



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

IN THE APPEAL OF

Docket No. OPA-PA-16-013

IP&E HOLDINGS, LLC,

DECISION

Appellant.

I. INTRODUCTION

This is the Decision of the Public Auditor for appeal number OPA-PA-16-013 regarding IP&E Holdings, LLC's ("IP&E") Appeal of the Guam Waterworks Authority's ("GWA") denial of procurement protest dated September 16, 2016, concerning Invitation for Bid No. GWA-2016-09 ("the IFB"), which solicits bids for the supply of diesel fuel oil no. 2 and automotive gasoline (regular unleaded) for GWA's Transportation Fleet and Heavy Equipment.

The parties did not request a Hearing and agreed to submit this matter on the record. In reaching this Decision, the Public Auditor has considered and incorporates herein the procurement record and all documents submitted by IP&E, GWA, and Interested Party Mobil Oil Guam Inc. ("Mobil"). Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

II. FINDINGS OF FACT

1. On or about August 8, 2016, GWA issued the IFB which solicits bids for the supply of diesel fuel oil no. 2 and automotive gasoline (regular unleaded) for GWA's Transportation Fleet and Heavy Equipment. (Procurement Record, Tabs 3 & 13.)

1 2. On August 15, 2016, GWA issued Amendment No. 1 to the IFB, which rescheduled the
2 bid opening date to September 7, 2016, at 10:00 a.m. (Procurement Record, Tab 6.)

3 3. The IFB stated, in relevant part:

4 a. "The award of the Contract will be made by GWA to the lowest responsive and
5 responsible bidder whose bid conforms to the Invitation for Bids and would be most advantageous
6 to GWA, in terms of price and all other factors considered as determined by GWA as provided in
7 the bid. GWA reserves the right to award the Contract to a vendor other than the lowest price
8 offeror and to reject any or all offers if it is determined to be in the best interest of the Territory of
9 Guam. A written Notice of Award (or acceptance of offer) will be mailed or otherwise furnished
10 via facsimile transmittal to the successful bidder within the time for acceptance specified in the
11 offer. GWA reserves the right to waive informalities and minor irregularities in bids received. In
12 the evaluation process, the following factors will be considered: (a) Price;

13 (b) Whether the bidder's ultimate offer meets and conforms to the announced requirements
14 of GWA in all material respects (specifications);

15 (c) Service rendering capability, status as producer, refiner, broker, or agent and his direct
16 financial responsibility;

17 (d) Overall clarity and presentation of bid;

18 (e) Whether the bidder has:

19 (1) the available appropriate financial, material, equipment, facility, and personnel
20 resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all
21 Contractual requirements;

22 (2) a satisfactory record of performance;

23 (3) a satisfactory record of integrity;

1 (4) qualified legally to Contract with the territory and properly licensed to conduct
2 such business on Guam; and

3 (5) supplied all necessary information in connection with the inquiry concerning
4 responsibility,” (Procurement Record, Tab 13 at 8);

5 b. “Bidder agrees to furnish and GWA agrees to accept and pay for all of Diesel
6 Fuel Oil No. 2 and Automotive Gasoline, Regular Unleaded (both fuels referred to in the
7 solicitation as Fleet Fuels) requirements for the Authority’s transportation fleet for the term of the
8 Contract. **Estimated** total quantity for the fleet’s fuel shall be:

9
10 (a) ***Diesel Fuel Oil No. 2: approximately 50,000 gallons per year (estimated).***

11 (b) ***Automotive Gasoline, Regular Unleaded: approximately 115,000 gallons per year***
12 ***(estimated).***” (Procurement Record, Tab 13 at 10 (emphases in original).)

13
14 4. IP&E, Mobil, and South Pacific Petroleum Corp. (“SPPC”) submitted bids in response
15 to the IFB.

16 5. On September 7, 2016, GWA conducted a bid opening.

17 6. IP&E bid a price offer of \$1.3200 per gallon for Diesel Fuel Oil No. 2 and \$1.5280 per
18 gallon for Automotive Gasoline, Regular Unleaded. (Procurement Record, Tab 14 at 16.)

19 7. Mobil bid a price offer of \$1.335 per gallon for Diesel Fuel Oil No. 2 and \$1.523 per
20 gallon for Automotive Gasoline, Regular Unleaded. (Procurement Record, Tab 16 at 16.)

21 8. SPPC bid a price offer of \$1.710 per gallon for Diesel Fuel Oil No. 2 and \$1.963 per
22 gallon for Automotive Gasoline, Regular Unleaded. (Procurement Record, Tab 15 at 16.)

23 9. On September 7, 2016, GWA prepared Bid Abstracts showing the bid prices offered by
24 IP&E, Mobil, and SPPC. (Procurement Record, Tab 18.)
25
26
27

1 10. In a Memorandum from the Evaluation Committee Members to the General Manager
2 of GWA, the Evaluation Committee stated that it determined based on the cost analysis attached
3 thereto that Mobil submitted the lowest cost overall, thereby being most advantageous to
4 GWA in terms of fuel usage stated in the cost analysis. The Evaluation Committee stated that,
5 “[a]s price and all other factors where [sic] considered in overall cost for Automotive Gasoline,
6 Regular Unleaded and Diesel Fuel Oil No. 2, the committee members hereby recommend to
7 proceed issuing the award to Mobil Oil Guam for Diesel Fuel Oil No. 2 at a cost per gallon of
8 \$1.335 and Automotive Gasoline, Regular Unleaded at a cost of \$1.523” The cost analysis
9 attached to the Memorandum shows the amount and price of actual gas purchased from October
10 2013 to July 2016. The cost analysis also shows IP&E’s and Mobil’s prices of diesel and unleaded
11 gas based on projected FY2016 actuals, and composite prices. The cost analysis shows 23,689.64
12 gallons of diesel based on projected FY2016 actuals and 104,477.90 gallons of unleaded based on
13 projected FY2016 actuals. (Procurement Record, Tab 24 at 3.)

14
15
16 11. In a Bid Status dated September 14, 2016, GWA informed IP&E and SPPC they were
17 not awarded the contract based on “High price.” (Procurement Record, Tab 25.) The Bid Status
18 further informed that the Bid is recommended for award to Mobil for Diesel Fuel Oil No. 2 and
19 Automotive Gasoline, Regular Unleaded. (Id.)

20
21 12. On September 14, 2016, GWA issued a Notice of Conditional Award to Mobil, advising
22 that the bid price of \$1.523 for Automotive Gasoline, Regular Unleaded and 1.335 for Diesel Fuel
23 Oil No. 2 has been accepted by GWA. The Notice further stated that the Notice of Award is
24 conditional on obtaining the approval of the Guam Consolidated Commission on Utilities for any
25 award over \$250,000 and the approval of the Guam Public Utilities Commission where the total
26 value over the life of the contract could exceed \$1M. (Procurement Record, Tab 27.)
27

1 the award to IP&E as the lowest responsive and responsible bidder. Pursuant to 5 GCA § 5703 and
2 2 GAR 4 § 12103, the Public Auditor shall review and determine GWA’s denial of IP&E’s protest
3 de novo.

4 In its procurement appeal, IP&E states that GWA was “required to use the estimated
5 quantities provided in the IFB for evaluation and award rather than unknown factors which were
6 stated in the agency response.” (Notice of Procurement Appeal at 2.) IP&E argues that, “[b]y
7 failing to include rational estimates, GWA is making an awarded [sic] based on factors outside of
8 the IFB and in contravention of Guam procurement law and regulations.” (Protestor Response to
9 Agency Report & Statement at 3.) The procurement regulation cited by IP&E is 2 GAR 4 §
10 3109(n)(1), which provides:
11

12 The contract is to be awarded “to the lowest responsible and responsive bidder”
13 whose bid meets the requirements and criteria set forth in the Invitation for Bids.
14 See 5 GCA §5211(g) (Competitive Sealed Bidding, Award) of the Guam
15 Procurement Act. The Invitation for Bids shall set forth the requirements and
16 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 4 § 3109(n)(1).

17 IP&E argues that the IFB stated an estimated requirement of 50,000 gallons of diesel and
18 115,000 gallons of MoGas, but that GWA’s award evaluation quantities were instead 31,270.32
19 gallons of diesel and 159,000 gallons of MoGas. “The actual volumes used in determining award
20 were off by almost 50% on diesel and almost 45% on MoGas from the stated requirements.”
21 (Protestor Response to Agency Report & Statement at 2.) Using the projected FY2016 actuals,
22 GWA determined that IP&E had a composite price of \$1.4896 while Mobil had a lower composite
23 price of \$1.4883.¹
24

25
26
27 ¹ IP&E’s reference for 31,270.32 gallons of diesel and 159,000 gallons of MoGas are actually projected costs.

1 GWA contends that the IFB contains no language indicating that the estimated quantities
2 will be used as part of the evaluation criteria. According to GWA, the IFB instead provides that
3 “the awarded contract will be made by GWA to the lowest responsive and responsible bidder
4 whose bid conforms to the invitation for bids and *would be most advantageous to GWA*’ and that
5 ‘GWA reserves the right to award the Contract to a vendor *other than the lowest price offeror*.’”
6 (Agency Statement at 2 (quoting the IFB) (emphases added).)
7

8 GWA states that it did not use actual usage as the sole determining factor in its criteria, but
9 that it also used trends and how GWA’s infrastructure changes over the next few years would
10 impact gasoline usage over the life of the Contract. Over the past three years, GWA’s actual fuel
11 usage shows a trend down in diesel usage. Also, GWA’s gasoline consumption decreased over the
12 last couple of years. GWA states that those trends appear to have leveled off, but gasoline usage is
13 expected to climb somewhat over the next several years due to expanded capital improvement
14 projects coming on-line. GWA concluded that “a lower gasoline price from a single provider is
15 more advantageous to GWA over the life of the contract and its potential extensions.” “GWA
16 contends that to award the contract on the method it used is not arbitrary but, a reasonable and
17 rational approach entirely within its discretion.” (Agency Statement at 2 and 3.)
18

19 Mobil has joined in the arguments posed by GWA, that there was no language in the IFB
20 explicitly stating that the estimated quantities would be used as part of the evaluation criteria, that
21 the IFB specifically provides that the awarded contract will be made by GWA to the lowest
22 responsive and responsible bidder whose bid conforms to the invitation for bids and would be most
23 advantageous to GWA, and that IP&E was privy to the actual figures used by GWA in determining
24 the lowest possible bidder and was therefore in a better position than Mobil to fashion its bid and
25 could therefore have not been prejudiced. Also, Mobil believes that the advantage of its fuel
26
27

1 distribution network and the high-flow diesel dispensers present at Mobil's stations place it as the
2 most advantageous choice for GWA even if estimated quantities were used. Mobil requests that
3 IP&E's protest be denied so that GWA may proceed with awarding the contract to Mobil as the
4 lowest responsive and responsible bidder. (Mobil Br. at 1-3.)
5

6 The Public Auditor finds that the IFB specifically includes "price" as a factor in the
7 evaluation process, and that the IFB required bidders to submit their prices based on the estimated
8 quantities of diesel and gasoline indicated therein. Nowhere in the IFB is it stated that GWA's
9 actual usage of diesel and gasoline is an evaluation criterion. Likewise, the quantities of 23,000-
10 plus diesel gallons and 104,000-plus gasoline gallons based on projected FY 2016 actuals are not
11 stated anywhere in the IFB. Further, the trends of GWA's usage and the impact that GWA's
12 infrastructure changes over the next few years would have on gasoline usage over the life of the
13 Contract were not included in the IFB as criteria in the evaluation process. Thus, the Public Auditor
14 finds that actual usage of diesel and gasoline, the trends of GWA's usage, and the impact that
15 GWA's infrastructure changes over the next few years would have on gasoline usage over the life
16 of the Contract are criteria not disclosed in the IFB. As the IFB was required to set forth the
17 requirements and criteria which would be used to determine the lowest responsive bidder and no
18 bid could be evaluated for any requirement or criterion not disclosed in the IFB, 2 GAR 4 §
19 3109(n)(1), the bids, including IP&E's bid, should not have been evaluated by using these
20 undisclosed criteria. Instead, GWA was limited to using only the requirements and criteria
21 disclosed in the IFB, including the price based on estimated quantities of diesel and unleaded
22 gasoline, to determine the lowest responsive bidder.
23
24

25 It is also noteworthy that the projected FY 2016 actuals of 104,000-plus gallons for
26 unleaded gasoline, which are contained in the cost-analysis used by GWA, included diesel and
27

1 premium gasoline usage. Accordingly, the cost analysis incorrectly projected the unleaded gasoline
2 usage for FY 2016. The cost analysis projected 104,477.90 gallons for FY 2016 unleaded gasoline
3 when it should have been 80,733 gallons. For this additional reason, the actual use figure was
4 improperly used by GWA to determine lowest responsive bidder.

5
6 The Public Auditor finds that it is in the best interests of the Territory that GWA purchase
7 diesel and unleaded gasoline at the lowest prices offered. As IP&E was the lowest responsive
8 bidder as to diesel, bidding \$1.3200 per gallon, and Mobil was the lowest responsive bidder as to
9 unleaded gasoline, bidding \$1.523 per gallon, GWA should have awarded IP&E the contract for
10 diesel and should have awarded Mobil the contract for unleaded gasoline. GWA admits that
11 awarding two contracts is permissible under the IFB, as it considered splitting the contracts between
12 fuel types and having a supplier for diesel and another for gasoline. (Agency Statement at 2.)
13

14 15 **IV. CONCLUSION**

16 Based on the foregoing, the Public Auditor hereby determines the following:

17 1. GWA was required to use the estimated quantities of gallons of diesel and unleaded
18 gasoline provided in the IFB for evaluation and award rather than unknown factors such as actual
19 usage of gasoline, trends of actual usage, and the impact that GWA's infrastructure changes over
20 the next few years would have on gasoline usage over the life of the Contract.


21
22 2. IP&E was the lowest responsive bidder as to diesel and Mobil was the lowest responsive
23 bidder as to unleaded gasoline.

24 3. GWA shall award IP&E the contract for diesel and shall award Mobil the contract for
25 unleaded gasoline.
26
27

1 4. Accordingly, IP&E’s procurement appeal is hereby GRANTED IN PART and DENIED
2 IN PART.

3 This is a Final Administrative Decision. The Parties are hereby informed of their right to
4 judicial review in the Superior Court of Guam of a Decision of the Public Auditor under 5 G.C.A.
5 Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law. In
6 accordance with 5 G.C.A. § 5481(a), such action shall be initiated within fourteen (14) days after
7 receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties
8 and their respective attorneys, in accordance with 5 G.C.A. § 5702, and shall be made available for
9 review on the OPA website at www.opaguam.org.

10
11 SO ORDERED this 23rd day of November, 2016.
12

13
14 

15 DORIS FLORES BROOKS, CPA, CGFM
16 Public Auditor of Guam
17
18
19
20
21
22
23
24
25
26
27