

DATE: 8-3-2020
TIME: 3:25 CIAM 1PM BY: JMO
FILE NO OPA-PA: 20-004

LAW OFFICES OF MINAKSHI V. HEMLANI, P.C.

Suite C312 OP Plaza, 285 Farenholt Ave.
Tamuning, Guam 96913
Tel: (671) 588-2030 Fax: (671) 649-2030
mvhemlani@mvhlaw.net

Counsel for Purchasing Agency *Guam Memorial Hospital Authority*

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
GOVERNMENT OF GUAM**

IN THE APPEAL OF:

JRN Air Conditioning & Refrigeration, Inc.

Appellant.

CASE NO: OPA-PA 20-004

**REPLY TO APPELLANT'S
COMMENTS RE AGENCY REPORT**

Purchasing Agency Guam Memorial Hospital Authority ("GMHA") hereby submits its Reply to Appellant JRN Air Conditioning & Refrigeration, Inc.'s ("Appellant" or "JRN") Comments to Agency Report filed July 27, 2020.

In its' Amended Agency Statement filed July 17, 2020, the GMHA set forth the legal standard for determining an offeror's responsibility in competitive sealed bidding. *See* 5 GCA §5201(f) *Responsible Bidder or Officer*; 26 GAR Div 2 §16317(2)(b)(1) *Standards of Responsibility*; 2 GAR Div 4 §3116(b)(2) *Standards of Responsibility*; and 2 GAR Div 4 §3116(b)(3) *Ability to Meet Standards*.

Title 2 GAR Div 4 §3116(b)(4) *Duty Concerning Responsibility* states, "Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible." The GMHA's Chief Procurement Officer is its Hospital Administrator/CEO. *See* 10 GCA §80110(c)(6).

JRN argues that the GMHA acted "arbitrarily and capriciously;" however, the standard to determine responsibility set forth under Guam procurement laws is clearly subjective and ultimately relies upon the satisfaction of the Procurement Officer i.e., the Hospital Administrator/CEO. The sole question is whether the GMHA was reasonable in determining JRN's bid was nonresponsible.

1 **A. JRN'S BID WAS NOT RESPONSIBLE.**

2 JRN does not comment upon its failure to heed and comply with the Special Reminder to
3 Prospective Bidders (“Special Reminder”) set forth in the Invitation for Bids (“IFB”). Specifically, the
4 first line item which requires, “Statement of Qualifications and Performance Data.” *See* Agency
5 Procurement Record at Tab 12. The Special Reminder ends with two sentences in bold which state,
6 **“Failure to comply with any of the requirements above may be cause for disqualification and
7 rejection of the bid. This reminder must be signed and returned in the bid envelope together with
8 the bid.”** JRN’s representative signed and dated the Special Reminder acknowledging receipt and that
9 JRN has “read and understand its intent and implications.” *See* Agency Procurement Record at Tab 12.

10 JRN did not submit with their bid the required Statement of Qualifications and Performance Data
11 relevant to the IFB’s scope of work: the removal and replacement of one (1) boiler unit and piping system.
12 Instead, JRN submitted two statements of qualifications specific to air conditioning sales and repair
13 services that included lists of licenses, memberships, past and current projects, and supplier information.
14 The GMHA could have rejected JRN’s bid at opening for its failure to comply with the requirement listed
15 on the Special Reminder, but it did not. This fact is relevant and counters JRN’s accusation that the
16 GMHA “clearly advantaged AMmanabat over the other bidders.”

17 Instead of outright rejection, the GMHA exercised its reserved right under Section 17 of the IFB’s
18 General Terms and Conditions to secure “from bidder information to determine whether or not they are
19 responsible...as necessary to determine their responsibility” *See* Agency Procurement Record at Tab 2.
20 The reservation of this right complies with 2 GAR Div 4 §3116(b)(2)(B) and 26 GAR, Div. 2, §16317(1).
21 It should be noted that exercise of this right is also a subjective decision that did not “clearly advantaged
22 AMmanabat over the other bidders.”

23 In fact, the GMHA provided JRN with two opportunities, through letters sent on December 5,
24 2019 and January 24, 2020, seeking documents to determine JRN’s responsibility. The GMHA maintains
25

1 that it cannot instruct bidders as to what specific documents should be provided as part of their Statement
2 of Qualifications and Performance Data. This position does not “shift the burden” to the bidder; that
3 burden always belongs to the bidder. In every competitive sealed bidding process, offerors must prove
4 their responsiveness and responsibility to the purchasing agency.

5 Contrary to JRN’s contention that it lacked instruction and guidance, all bidders are provided with
6 the same information under Section 19 of the IFB’s General Terms and Conditions *Standard for*
7 *Determination of Lowest Responsible Bidder* which states, “In determining the lowest responsible offer,
8 the Hospital Administrator shall be guided by the following:
9

- 10 a. Price of items offered.
- 11 b. The ability, capacity, and skill of the Bidder to perform.
- 12 c. Whether the Bidder can perform promptly or within the specified time.
- 13 d. The quality of performance of the Bidder with regards to awards previously made to him.
- 14 e. The previous and existing compliance by the Bidder with laws and regulations relative to
15 procurement.
- 16 f. The sufficiency of the financial resources and ability of the bidder to perform.
- 17 g. The ability of the bidder to provide future maintenance and services for the subject of the
18 award.
- 19 h. The compliance with all of the conditions to the Solicitation. 3-202.14.4. (GPR&R) / 26
20 GCA2- §16309(n)(4).”

21 JRN argues that “GMHA supplies no other insight” on the meaning of “ability, capacity, and skill
22 of the Bidder to perform.” It is unclear what JRN expected of the GMHA.

23 The GMHA wrote in its December 5, 2019 letter, “We are unable to locate any statements,
24 experience or projects related to boiler installation.” And in its January 24, 2020 follow up letter wrote,
25 “your letter states that a Mechanical Engineer employed at JRN has experience in installation of boilers
26 and that such experience can be found in his resume. However, the GMHA was unable to identify any
27 such statements, experience, or projects related to boiler installation. Please provide qualification and
28 performance data specific to boiler installation.” See Agency Procurement Record at Tab 18. The
letters provide clear instruction as to what the GMHA was seeking from JRN.

On January 29, 2020, JRN submitted an “Affidavit of Professional Experience” made by JRN’s

1 mechanical engineer, Mr. Teddy G.R. Garcia, who attested to maintenance and other experience with
2 boiler systems in the years 2004 and 2005, that was not previously stated in his five-page resume
3 submitted by JRN as part of its bid. *See* Agency Procurement Record at Tab 18. The GMHA was not
4 satisfied that the affidavit proved the ability, capacity, and skill of JRN to perform, and therefore rejected
5 JRN's bid as nonresponsible.

6 **B. ALL BIDS WERE HELD TO THE SAME STANDARD.**

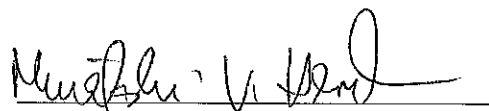
7
8 In evaluating the second lowest bidder for responsibility, the GMHA reviewed the Statement
9 of Qualification and Performance Data AMmanabat Corporation ("AMmanabat") submitted with its
10 bid. *See* Agency Procurement Record at Tab 12. As an example, and for comparison, AMmanabat's
11 subcontractor's experience included boiler *installation* versus JRN's proffered employee whose
12 affidavit stated his experience in boiler *maintenance*. *See* Agency Procurement Record at Tabs 12 and
13 18. AMmanabat's subcontractor also provided 6 pages listing 62 specific projects many of which
14 involved mechanical works that further satisfied GMHA as to AMmanabat's ability, capacity, and
15 skill to perform the IFB's scope of work: the removal and replacement of one (1) boiler unit and piping
16 system.
17

18 The final determination was a subjective decision regarding the bidder's ability to perform. A
19 purchasing agency assumes the risk in awarding any contract that performance will be satisfactory;
20 therefore, the determination to make such an award is properly subjective.
21

22 **CONCLUSION**

23 Based on the foregoing the GMHA submits that it was reasonable in its determination that JRN's
24 bid and subsequently submitted documents were nonresponsible.

25 Respectfully submitted this 3rd day of August 2020.

26 
27 Minakshi V. Hemlani, Esq.
28