



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

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS**

6 IN THE APPEAL OF, 7 8 IP&E HOLDINGS, L.L.C., 9 10 Appellant)))))	APPEAL NO: OPA-PA-15-013 DECISION
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I. INTRODUCTION

This is the Decision of the Public Auditor for appeal number OPA-PA-15-013 which was filed by IP&E HOLDINGS, L.L.C., (Hereafter Referred to as "IPE") on November 9, 2015 regarding the GUAM POWER AUTHORITY's (Hereafter Referred to as "GPA") October 30, 2015 denial of IPE's undated September 2015 Protest concerning GPA-IFB-005-15 (Diesel Fuel Oil No. 2 and Automotive Gasoline) (Hereafter referred to as "IFB"). The Public Auditor holds that to revise the IFB in compliance with 2 G.A.R., Div. 4, Chap. 3, §3109(i)(3), GPA must allow the bidders a reasonable time to modify their bids pursuant to 2 G.A.R., Div. 4, Chap. 3, §3109(k)(2). Accordingly, IPE's appeal is hereby GRANTED.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, pursuant to GPA's December 18, 2015 waiver of hearing. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

1 1. On or about November 6, 2014, GPA issued the IFB.¹

2 2. The IFB stated, in relevant part:

3 a. That the Contractor shall furnish GPA with two (2) copies of insurance
4 evidencing policies for Workmen's Statutory Compensation Insurance and Employer's Liability
5 Insurance, Commercial General Liability, Automobile Liability Insurance, Pollution Liability
6 Insurance, and Excess Liability Insurance, and that such certificates shall specifically indicate the
7 Commercial General Liability Insurance includes various extensions of coverage as specified by
8 the IFB, and that the insurance certificate state that the insurance company or companies issuing
9 the insurance policies shall give GPA at least thirty (30) days written notice in the event of
10 cancellation of or material change in any of the policies, and that if coverage on the certificate or
11 certificates is shown to expire prior to the completion of all terms of the Contract, the Contractor
12 shall furnish Certificates of Insurance evidencing renewal of such coverage to GPA and that the
13 Certificates of Insurance shall show the IFB's Contract number.²

14 b. That the Contractor shall provide a copy of their Insurance Policy to GPA as part
15 of the bid requirements. All updates or revisions after contract commencement shall also be
16 forwarded to GPA.³

17 c. That any explanation desired by a bidder regarding the meaning or interpretation
18 of the IFB must be submitted in writing and with sufficient time allowed for a written reply to
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27 ¹ IFB Advertisement, page 35, Pacific Daily News dated November 6, 2014, Tab
28 2, Procurement Record filed in OPA-PA-15-006 on May 7, 2015. NOTE: Pursuant
 to the December 15, 2015 Order After Hearing, the Procurement Record filed in
 OPA-PA-15-006 shall be used in this matter because both matters concern the
 same solicitation.

² Section 3.13.G Insurance, page 872, IFB, Tab 3, Id.

³ Id.

1 reach all bidders before submission of their bids.⁴

2 d. That the IFB's bid opening was at 2:00 p.m. on December 4, 2014, and that all
3 bids submitted in response to the IFB must be submitted prior to that date and time.⁵

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5 3. On November 6, 2014, IPE picked up a copy of GPA's Bid Package.⁶

6 4. On December 1, 2014, IPE sent a written request to GPA to answer the following
7 questions, in relevant part:

8 a. Concerning IFB Part II, Fuel Supply Contract, Section 3.13 Insurance, F. Excess
9 Liability's requirement that the Contractor must carry Excess Liability Insurance for \$5,000,000,
10 IPE inquired whether GPA would accept increasing General Liability Insurance from \$2,000,000
11 to \$7,000,000 in lieu of the Excess Liability Insurance requirement.

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13 b. Concerning, Part II, Fuel Supply Contract, Section 3.13 Insurance, G. Certificate
14 of Insurance's requirement that the Contractor provide two (2) copies of a Certificate of
15 Insurance in GPA's favor, and GPA's is request for the bidder's Insurance Policies as part of the
16 bid requirements, IPE inquired whether a certificate of insurance in GPA's favor with maximum
17 insurance limits for items in paragraphs B (Workmen's Statutory Compensation Insurance and
18 Employer's Liability Insurance), C (Commercial General Liability Insurance), D (Automobile
19 Liability Insurance), and E (Pollution Liability Insurance), would suffice in lieu of insurance
20 policies?⁷

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23 4. On December 3, 2014, GPA issued IFB Amendment No. I, which extended the bid
24 opening date from 2:00 p.m. on December 4, 2014 to 2:00 p.m. on December 23, 2014.⁸

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27 ⁴ Paragraph 3, Explanation to Bidders, Sealed Bid Solicitation Instructions, page 897, Id.

28 ⁵ Page 832, Id.

⁶ Bidder's Register, page 812, Tab 4, Id.

⁷ IFB Amendment No. II dated December 12, 2014, page 829, Tab 3, Id.

⁸ IFB Amendment No. I dated December 3, 2014, page 795, Tab 7, Id.

1 5. On December 12, 2014, GPA IFB Amendment No. II, which, in relevant part:

2 a. Answered IPE’s inquiry concerning whether GPA would accept increasing
3 General Liability Insurance from \$2,000,000 to \$7,000,000 in lieu of the Excess Liability
4 Insurance requirement by stating: “Please submit a copy of the insurance coverage for GPA’s
5 review.”
6

7 b. Answered IPE inquiry concerning whether a certificate of insurance in GPA’s
8 favor with maximum insurance limits for items in paragraphs B (Workmen’s Statutory
9 Compensation Insurance & Employer’s Liability Insurance), C (Commercial General Liability
10 Insurance), D (Automobile Liability Insurance), & E (Pollution Liability Insurance), would
11 suffice in lieu of insurance policies by stating: “No, GPA requires a copy of the insurance
12 policies.”⁹
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14 6. On December 22, 2014, GPA issued IFB Amendment No. III which extended the bid
15 opening date from 2:00 p.m. on December 23, 2014 to 2:00 p.m. on January 6, 2015.¹⁰
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17 7. On January 5, 2015, GPA issued IFB Amendment No. V which extended the bid
18 opening date from 2:00 p.m. on January 6, 2015 to 2:00 p.m. on January 13, 2015.¹¹
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20 8. On January 13, 2015, prior to bid opening, GPA received bids in response to the IFB
21 from IPE, MOBIL OIL GUAM, INC. (Hereafter referred to as “MOBIL”) and SOUTH
22 PACIFIC PETROLEUM CORPORATION (Hereafter referred to as SPPC).¹²
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24 9. GPA opened the bids at 2:00 p.m. on January 13, 2015, and determined, in relevant
25 part, that IPE and SPPC included copies of their insurance policies with their bids and MOBIL
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28 ⁹ IFB Amendment No. II dated December 12, 2014, page 829, Tab 3, Id.

¹⁰ IFB Amendment No. III dated December 22, 2014, page 823, Id.

¹¹ IFB Amendment No. V dated January 5, 2015, page 815, Id.

¹² Bidder’s Register, TAB 4, Id.

1 did not include a copy of its insurance policy with its bid.¹³

2 10. On January 29, 2015, GPA's Bid Evaluation Committee requested that GPA's
3 Supply Management Administrator inquire from the three (3) bidders that upon award their
4 insurance provider will comply with the insurance requirements as stated in the IFB.¹⁴

5 11. On January 29, 2015, Jamie L.C. Pangelinan, GPA's Supply Management
6 Administrator sent a letter to IPE, MOBIL, and SPPC requesting that they confirm that if
7 awarded the IFB contract each of them would respectively comply with the insurance
8 requirements as stated in IFB, Part B, Section 3.13, Insurance of the IFB and she required the
9 bidders to submit their responses no later than February 2, 2015.¹⁵

10 12. On January 29, 2015, SPPC responded to GPA's request for confirmation by stating
11 that if awarded, SPPC will comply with the insurance requirements stated in Part B, Section
12 3.13, insurance of the IFB.¹⁶

13 13. On January 30, 2015, IPE responded to GPA's request for confirmation with a letter
14 confirming their ability to comply with the IFB's insurance requirements and IPE attached
15 copies of the insurance policies it provided to GPA with IPE's bid and IPE stated that these
16 documents were required by Part B, Section 3.13, Subpart G, Certificate of Insurance and that
17 this requirement was further clarified by answer to Question 14, in IFB Amendment No. II.¹⁷

18 14. On February 2, 2015, MOBIL responded to GPA's request for confirmation by
19 stating that MOBIL would comply with the insurance requirements upon receiving the formal
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25 ¹³ Abstract of Bids dated January 13, 2015, TAB 22, Id.

26 ¹⁴ GPA Memorandum dated January 29, 2015 from Evaluation Committee to Supply
27 Management Administrator, TAB 28, Id.

28 ¹⁵ See Letter from Jaimie Pangelinan dated January 29, 2015 to SPPC, to IPE,
and to MOBIL, located respectively at page 231 (SPPC), and at page 234
(IPE) TAB 29, and page 225 (MOBIL), TAB 30, Id.

¹⁶ Letter from Anna Van Seters to Jaimie Pangelinan dated January 29, 2015,
page 227, TAB 29, Id.

¹⁷ Letter dated January 30, 2015 from Fred Keller to Jamie L.C. Pangelinan,
page 152, TAB 31.

1 award notice and executed supply contract and MOBIL attached its existing Certificates of
2 Insurance. MOBIL further stated that it would include the IFB Contract in its insurance policies,
3 add GPA as an additional insured, and grant a waiver of subrogation to GPA.¹⁸
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5 15. On February 5, 2015, GPA's Bid Evaluation Committee determined that IPE,
6 MOBIL, and SPPC bids met the IFB's specifications and they recommended awarding the IFB
7 contract to MOBIL because it was the overall lowest, and most responsive and responsible
8 bidder. GPA's General Manager approved the Bid Evaluation Committee's recommendation that
9 same day.¹⁹
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11 16. On February 6, 2015, GPA issued a Notice of Intent of Possible Award of the IFB
12 Contract to MOBIL, which gave MOBIL fourteen (14) days to submit their performance bond to
13 GPA.²⁰
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15 17. On that same day, GPA issued a Bid Status to IPE and SPPC informing them that
16 their respective bids were rejected due to high price and notifying them that the IFB Contract
17 was being recommended for award to MOBIL.²¹
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19 18. On February 13, 2015, seven (7) days after being notified that its bid was rejected
20 due to high price and that GPA was considering awarding the IFB Contract to MOBIL, IPE
21 protested GPA's acceptance and consideration of MOBIL's bid because it did not include the
22 insurance documents required by IFB Section 3.13, Insurance, Item G.²²
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25 ¹⁸ Email dated February 2, 2015 from Tom Anitok to Stephanie Taijeron, page
26 140, TAB 32, Id.

27 ¹⁹ GPA Memorandum dated February 5, 2015 from Bid Evaluation Committee to
28 Supply Management Administrator, page 135, TAB 34, Id.

²⁰ Letter dated February 6, 2015 from John M. Benavente to Charles Ewart, page
123, TAB 35, Id.

²¹ See BID Status dated February 6, 2015 for IPE and SPPC, page 132 (IPE), and
page 127 (SPPC), Id.

²² IPE's Protest dated February 13, 2015, page 107, TAB 36.

1 19. That same day, GPA issued a stay of procurement as result of IPE's protest.²³

2 20. On April 17, 2015, GPA denied IPE's February 13, 2015 protest on the grounds that
3 the IFB did not require the bidders to submit insurance certificates and policies and that Section
4 3.13 of the Supply Contract form states that: "the contractor shall not commence work under this
5 contract until it has obtained all insurance required under this section and such insurance has
6 been approved by GPA," and GPA only required the winning bidder to submit the insurance
7 policies in Section 3.13 because such policies could not be provided until after the contract is
8 awarded.²⁴

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11 21. On April 29, 2015, IPE filed its appeal in OPA-PA-15-006 alleging: (1) MOBIL's
12 bid was unresponsive because it did not include the insurance documents required by IFB
13 Section 3.13, Insurance, Item G; and (2) OPA should direct award of the IFB contract to IPE.²⁵

14 22. On September 18, 2015, the OPA issued its Decision in OPA-PA-15-006 finding: (1)
15 The bidders were required to submit with their bids, the insurance policies required by Part B,
16 Section 3.13 of the IFB; (2) This requirement violated 5 G.C.A. §5001(b)(6) and 2 G.A.R., Div.
17 4, Chap. 1, §1102(5) because the requirement highly favors bidders with existing GPA contracts
18 and prejudices bidders who do not have them.²⁶

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20 23. Said Decision also required GPA to either cancel the IFB or revise it to comply with
21 5 G.C.A. §5001(b)(6) and 2 G.A.R., Div. 4, Chap. 1, §1102(5), no later than thirty (30) days
22 after the Decision was issued.²⁷

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24 24. On October 8, 2015, GPA issued IFB Amendment No. VII which deleted Part B,
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26 ²³ Letter dated February 13, 2015 from John M. Benavente, page 102 (To SPPC),
page 104 (To MOBIL), TAB 37, Id.

27 ²⁴ GPA's Denial of Procurement Protest dated April 17, 2015, page 72, TAB 41,
Id.

28 ²⁵ Notice of Appeal filed on April 29, 2015 in OPA-PA-15-006, page 2.

²⁶ Decision filed on September 18, 2015 in OPA-PA-15-006, page 12.

²⁷ Id.

1 Section 3.13.G of the IFB by deleting the language requiring the bidders to submit insurance
2 policies with their bids. It also stated that the “Stay of Procurement” has been lifted and that
3 GPA intends to move forward with the award of the IFB contract to MOBIL.²⁸
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5 25. In September 2015 shortly after receiving IFB Amendment No. VII, IPE filed a
6 protest alleging that if GPA wishes to amend the IFB, it is required to make a formal amendment
7 and then solicit bids to reflect the change and that if specifications are changed, a bidder must be
8 accorded the opportunity to respond.²⁹
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10 26. On October 30, 2015, GPA denied IPE’s protest alleging that the Decision in OPA-
11 PA-15-006 specifically required GPA to cancel or revise the IFB and that GPA revised the IFB
12 in accordance with the Decision.³⁰
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14 27. On November 9, 2015, ten (10) days after GPA issued its Protest Decision denying
15 IPE’s protest, IPE filed this appeal.
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17 III. ANALYSIS

18 Pursuant to 5 G.C.A. §5703, the Public Auditor shall review GPA’s October 30, 2015
19 Decision denying IPE’s September 2015 Protest *de novo*. The sole issue in this matter is whether
20 GPA’s IFB Amendment No. VII complied with Guam’s Procurement Law and Regulations and
21 whether GPA must allow the bidders additional time to amend their bids, even after bid opening,
22 to make any changes they believe as a result of the IFB Amendment. The Public Auditor will
23 review Guam’s Procurement Regulations to answer this question.
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26 ²⁸ IFB Amendment No. VII dated October 8, 2015, Procurement Record Additional
27 Documents filed on December 18, 2015 in this matter.

28 ²⁹ IPE Protest, undated letter, Attachment A, Notice of Appeal filed in this
matter on November 9, 2015.

³⁰ GPA Protest Decision dated October 30, 2015, Attachment B, Id.

1 **A. GPA is required to allow the bidders to modify their bids.**

2 GPA must allow the bidders time to modify their bids if it proceeds with its IFB Amendment
3 No. VII. Generally, amendments shall be distributed within a reasonable time to allow
4 prospective bidders to consider them in preparing their bids, and, if the time and date set for
5 receipt of the bids will not permit such preparation, such time shall be increased to the extent
6 possible in the amendment. 2 G.A.R., Div. 4, Chap. 3, §3109(i)(3). Here, it is no longer possible
7 for GPA to issue Amendment No. VII prior to the time set for receipt of the bids because, as set
8 forth above, the bids were received on January 13, 2015 and opened that day. Hence, to follow
9 the aforementioned requirement that bidders be given a reasonable time to consider the IFB
10 amendments, GPA must allow the bidders a reasonable opportunity to amend their bids.

11 Generally, bid modifications received after bid opening are considered late and are usually not
12 considered. 2 G.A.R., Div. 4, Chap. 3, §3109(k)(1) and (2). However, there is an exception to
13 this general rule. A late bid modification can be considered if it is received before contract
14 award, and the bid modification would have been timely, but for the action or inaction of
15 Government of Guam personnel directly serving the procurement activity. 2 G.A.R., Div. 4,
16 Chap. 3, §3109(k)(2). Here, GPA has not awarded the contract to MOBIL. Further, as set forth
17 above, the amendment to the IFB would not be necessary, but for GPA's inclusion of Part B,
18 Section 3.13 of the IFB which violated 5 G.C.A. §5001(b)(6) and 2 G.A.R., Div. 4, Chap. 1,
19 §1102 in the IFB as stated in the Decision in OPA-PA-15-006. Therefore, the Public Auditor
20 finds that to revise the IFB in compliance with 2 G.A.R., Div. 4, Chap. 3, §3109(i)(3), it must
21 allow the bidders a reasonable time to modify their bids pursuant to 2 G.A.R., Div. 4, Chap. 3,
22 §3109(k)(2).

23 **IV. CONCLUSION**

24 Based on the foregoing the Public Auditor hereby determines the following:

25 1. The Public Auditor finds that to revise the IFB in compliance with 2 G.A.R., Div. 4,
26 Chap. 3, §3109(i)(3), GPA must allow the bidders a reasonable time to modify their bids
27 pursuant to 2 G.A.R., Div. 4, Chap. 3, §3109(k)(2).

28 2. IPE's Appeal is hereby GRANTED.

1 3. No later than thirty (30) days after this Decision is issued, GPA shall issue an
2 amendment giving the bidders no less than fourteen (14) calendar days to modify their bids and
3 GPA may proceed with the solicitation after time it gives the bidders to modify their bids has
4 expired.

5 4. The Public Auditor finds that IPE is entitled to its reasonable costs incurred
6 in connection with the IFB's solicitation and IPE's protest, excluding attorney's fees, pursuant to
7 5 G.C.A. §5425(h), because there was a reasonable likelihood that IPE may have been awarded
8 the contract as it had the second lowest bid, but for GPA's violations of Guam Procurement Law
9 and Regulations as set forth herein. GPA may object to IPE's cost demand by filing the
10 appropriate motion with the Public Auditor no later than fifteen (15) days after IPE submits such
11 cost demand to GPA.

12 This is a Final Administrative Decision. The Parties are hereby informed of their right to
13 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
14 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
15 Decision. 5 G.C.A. §5481(a).

16 A copy of this Decision shall be provided to the parties and their respective attorneys, in
17 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
18 www.opaguam.org.

19 **DATED** this 19th day of January, 2016.

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22 _____
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Re: OPA-PA-15-013 Decision

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