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OFFICE OF THE PUBLIC AUDITOR

GUAM

IN THE APPEAL OF
JRN AIR CONDITIONING &
REFRIGERATION, INC.

Appellant.

APPEAL NO. OPA-PA-10-007

**APPELLANT'S COMMENTS IN
RESPONSE TO AGENCY REPORT;
DECLARATION OF MARTIN
MERCADO**

I. Introduction

This appeal is a result of the Guam Department of Education's (hereinafter "GDOE") disregard of the Guam Procurement Law as set forth in Title 5 Chapter 5 of the Guam Code Annotated. The procurement law mandates that all territorial contracts be awarded by competitive sealed bidding. 5 G.C.A. § 5210. The requirements for competitive sealed bidding include (1) mandatory provisions for an Invitation for Bids (hereinafter "IFB"); (2) how bids are accepted and evaluated; and (3) to whom and how an award is made. See 5 G.C.A. § 5211. The Procurement Record shows that GDOE ignored these statutory provisions in the procurement of Preventive Maintenance and Repair of Central Air-Conditioning Equipment for All GDOE Public Schools and Support Facilities.

All IFB's must include a provision that bidders comply with the Article 13 of Title 5 of



the Guam Code (Wage and Benefits Determination) and also requires GDOE to obtain a demonstration of compliance prior to awarding a contract. The Procurement Record shows that GDOE failed obtain a demonstration of compliance in violation of the law.

All bid submissions accepted must be evaluated objectively. The Procurement Record shows that GDOE failed to sufficiently provide criteria to the offerors so that GDOE could objectively evaluate the bid submissions.

The purchasing agency is required to determine if the offeror is in fact the lowest most responsible bidder. This process requires GDOE to determine if the offeror has met all the requirements set forth in the IFB and more importantly, that the minimum bid be sufficient to comply with Article 13, §§ 5801 & 5802 (Wage and Benefit Determination). The Procurement Record shows that GDOE failed to ensure that the minimum bids were sufficient to comply with the wage and benefit determination as required by the law.

Strict adherence to the Guam procurement law is the only way the government of Guam can protect the quality and integrity of the procurement process. Thus, in this case the only viable remedy based on the violations of the procurement law is termination of the award of GDOE IFB 007-2010 to J&B Modern Tech and the issuance of a new IFB for Preventive Maintenance and Repair of Central Air-Conditioning Equipment for all GDOE Schools and Support Facilities. An attempt to ratify or affirm the award to J&B Modern Tech is not in the best interest of the Territory as it would provide precedent allowing violations of the Guam procurement law, specifically 5 G.C.A. §§ 5211 (b), (e), & (g) and thus any violation should not be waived.

GDOE's failure to ensure that its bid specifications were adequate and that J&B Modern Tech's bid was in compliance with Article 13 (Wage and Benefits Determination) is a violation of Guam procurement law.

The Guam Procurement Law Section 5211 sets forth the procedure and requirements for

awarding a contract by competitive sealed bidding.¹

The IFB must include a purchase description, a recitation of the Wage Determination most recently issued by the U.S. Department of Labor, and all contractual terms and conditions applicable to the procurement *including* a demonstration of compliance with Article 13, §§ 5801 & 5802 of this Chapter. 5 G.C.A. § 5211 (b).

Once the bids are closed, all submitted bids must be evaluated based on the requirements set forth in the IFB. 5 G.C.A. § 5211 (e). Criteria that affects the bid price and considered in the evaluation for award must be objectively measurable. *Id.* In evaluating the bids, only the criteria set forth in the IFB may be used in bid evaluations. *Id.*

A contract is generally awarded by written notice to the *lowest responsible bidder whose bid meets the requirements and criteria set forth in the IFB and whose bid amount is sufficient to comply with Article 13, §§ 5801 & 5802 of this Chapter.* 5 G.C.A. § 5211 (g).

Thus in order to comply with the procurement law, GDOE was required to identify the recent wage determination issued by the U.S. Department of Labor Wage Determination to be used and to notify all offerors to demonstrate compliance with the wage determination mandated by Article 13. GDOE was also required to ensure that evaluation criteria affecting bid price be objectively measured, which required GDOE to identify specific occupation titles so the bids could be evaluated on the same labor cost requirement for preventive maintenance, minor repairs, and major repairs as noted in the IFB. Finally, GDOE was required to determine if the minimum bid price was sufficient to comply with Article 13 prior to the award. The Procurement Record shows that GDOE failed to comply with these requirements of the procurement code.

¹ Contracts shall be awarded by competitive sealed bidding unless otherwise stated. 5 G.C.A. §5211(a).

- A. GDOE failed to obtain a demonstration of compliance with Article 13, §§ 5801 & 5802 in violation of the Guam procurement law.

Article 13 of the Guam procurement law states that in cases where a contract between the government of Guam and a contractor is executed for the provision of a service to the government of Guam and where the contractor employs a person(s) whose purpose, in whole or in part, is the direct delivery of service contracted by the government of Guam, the contractor shall pay the employee(s) in accordance with the Wage Determination for Guam issued and promulgated by the U.S. Department of Labor. 5 G.C.A. §5801. In addition to paying the wage as determined by the U.S. Department of Labor, the contractor shall incorporate provisions mandating health and similar benefits for employees, such that the benefits having a minimum value as detailed in the Wage Determination and shall contain provisions guaranteeing a minimum of ten (10) paid holidays per annum per employee. 5 G.C.A. § 5802.

GDOE IFB 007-2010 required bidders to comply with the U.S.D.O.L. Wage Determination as required by §5211 (b). Procurement R. Exhibit 1 (July 9, 2010). However, GDOE did not require the any offeror to demonstrate compliance with 5 G.C.A. §§ 5801 & 5802. Mercado Decl. ¶5 . After conducting the evaluations and noting that J&B Modern Tech presented the lowest bid, Ms. Carmen Taitano, GDOE Buyer I presented the Analysis and Recommendation to the Supply Management Administrator recommending J&B Modern Tech be awarded the contract. Procurement R. Exhibit 4 (September 3, 2010). The Analysis and Recommendation states "after further review, it is recommended to award the lowest most responsive and responsible bidder," namely J&B Modern Tech. The memorandum does not identify what type of review was conducted or whether any additional effort if any was made to ensure compliance with §§ 5801 & 5802 as required by law.

Instead GDOE relied entirely on Form E (Declaration of Compliance with the Wage

Determination). Procurement R. Exhibit 5 (October 13, 2010) & (October 28, 2010). Form E is a declaration signed by an offeror attesting (1) that the signor is authorized to present the bid; (2) that the offeror has read and understands the provisions of Article 13, §§ 5801 & 5802; (3) that the offeror is in full compliance with §§ 5801 & 5802; and (4) that the offeror has attached the most recent wage determination applicable to Guam by the U.S. Department of Labor. Submission of Form E is insufficient to comply with 5211(b) because it disregards the statute's mandate to demonstrate compliance as a condition of award. Demonstrating compliance with §§ 5801 & 5802 can easily be done by submitting documentation showing that the bid price is at a minimum complies with Article 13. The law requires more than just a declaration or a promise to comply with the wage and benefit determination provisions; the law requires a demonstration of compliance. J&B Modern Tech's submission of Form E without providing sufficient support demonstrating compliance falls short of the mandate of § 5211(b). Thus, GDOE's failure to request and require the successful bidder to demonstrate compliance violates the Guam procurement law.

B. GDOE failed to include the specific occupation codes (title) in the IFB in violation of the Guam procurement law.

All IFB's must be evaluated based on the requirements set forth in the IFB and any *criteria that affects bid price must be "objectively measurable."* 5 G.C.A. §5211 (e).

In this IFB, the sole evaluation factor as indicated in the General Specifications² is *labor cost* for (1) preventive maintenance; (2) minor repairs; and (3) major repairs, installations, relocation and replacements of central air-condition equipment. Procurement R. Exhibit 1 (July 13, 2010). Because the sole evaluation factor is "labor cost", the most significant criteria for bidders is the identification of a specific occupation that is required by GDOE. Each occupation

² See Item 1 of Bid Specifications beginning on page 18 of the IFB.

listed in the Wage Determination correlates with a specific wage rate and the stated rate is the minimum rate that offeror must pay an employee holding the specific occupation. For instance, an employee working for an offeror bidding on a government of Guam service contract holding the title of Air Condition Mechanic must be paid a minimum of \$15.76 per hour.³ Procurement R. Exhibit 3 (September 1, 2010). Additionally, the wage determination requires that the same employee be entitled to health and welfare benefits which amounts to an additional \$3.50 per hour. Id.

Failing to identifying the specific occupation would make a decision for award in this case subjective and arbitrary. In other words, failure to specify the type of occupation GDOE required, the IFB failed to provide a level playing field for all bidders, a clear violation § 5211 (e) of the Guam procurement law. In order to objectively measure the bids GDOE should have identified the specific occupation in the specifications because that is only way the bids could be objectively evaluated.

Instead of identifying a specific occupation title, the IFB only requires that the offeror provide a minimum of two (2) crews for installation and three (3) crews for repair and preventive maintenance per district (1 technician and 1 helper or a total of 10 persons per district). The U.S.D.O.L. Wage Determination category for Mechanics and Maintenance and Repair Occupations incorporates over 60 different occupations. Absent a specific occupation, each bidder may subjectively apply different occupation codes in submitting its bid.

For instance, the IFB called for each crew to include a "helper". The Wage Determination does not include an occupation title of "helper". Thus a bidder may use occupation title "general maintenance worker" which requires a minimum wage of \$11.95 per hour; or a bidder may use the occupation title "laborer" which requires a minimum wage of

³ U.S. Department of Labor Wage Determination, 2005-2147 (Rev. 12 8/19/2010).

\$10.65 per hour; or a bidder may use the occupation title "maintenance trades helper" which requires a minimum wage of \$9.92 per hour.⁴ Without clearly specifying an occupation the bid price cannot be objectively measured. The subjective application of occupation codes violates §5211 (e) because it does not provide for a level playing field for the bidders in violation of the procurement law.

C. GDOE failed to ensure that J&B Modern Tech's bid met the requirements and criteria set forth in the IFB.

In awarding a contract the purchasing agency must determine whether the successful bidder is the lowest responsible bidder whose bid meets the requirements and criteria set forth in the IFB and whose bid amount is sufficient to comply with Article 13 (Wage and Benefit Determination). 5 G.C.A. §5211 (g).

Prior to awarding a contract, the procurement officer must be satisfied that the prospective contractor is responsible. 2 G.A.R. § 3116(b)(4). The Public Auditor has concluded that it is serious error and grounds for sustaining a protest, if an agency had reason to suspect that an issue affecting a bidder's determination of responsibility exists and does not conduct an inquiry prior to awarding a contract. In the Appeal of Latte Treatment Center, Inc., OPA-08-008.

1. GDOE failed to conduct a responsibility inquiry to ensure that J&B Modern Tech's bid is an amount sufficient to comply with the Wage and Benefits Determination prior to awarding the contract.

On September 7, 2010, JRN requested presented in writing that J&B Modern Tech may not be in compliance with the Wage and Benefit Determination as required by 5 G.C.A. § 5211.⁵ On the same day, Mr. Brian Mafnas⁶ instructed his staff to obtain a breakdown from all bidders

⁴ Wage Determination No. 2005-2147 (Rev. 12 8/19/2010).

⁵ Letter from JRN not included GDOE Procurement Record.

⁶ Subsequent to the JRN's Protest and prior to the award of this procurement, Mr. Brian Mafnas, Supply Management Administrator resigned.

of their bids to ensure that the bids comply with the Wage and Benefits Determination.⁷ Id. The Procurement Record does not show that an inquiry was made prior to the award. JRN was not contacted to provide a breakdown or to clarify its bid price. Disregarding this instruction is a violation of the procurement law and puts into question the quality and integrity of procurement process.

Rather than following Mr. Mafnas' instructions the acting administrator sent a request to J&B Modern Tech asking it to address and explain the issue presented by JRN.⁸ On September 27, 2010 J&B Modern Tech replied via email to the acting administrator stating that they will comply with the wage and benefit determination, but failed to provide any evidence of compliance.⁹ Procurement R. Exhibit 5 (September 27, 2010). The acting administrator disregarded the instruction and the law by rejecting JRN Air Conditioning's (hereinafter "JRN") protest filed on September 11, 2010 without conducting further inquiry. In fact the language in the Agency Report infers that a violation of the Wage Determination provisions is allowed if J&B Modern Tech acknowledges that it has to pay the prevailing wages and benefit determination even if out of pocket. Procurement R. Exhibit (October 13, 2010).

GDOE's position is erroneous because the law requires an offeror to pay the prevailing wage as stated in the latest wage determination. 5 G.C.A. §5801. The law also requires that a bid be a minimum of the amount needed to pay for the wage determination. § 5211(g). For instance, assuming the appropriate occupation code for a technician is 23410 (Heating, Ventilation, and

⁷ After receiving a request for a reevaluation of the bids from JRN on September 7, 2010 based on, GDOE Supply Administrator instructed staff to obtain a demonstration of compliance. In a note to his staff, GDOE's Supply Administrator clearly recognized that the winning bidder's submission "seemed low" and instructed staff to request for a breakdown of the bids submitted to ensure the bids comply with §§ 5801 & 5802.

⁸ Email correspondence not included in GDOE Procurement Record.

⁹ A response from J&B Modern Tech was not included in the Procurement Record. The only support provided was a payroll register dated September 17, 2010, which further indicated that J&B Modern Tech did not employ the sufficient number of employees to meet the requirements of 5 crews per district (1 technician and 1 helper per crew). A review of the register clearly indicates that J&B Modern Tech only employed three (3) A/C Technicians. Thus, J&B should have been deemed nonresponsive and should not have been awarded the contract.

Air-Conditioning Mechanic) the appropriate wage rate is \$15.76 per hour. Additionally, the law requires all occupations to include in addition to their applicable rate, health and welfare benefits of \$3.50 per hour. 5 G.C.A. § 5802.

Thus, based on the applicable wage rate and the health and welfare benefits rate, the minimum bid amount could not be below \$19.26 (\$15.76 + \$3.50) per hour. J&B Modern Tech bid the following: \$15.85 per hour for Preventive Maintenance; \$15.90 per hour for Minor Repairs; and \$15.90 per hour for Major Repairs. Procurement R. Exhibit 3. (September 2, 2010). All the amounts fall below the minimum bid requirement of \$19.26 thus clearly, J&B Modern Tech could not be deemed the lowest responsible bidder.

In GDOE's letter to JRN rejecting the protest, GDOE states that it determined that J&B Modern Tech was in compliance with the statute; that the bid abstract indicates that J&B Modern Tech was the lowest bidder; and by acknowledging and signing Form E (Declaration Re Compliance with U.S.D.O.L. Wage Determination) J&B Modern Tech is in compliance with the statute. Procurement R. Exhibit 5 (October 13, 2010).

GDOE posits that the completion of Form E (Declaration of Compliance with the Wage Determination) is sufficient to comply with the statute.¹⁰ Exhibit 5 (October 13, 2010). This position is a fallacy because FORM E is nothing more than a promise to comply *and* an acknowledgement to pay the prevailing wages and benefits as determined in the U.S. DOL Wage Determination. FORM E is neither actual compliance nor is it a demonstration of compliance. GDOE's position is not supported by law and is erroneous because the law requires a minimum bid in this case to ensure compliance. 5 G.C.A. §5211 (g).

GDOE's clearly misinterprets the statute in that they take the position that an inquiry or demonstration of compliance is permissive so long as the winning bidder acknowledges that it

¹⁰ GDOE Agency Report for OPA-PA-10-007 (November 15, 2010).

must pay the required wage and benefits even if it must pay "out of pocket." Procurement R. Exhibit 5 (October 13, 2010) & (October 28, 2010). However §5211 (g) makes it mandatory for the purchasing agency to ensure that prior to award the bid "include at a minimum an amount sufficient to comply with the wage and benefit determination." GDOE's knowledge that the bids may be below the wage and benefit determination coupled with its failure to conduct a responsibility inquiry is serious error and is sufficient grounds to sustain this protest.

2. GDOE failed to conduct a responsibility inquiry to ensure that J&B Modern Tech had sufficient employees as required by the IFB.

On September 17, 2010, GDOE was made aware that the successful bidder did not employ the adequate number of technicians or helpers to comply with the requirements of the IFB.¹¹ Procurement R. Exhibit 5 (September 17, 2010). J&B Modern Tech's payroll register listed three (3) air-conditioning technicians and one (1) general maintenance helper. Id. Upon receiving this information, GDOE should have conducted a responsibility inquiry to determine if in fact J&B Modern Tech does have sufficient number of employees to comply with the crew requirements.

The Guam procurement regulations require an offeror to supply information required by the procurement officer concerning the responsibility of the contractor. 2 G.A.R. § 3116 (b)(2)(B). If the contractor fails to supply the information the procurement officer shall base the determination upon the information available or find the contractor nonresponsible.

The IFB Bid Specifications Item F(4) defines the Crew requirements. Procurement R. Exhibit 1 (July 13, 2010). The IFB states that the Contractor must provide a minimum of two (2) crews for installation and three (3) crews for repair and preventive maintenance per district.¹² Each crew should include one (1) technician and one (1) helper or a total of ten (10) persons per

¹¹ In response to a request by the acting administrator to explain JRN's protest allegations, J&B Modern Tech submitted to GDOE a copy of its payroll register dated September 17, 2010.

¹² Guam DOE schools are divided into four (4) districts.

district. Based on GDOE's Agency Report and the Procurement Record, GDOE did not request supplemental information, in other words GDOE failed to conduct a responsibility inquiry regarding whether J&B Modern Tech had sufficient number of employees to perform under the IFB in light of its knowledge of the number of employees J&B Modern Tech employed as of September 17, 2010. Absent further inquiry, GDOE should have made a determination that J&B Modern Tech is not a responsible bidder because it did not employ a sufficient number of employees to perform under the IFB. Failure to conduct a responsibility inquiry to determine responsibility violates the procurement law.

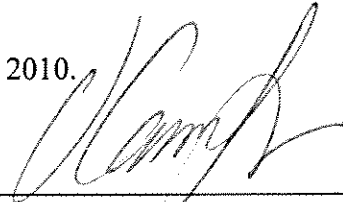
III. CONCLUSION

The Guam procurement law was clearly circumvented in this case and thus the awarded contract should be terminated immediately. Ratifying or affirming the award would set dangerous precedent for future procurement in that it would allow defective procurements to be awarded to nonresponsive or nonresponsible offeror which is a violation of the Guam procurement law.

On the grounds set forth above, JRN's procurement protest should be granted. The award to J&B Modern Tech for GDOE IFB 007-2010 should be terminated immediately and GDOE should be required to issue a new IFB for Preventive Maintenance and Repair of Central Air-Conditioning Equipment for all GDOE Public Schools and Support Facilities with one (1) weeks of termination. Finally, JRN should also be reimbursed for costs relating to pursuing this appeal and the underlying protest.

DATED: Hagåtña, Guam, November 24, 2010.

CARLSMITH BALL LLP




VINCENT C. CAMACHO
Attorneys for Appellant
JRN Air Conditioning & Refrigeration, Inc.

DECLARATION OF MARTIN MERCADO

I, Martin Mercado, declare under penalty of perjury as follows:

1. I have personal knowledge of the events referenced in this Declaration.
2. I attended the pre-bid conference for IFB-007-2010 last July 27, 2010 at CIP office, Piti.
3. As far as I remember there were 5 bidders who attended the pre-bid.
4. In the pre-bid conference there were some inquiries that were brought up and some clarifications that were clarified on the bid documents including how many exact AC units were there in each school. They also mentioned that all works should be coordinated with school administrators, The pre-bid conference took only a short time because IFB-007-2010 and IFB-008-2010 are almost the same.
5. At the pre bid conference GDOE did not ask any evidence if the company/bidder is complying with the wage determination.

Dated this 24th day of November, 2010.



MARTIN MERCADO