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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY PROCUREMENT APPEAL

IN THE APPEAL OF	)	DOCKET NO. OPA-PA-13-001
	)	
MORRICO EQUIPMENT, LLC.	)	**REBUTTAL TO COMMENTS**
	)	
Appellant.	)	
	)	

Respondent, General Services Agency, Department of Administration ("GSA") hereby provides this rebuttal to the comments of Appellant filed in this matter on February 28, 2013.

I. Appellants Comments Untimely Filed.

The General Services Agency filed its Agency Report in a timely manner on February 14, 2013. Appellant's Comments On Agency Report were, with neither justification nor request for extension, untimely filed in this matter on February 28, 2013. Under the Rules of Procedure for Procurement Appeals to the Public Auditor ("Rules"), Appellant's comments were due to be filed on February 25, 2013. "Comments on the agency report by an appellant ... shall be filed with the Public Auditor within ten (10) days after the Public Auditor's receipt of the report, with a copy to the agency office that furnished the report." 2 GAR, Div.

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4, §12104(c) (4). The proper manner in which to count time under the Rules is provided at 2 GAR, Div. 4, §12102 (g) which states:

> "In computing any period of *time* prescribed by these rules, the day the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, a Sunday, a legal holiday or when the Office of the Public Auditor is closed by order of the Governor, in which event a period extends until the end of the next day which is not a Saturday, a Sunday, a legal holiday or when the office is not closed. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, legal holidays and days the government offices are closed by order of the Governor shall be excluded in the computation.

In this case, the tenth day from February 14, 2013 is Sunday, February 24.[1] Appellant's comments were due to be filed in this matter on Monday, February 25, 2013. The Rules provide that "[t]he failure of an Appellant or Interested Party to comply with the time limits stated in this section may result in resolution of the Appeal without consideration of the comments untimely filed." 2 GAR, Div. 4, §12104(c)(5). [Emphasis added.] This time rule and the applicable consequence for failure to meet the rule apply specifically to the Appellant. As the party that initiated this proceeding, a proceeding that has stayed the government from proceeding to acquire very important life-saving equipment for the Guam Fire Department, it should be held to strict compliance with this rule. The Comments On Agency Report filed by Appellant should be ignored by the Public Auditor as untimely filed.

[1] The Rules do specifically provide for counting "work days" in some time prescriptions. See, for example, the time for filing the Agency Report at §12104(c)(3) which states that "the Agency Report shall be submitted within ten working days of receipt by the Agency of the Notice of Appeal ..."

II. The Multi-Step Bid Clearly Advises That Delivery Time is a Mandatory Requirement.

In the event that the Public Auditor chooses to consider the untimely Comments On Agency Report, then the assertion by Appellant in its Comments that the Multi-Step Bid does not set out clearly what the minimum requirements of the solicitation are, is both erroneous and misleading. First, the Appellant goes to some length to show that the Multi-Step Bid does define a series of minimum requirements. I would refer to the several pages of the Comments where minimum requirements of the solicitation are set out by the Appellant itself. See Comments, pages 4 and 5. Appellant's complaint seems to be that GSA did not set out the mandatory delivery requirement in the same manner as these other mandatory requirements.

What GSA did do was state in at least five different places that the delivery date is a mandatory requirement of this solicitation. GSA **highlighted** this requirement and underlined this requirement and required a **guarantee** that the apparatus will be delivered on time. This is covered in the Agency Report at page 4 and page 5. In the Agency Report the specific sections of the solicitation are both identified and quoted, and there is no need to restate that material here. Suffice it to say, GSA effectively communicated the importance and the mandatory nature of the delivery date. That other mandatory requirements of the solicitation are stated differently does not mean that this particular requirement was not stated clearly, obviously and to the point. It was. Appellant offers no law or regulation that would require a specific format for setting out what are the material requirements of a solicitation. The applicable law with regard to responsiveness has been referenced in the Agency report. The law is necessarily general because procurement involves the acquisition

of tens of thousands of different types of supplies and services. But in this solicitation, GSA was clear with regard to the delivery requirement. How clear was GSA? Crystal clear.

III. GSA Not Obligated To Ignore Non-Responsiveness of Proposals To Insure Competition.

Appellant argues that the procurement rules require GSA to virtually ignore the fact that a technical proposal is non-responsive in favor of assuring some level of competition in this multi-step proposal.[2] Appellant references the following provision of the procurement regulations in support of this proposition:

> "The Procurement Officer may initiate Phase Two of the procedure if, in the Procurement Officer's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the Procurement Officer finds that such is not the case, the Procurement Officer shall issue an amendment to the Invitation for Bids or engage in technical discussions as set forth in Subsection 3109(t)(5) of this Section."

2 GAR, Div. 4, §3109(t) (4). However, Section 3109(t) (4) must be read and understood with other applicable rules set out in the procurement regulations. Specifically, Section 3109(t) must be read in accord with 2 GAR, Div. 4, §3102(c), which states:

> "(c) Only One Bid or Proposal Received.
>
> (1) **One Bid Received**. If only one responsive bid is received in response to an Invitation for Bids (including multi-step bidding), an award may be made to the single bidder if the Procurement Officer finds that the price submitted is fair and reasonable, and that either other prospective bidders had reasonable opportunity to respond, or there is not adequate time for resolicitation. Otherwise, the bid may be

[2] It is not clear what Appellant feels the proper remedy is, other than to go on to the second step in the multi-step process with one responsive bid and two non-responsive bids, for technical review. I would understand this to mean to ignore the delivery date requirement altogether.

> rejected pursuant to the provisions of §3115 (Cancellation of Solicitations; Rejection of Bids or Proposals) and:
>
> (A) new bids or offers may be solicited;
> (B) the proposed procurement may be cancelled; or
> (C) if the Chief Procurement Officer ... determines in writing that the need for the supply or service continues, but that the price of the one bid is not fair and reasonable and there is no time for resolicitation or resolicitation would likely be futile, the procurement may then be conducted under §3112 (Sole Source Procurement) or §3113 (Emergency Procurement), as appropriate." [Emphasis added.]

Section 3102 specifically applies to multi-step bids. That is the situation here. It applies to a solicitation where there is only one responsive bid. That is the situation here. It applies to a situation in which the Chief Procurement Officer can assure that the price offered is fair and reasonable. That has not been determined here because the protest by Appellant stopped the procurement process prior to such a determination being made. Finally, it applies to situations where other bidders had a reasonable opportunity to respond to the bid. That is the situation here as there were two other bidders, albeit, non-responsive bidders.

Section 3109(t) must be read and applied in accord with section 3102(c). The only way in which these sections can be applied to this matter and remain in accord is to permit the Chief Procurement Officer an opportunity to determine, pursuant to Section 3102 (c), whether the one responsive bid is fair and reasonable.

A comment on competition is appropriate here. The fact of the matter is, if you look at competition from the point of view of the market place, there was and is competition in this solicitation. First, competition includes the ability to deliver the product at the time that the government is in need of it. Second, competition means that an offeror knows that the

solicitation has been received by its competitors and those competitors are vying to acquire the same contract by selling to the government the equivalent product. The bid of every offeror is going to reflect this knowledge that each offeror has, that there is, in fact, competitors and competition in the market place. The sealed price quote of the responsive offeror reflects this marketplace competition. Finally, competition means that the solicitation itself, provided specifications that are competitive. It is worthy to note that there is no protest in this solicitation concerning the specifications.[3] The specifications were competitive. This multi-step bid process was highly competitive even though there is only one responsive bidder.

IV. *Isratex, Inc. v. U.S.* Does Not Assist in the Analysis of This Case

Appellant would rely upon *Isratex, Inc. v. United States*, 25 Cl. Ct. 223 (1992) for the proposition that a solicitation must advise potential offerors of factors that would render a proposal subject to automatic rejection. Further, it asserts that *Isratex* holds for the proposition that, in the technical review stage of a multi-step bid process, prospective bidders must be apprised of the fact that if one technical requirement of the bid is to be weighed at a much higher value than other technical factors, the prospective bidders must be apprised of the weight factors to be used.

It should be noted that the *Isratex* case is applying federal procurement law, whereas in the instant case, Guam is applying local procurement law based upon the Model Procurement Code. Application of any federal procurement case to this matter should be done with recognition that the law and rules are not equivalent.

[3] This is the third attempt by the government to acquire this particular apparatus. The first two attempts had to be cancelled due to non-competitive specifications that were protested.

The first point of Appellant's reliance on this case, that is, a solicitation must advise potential offerors of factors that would render a proposal subject to automatic rejection has been addressed adequately in Section **II,** above. As well, it can be assumed from the facts of *Isratex* that all of the offerors, including Isretex, Inc. were found to be responsive bidders. Therefore, Isratex had already progressed to the next stage of the multi-step process, having been found responsive already, and the law expressed in the case is applicable to its facts, that is, law related to technical review of a proffered product. The instant case is not about a dispute over a faulty technical review in a multi-bid solicitation. The instant case is about whether or not Appellant was properly found to be non-responsive prior to any technical review, and whether GSA handled its non- responsive bid properly under the rules.

The second point of Appellant's reliance on *Isratex,* that is, that, in the technical review stage of a multi-step bid process, prospective bidders must be apprised of the fact that if one technical requirement of the bid is to be weighed at a much higher value than other technical factors, the prospective bidders must be apprised of the weight factors to be used. This is simply inapplicable to the law and the facts of the instant case. Again, for whatever legal point *Isratex* may stand for, it is properly applied to cases that address responsiveness at the stage in the process of the technical review. As to this second point, *Isratex* is likely good law in federal procurements. It does not apply here.

V. *Appeal of O&M Energy, S.A.* is in Accord with GSA Decision

Appellant cites *O&M Energy, S.A.,* OPA-PA-08-004 (September 30, 2008 Decision), for the proposition that, otherwise material requirements of an Invitation for Bid that are applicable to a responsiveness determination, can be waived if the government can acquire an otherwise suitable product or service for a lesser price. Further, Appellant seems to be

asserting that, in order to make a responsiveness decision, the government must be in a position to take into account the costs of the supply or service that is being solicited. These are not the holdings of this otherwise relevant case.

The facts of *O&M Energy* are important to understanding its proper application to the case at bar. The Guam Power Authority ("GPA") was soliciting a company to operate a power plant under a performance management contract. It sought bids in a multi-step bid process like the process used in the instant case. There were two phases to the multi-step process, 1) the submission of a technical bid, and 2) the submission of a price proposal. Two companies had 'passed' the first stage of the process, including O&M Energy, SA. In the second stage of the process, the review of the price proposals, the O&M price proposal was found by GPA to be non-responsive because it proposed four 'exceptions' to the manner of pricing required by the Invitation for Bids. O&M's price proposal was found to be non-responsive as a result of these exceptions. Its bid was thereafter rejected as non-responsive. A protest by O&M and an appeal to the Public Auditor followed.

It is important to the analysis of *O&M Energy* to acknowledge that it was at the review of the price proposal, the second stage of the process, that the question of responsiveness arose. *O&M Energy* at its most basic is a case about evaluating whether exceptions taken by a bidder to a price proposal requirement are material, and if so, are cause to reject a bid as non-responsive. As such its holding is limited when applid to the instant case. Why, because the instant case does not deal with a question of the materiality of price factors, for one, and two because it is not a case about price evaluation and price responsiveness. All assertions made by Appellant concerning price materiality in its

Comments, based upon the holdings in *O&M Energy* are not relevant or applicable to an understanding of this case at bar.[4]

In the instant case, the fact is that there is a question of responsiveness which has arisen even prior to getting to the first stage of the technical review, much less a review of prices.[5] For this reason, *O&M Energy,*[6] in its application to the case at bar, properly stands for, and is limited, to certain holdings and statements of law relative to the general concept of responsiveness, to wit:

> "Thus the issue is whether O&M was non-responsive, or whether the irregularities found in their bid submission might be determined to be waiverable irregularities. There is no question that a public contract based upon materially non-responsive bid revised after a bid opening is void. Valley Crest Landscape, Inc v. City Council (1996). 41 Cal.App 4th (1432)."

Decision in *O&M Energy*, at page 5. GSA would assert that a deviation from the delivery date is not a waiverable requirement of this bid. To waive the delivery date requirement in this bid, after stating it so clearly, would be a revision after the bid opening that would make the whole bid void.

> "GPA may only apply objectively measurable criteria which are set forth in the Invitation for Bids, in determining the lowest bidder. ... The Invitation for Bids shall set forth the evaluation criteria to be used. No

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[4] The Public Auditor overturned the decision of GPA, finding that the factors used by GPA to determine that O&M's bid was non-responsive were 1) not properly evaluated to determine materiality, and 2) that materiality in a cost evaluation process necessarily involved a determination of whether the costs of the so called 'exceptions' cited by GPA would span the difference between two known price quotes.

[5] The bid for fire trucks has no factors relative to price and presumably price would require no evaluation at all.

[6] In *O&M Energy* the Public Auditor took note of an important factor, that the other bidder was apparently non-responsive in its price proposal, but that this non-responsiveness was neither noted nor evaluated by GPA. "TEMES appears to have been favored over O&M in that TEMES' own non-responsiveness was overlooked." Decision at page 5.

criteria may be used in bid evaluation that are not set forth in the Invitation for Bids."

Decision in *O&M Energy*, at page 5. The delivery date requirement is an objectively measurable criteria set forth in the Multi-Step Bid Invitation. *O&M Energy* is applicable here because it stands for the need to have objectively measurable criteria upon which to determine responsiveness, and that these criteria are not able to be waived by the government once bids are opened. Guam law and regulations will not permit the waiver of such criteria. However, as stated in **III**, above, Guam regulations do provide that the procurement officer can consider a lone responsive bid in a multi-step bid if the price is fair and reasonable and the potential vendors in the marketplace were not prevented from participating fairly in the process.

VI. Conclusion.

The Comments filed by Appellant should be disregarded as they are filed outside of the time limits set by law. For the reasons stated hear and in the Agency Report, the Public Auditor should dismiss this appeal, uphold the decision by the Chief Procurement Officer, and permit GSA to continue to pursue this solicitation.

Respectfully submitted this 7th day of March, 2013.

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