '[a] procurement officer may waive as a minor informality the failure to supply requested documents or information at time of bid opening bearing on responsibility. The bidder may supply such requested information after bid opening but before award of the contract.'" DeBarros Constr. Corp, MSBCA 1467, 3 MSBCA ¶215 (1989) at p.4 citing Calvert General Contractors Corp., MSBCA 1314, 2 MSBCA ¶140 (1986)."

In the Appeal of Simplex Grinnel LP, MSBCA 2344 and 2355, August 5, 2003, http://www.msbca.state.md.us/decisions/pdf/2344simplex.pdf, the bid required the bidder to do

certain work for which the bidder was not licensed. The Board found that the bidder was able to rectify this deficiency by contracting the required work after the bid opening, upon the request for more information from the procurement officer.

One last matter needs to be commented on. Appellee's Answer avers that GMHA has its own Procurement Rules and Regulations, which make the Guam Procurement Regulations irrelevant (see footnote 2, *supra*).

If the Public Auditor accepts this position, it invites wholesale rewriting of all the miscellaneous agencies' procurement regulations.

And, more importantly, it flies in the face of 5 GCA §§ 5130 and 5131, which requires the agencies to adopt regulations promulgated by the Policy Office and prevents the Policy Office from delegating its power to promulgate regulations. While these sections are contained in Article 2 of the Chapter containing the Procurement Act, there is nothing in §5125 which *exempts* the agencies from the provisions of Article 2. The effect of §5125 is simply to allow the agencies to conduct their own procurement outside the centralized procurement regime of Article 2, e.g., via GSA or DPW. The Public Auditor should not allow this contention to stand.

Conclusion

Appellant has gone to great lengths to emphasize the critical distinction between responsive and responsible because GMHA still does not "get it" that these are independent matters to be addressed, and that it is improper to make one determination and call it the other determination.

Appellee seeks to remove all consideration of responsibility from the carefully constructed scheme of the procurement process by allowing that issues of responsibility be overwritten with the determination of responsiveness; and that is the effect of saying, as Appellee argues, you are not responsible if you don't give us the information required for determining responsibility in the bid package.

Appellee is requiring that all matters of responsibility be established at the bid opening and not after. That is not what the law and regulations require. Appellant is not seeking any "concession" nor is it "getting another bite at any apple" by seeking a post-opening determination of responsibility, it is merely seeking its due process rights[6] for an inquiry into responsibility before it is effectively determined to be nonresponsible under the rubric of responsiveness.

The code and regulations, as argued in Appellant's Notice of Appeal, clearly require that any matter of determination of responsibility be accompanied by an inquiry. Appellee's argument is

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[6] 2 GAR §3116

that Appellant didn't supply the information necessary **to make a determination of responsibility** (see footnotes 1 and 2, *supra*), and that failure was a failure of responsiveness, which does not require any such inquiry. It is a thimble game whereby one is supposed to find responsibility either under the thimble of responsiveness or responsibility, but it is not the law.

This dispute should not be contentious. Appellant unequivocally offered to provide the work sought by GMHA at the lowest price. If, as Appellee claims, the essential reason Appellant's bid was rejected was that it failed to submit matter required to determine it to be responsible, it must have been in the best interests of the GMHA to make the simple inquiry[7] into responsibility to save the $53,000.00 it would have to pay the next higher bidder. It must not be presumed to be in the best interest of GMHA to spend an additional $53,000.00 on this contract simply to avoid asking a few questions delving a bit deeper into the contract responsibility of J&G.

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[7] Even Appellee points to its own regulation, Section 3-401(1), which provides, "The unreasonable failure of a bidder or offeror to promptly supply information **in connection with an inquiry** with respect to responsibility may be grounds for a determination of nonresponsibility...." Cf, 5 GCA §5230(a) which is virtually *verbatim*. 5 GCA §5320(b) then goes on to speak of rights of nondisclosure. This tracks the scheme of the regulations, in that 2 GAR §3116(a), which establishes the procedure for making the determination of nonresponsibility, as argued in Appellant's Notice of Appeal, includes §3116(b), which speaks of rights of nondisclosure. Appellee's arguments would write §3116 right out of the regulations.

Submitted this 19th day of July, 2007.

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