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PROCUREMENT APPEALS

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FILE No. GPA-PA 09-005

Attorneys for International Bridge Corporation

BEFORE THE GUAM PUBLIC AUDITOR
Procurement Appeal

IN THE APPEAL OF:)	DOCKET NO. OPA-PA 09-005
)	
)	
)	INTERESTED PARTY
GUAM COMMUNITY IMPROVEMENT FOUNDATION, INC.)	INTERNATIONAL BRIDGE CORPORATION'S STATEMENT
)	RE REMEDIES
Appellant.)	
)	
)	

The Office of the Public Auditor has asked the parties to submit memoranda concerning remedies. International Bridge Corporation (“IBC”) submits that the only appropriate remedies would be to uphold the Department of Public Work’s denial of Guam Community Improvement Foundation, Inc.’s (“GCIF”) protest and the procurement should be allowed to continue, or a dismissal of the Appeal, as discussed more fully below.

**A. The Contract Has Not Been Awarded and 5 GCA §§ 5450
and 5451 Do Not Apply**

The only “Remedies” provisions in the Guam Procurement Law applicable where a contract has not been awarded, are found in 5 GCA §§ 5450 and 5451. If there had been a violation, which, as has been amply demonstrated in these proceedings, is not the case here, then the provisions of 5 GCA § 5451 would apply since, as this Office has held, there has not been an award of a contract in this procurement:

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (a) cancelled; or
- (b) revised to comply with the law.

5 GCA § 5451.

IBC's position is and has been that the contract has not been awarded, there has been no violation of the Guam Procurement Law, and the decision of the Department of Public Works denying GCIF's protest should be upheld.

B. GCIF's Protest Should be Dismissed If the OPA Determines that GCIF's Failure to Guaranty Completion of Construction Within 9 Months Rendered Its Proposal Non-Responsive.

On October 27, 2009, former DOE Finance and Administrative Services Deputy Superintendent of GPSS, Doreen Crisostomo, testified at the Hearing on the Merits that two of the proposals did not guarantee completion of the construction within the nine (9) month period required under the RFP. The Instructions to Bidders portion of the RFP specified that the "construction phase shall be completed within two-hundred-seventy (270) calendar days, complete and ready for use." Instructions to Bidders, § 2, IB-a(AD-3). Since IBC guaranteed completion of construction within the nine (9) month period, Ms. Crisostomo could only be referring to the two other proposers, GEF and GCIF. Because there has not been an award, GEF and GCIF's proposals have not been disclosed to the public. IBC is, therefore, unable to independently confirm the accuracy of Ms. Crisostomo's statement in this regard. The Office of the Public Auditor has received copies of the three proposals in connection with this protest, and is in a position to verify the accuracy of Ms. Crisostomo's statement.

If the Public Auditor finds that any offeror submitted a proposal specifying that it could not or would not complete the construction phase within 270 days, that proposal should be deemed non-responsive since it differed in material respect from the solicitation. See 5 GCA § 5201(g) (“*Responsive Bidder* means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.”). An offeror stating that it would not complete the construction in 270 days is simply abnegating the government’s statutorily mandated requirement. Title 5 GCA § 58A105, added by Public Law 29-114, § 2, directs that “The RFP . . . shall include a requirement that occupancy of the JFK facility take place *no later* than nine (9) months after execution of the Contract.” Thus, the government could not have awarded a contract to any offeror that refused to agree to complete the construction within nine months.

A right to protest is given to “[a]ny actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract.” 5 GCA § 5425(a). A non-responsive bidder or offeror, however, cannot, as argued below, be aggrieved since it has no direct economic interest affected by the award or failure to award a contract. In this case, if an offeror in its proposal refused to agree to complete the construction within nine months, it could not be awarded the contract because an award would be in contravention to Public Law 29-144 and the RFP. Thus, non-responsive offeror would not be aggrieved since it would not be awarded the contract regardless of the outcome of its protest.

The standard for determining whether a party is “aggrieved” under Guam’s Procurement Law can be fleshed out by examining the federal law on protestor standing. Under federal procurement law, a protester

must be an “ *actual or prospective bidder* [] or offeror[] whose *direct economic interest* would be affected by the award of the contract or by failure to award the contract.” *Id.* (quoting *Am. Fed'n of Gov't Employees v. United States*, 258 F.3d 1294, 1298 (Fed.Cir.2001) and 31 U.S.C. § 3551(2)(A)) (emphasis in original). The Federal Circuit has further clarified that, to satisfy the direct economic interest prong, a plaintiff must show “not only some significant error in the procurement process, but also that there was a substantial chance it would have received the contract but for that error.” *Id.* at 1308 (quoting *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1582 (Fed.Cir.1996)). In interpreting similar language in the Brooks Act, 40 U.S.C. § 759(f)(9)(B) (Supp. V 1987), the Federal Circuit held that a plaintiff must have been next in line for award to be an “interested party” with a direct economic interest in the award. *United States v. Int'l Bus. Machines Corp.*, 892 F.2d 1006, 1011 (Fed.Cir.1989).

Dismas Charities, Inc. v. U.S. 75 Fed.Cl. 59, 60 (Fed.Cl.,2007).

Thus, a bidder or offeror who has submitted a nonresponsive bid has no standing to protest an award because it has no chance of receiving the award:

This Court has held that “[a] bidder submitting a nonresponsive bid has no standing to protest an award, because it has no chance of receiving the award.” *A & D Fire Protection [Inc. v. United States]*, 72 Fed.Cl. [126] at 138 [Fed. Cl. (2006)]. Although responsiveness is generally used to describe sealed bids, the same concept applies to final offers submitted after negotiations. Just as a sealed bid that does not meet the minimum solicitation requirements is non-responsive and cannot be considered for contract award, FAR § 14.301(a), a Final Proposal Revision that does not conform to the solicitation requirements is technically unacceptable and cannot be considered for award unless the agency reopens negotiations for all offerors or modifies the solicitation. *See* FAR § 15.307(b); *cf. Labat-Anderson, Inc. v. United States*, 42 Fed.Cl. 806, 841 (1999) (contrasting technically unacceptable initial proposals with technically unacceptable Best and Final Offers).

Dismas Charities, Inc. v. U.S., 75 Fed.Cl. at 61.

In *CHE Consulting, Inc. v. U.S.*, 47 Fed. Cl. 331 (Fed. Cl. 2000), the court, quoting from *U.S. v. International Business Machines Corp.*, 892 F.2d 1006, 1012 (Fed. Cir. 1989), explained:

We see responsiveness as another facet of the interested party inquiry. When responsiveness is an issue, it must be resolved before the board can proceed. If a bid is not responsive, the protester has no more right to invoke the office of the board than the proverbial man on the street. A nonresponsive bidder is the epitome of one who lacks a direct economic interest. This is not a mere technicality; it is the predicate for the board's right to intervene in governmental procurements. A bidder's standing to protest a contract given to another cannot be divorced from the responsiveness of its offer.

Id.[*U.S. v. International Business Machines Corp.*, 892 F.2d 1006, 1012 (Fed. Cir. 1989)] *See also Ryan* [*Co. v. United States*], 43 Fed.Cl. [646] at 656 [(Fed. C. 1999)] (citing *Protests of Rocky Mountain Trading Co. Sys. Div.*, 90-2 B.C.A. ¶ 22,739 (1990))(relying on IBM in its conclusion that a nonresponsive bidder cannot raise the question of the responsiveness of the awardee's successful bid); *RRRS Enters., Inc.*, 91-1 CPD ¶ 551 (1991)(holding that a nonresponsive bidder is not an “interested party” within the meaning of 31 U.S.C. § 3551(2)).

The *IBM* decision plainly instructs that the phrase “interested party” does not include a party that makes a nonresponsive bid. A nonresponsive bidder is no different than the “proverbial man on the street.” *IBM*, 892 F.2d at 1012. *See also Ryan*, 43 Fed.Cl. at 656. As a nonresponsive bidder, CHE lacks a direct economic interest. *See Ryan* 43 Fed.Cl. at 657.

Id. at 337.

Furthermore, even when the agency has not found the protestor’s bid or offer nonresponsive, the matter can be addressed during the administrative appeal since, as pointed out in *U.S. v. International Business Machines Corp.*, it is a matter of standing that “cannot be divorced from the responsiveness of its offer.” *U.S. v. International Business Machines Corp.*, 892 F.2d at 1012.

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For the foregoing reasons, if the Office of the Public Auditor confirms Ms. Doreen Crisostomo's statement to be true, then GCIF and GEF's proposals should be dismissed forthwith. Alternatively, the Office of the Public Auditor should uphold the Department of Public Works' denial of GCIF's protest.

Respectfully submitted this 30th day of October, 2009.

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By: 

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