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FILE NO OPA-PA: 21-012

**OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS**

IN THE APPEAL OF)	DOCKET NO. OPA-PA-21-012
)	
)	(PROPOSED)
Graphic Center, Inc.,)	FINDINGS AND FACTS AND
)	CONCLUSIONS OF LAW
Appellant.)	
_____)	

INTRODUCTION

This matter came before the Honorable Benjamin Cruz on February 4, 2022 for a Bench Trial on Graphic Center, Inc.’s (“Graphic”) appeal from the Guam Power Authority’s (“G.P.A.”) denial of Appellant’s protest of the award of GPA-RFP-21-002 to Infosend, Inc. Graphic Center, Inc. was represented by James M. Maher; D. Graham Botha, Esq. represented G.P.A. Ms. Well represented Infosend, Inc.(“Infosend”), an interested party. After hearing the parties’ arguments, considering the pleadings and the record, the Court now issues the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

By a preponderance of the evidence, the Court makes the following findings of fact:

1. The parties stipulated to the admission into evidence of Appellant’s and Appellee’s exhibits (James M. Maher and D. Graham Both stipulation, Digital Recording at 2:30-2:45, February 4, 2022).
2. The Guam Power Authority (“GPA”) issued its Bid Invitation GPA-RFP-21-002 in May

of 2021 for printing, mailing and processing of utility customer billings ("RFP"). (Appellant's Exhibit "1").

3. G.P.A. received three (3) bids for the RFP from Graphic Center, Inc., Infosend, Inc and Moonlight BPO (Appellant's exhibit "6", "4" & "15").

4. G.P.A. summarily disqualified Moonlight BPO for failing to provide a document required of a bid to the RFP: an entry on the affidavit, an Affidavit of Disclosure of Major Shareholders. (Appellant's exhibit "1", § 2.12, REQUIRED FORMS; appellant's exhibit "15").

5. On May 28, 2021, approximately three (3) business days before the Bid submission deadline, GPA informed Graphic of its amendment to the RFP. (Appellant's Exhibit "1", "2" & "5")

6. G.P.A. identified its amendment as "Amendment No. 1." ("Amendment") (Appellant's exhibit "2") which G.P.A. later identified in the RFP as "Exhibit A". (Appellant's exhibit "1", § 2.12, item "G").

7. The Amendment ("Amendment") consisted of approximately seventy-three (73) yes-no questions with some of the questions containing sub-parts but all questions and subparts permitted explanatory comments to the yes-no responses (Appellant's exhibit "2").

8. G.P.A. appointed a committee of five (5) employees ("committee") to act as evaluators to score and rank the bidders' responses. (Appellant's exhibit "1", 5.0: RPF EVALUATION CRITERIA).

9. Dawn Fejeran, G.P.A. Procurement, testified that each bidder was required to submit the Amendment with its bid pursuant to § 2.12 of the RFP (Testimony of Dawn Fejeran, Digital recording at 2:52:50 -54:33, February 4, 2022) and that Infosend did not submit the Amendment with its bid. (Testimony of Dawn Fejeran, Digital recording at 2:56:35 -58:15, February 4, 2022).

10. Kelly Law, an Infosend witness, testified that Infosend did not include the Amendment in

its response to the RFP. (Testimony of Kelly Law, Digital recording at 3:48:00 – 48:37, February 4, 2022).

11. Though its response contained neither the Amendment nor answers to the Amendment questions, Infosend acknowledged receipt of the Amendment in its bid (Appellant’s exhibit “4”, p. 43, ADDITIONAL REQUESTS).

12. One evaluator, John Kim, G.P.A.’s Chief Financial Officer, testified that he was unable to locate Infosend’s answers to the Amendment questions in Infosend’s bid (Testimony of John Kim, Digital recording at 2:25:3- - 29:53, February 4, 2022).

13. While acknowledging G.P.A.’s disqualification of Moonlight BPO (Appellant’s exhibit “15”) for failing to provide in its bid a required form under § 2.12 of the RFP, Ms. Fejeran testified that Infosend was exempted from disqualification for failing to include the Amendment in its bid because G.P.A. granted Infosend a waiver. (Testimony of Dawn Fejeran, Digital recording at 2:58:11 – 3:01:10, February 4, 2022).

14. When asked if there was a record of G.P.A. granting Infosend a waiver of the required forms under 2.12, Ms. Fejeran testified that she was unaware of any such record or documentation susceptible to public review. (Testimony of Dawn Fejeran, Digital recording at 2:58:11 – 3:01:10, February 4, 2022).

15. § 2.12 of the RFP lists seven (7) documents that bidders are required to submit, one of which was the Amendment designated as Exhibit “A” in the RFP. (Appellant’s exhibit “1”, § 2.12).

16. Mr. Kim testified that Graphic included the Amendment in its bid and answered the Amendment questions contained in it. (Testimony of John Kim, Digital recording at 2:36:00 – 36:25, February 4, 2022).

17. In point of fact, Graphic's bid included the amendment (Appellant's trial exhibit "6", p.30) and answers to all but six (6) of the seventy-three (73) questions (Appellant's trial exhibit "6", p.31-38).

18. Infosend asserted that it did not timely receive the Amendment and in fact did not see the Amendment "...until it pulled the appeal documents on line..." but was aware of it from the RFP. As such, according to Infosend, to meet the bid's submission deadline, it did not include the Amendment nor submit answers to the Amendment questions in its bid. ((Testimony of Kelly Law, Digital recording at 3:37:30 – 39:40, February 4, 2022).

19. Nonetheless, the Tribunal found that Infosend had, in fact, answered all seventy-three questions contained in the Amendment without benefit of having had the Amendment to prepare answers to the Amendment questions. (Tribunal, Digital recording at 3:40:10 – 43:00, February 4, 2022).

20. Jessie Rosario, Graphic's Sales Manager, who had reviewed Infosend's bid and had testified in Graphic's case-in-chief that Infosend had not included the Amendment in its bid nor had answered the Amendment questions (Testimony of Jessie Rosario, Digital recording at 18:30 – 19:15, February 4, 2022), testified in rebuttal that Infosend did not answer a single yes-no question from the seventy-three Amendment questions, that one might infer an answer from information Infosend provided in its bid but then such an inference pertained to approximately fifty (50%) percent of the seventy-three (73) questions posed in the Amendment. (Testimony of Jessie Rosario, Digital recording at 4:07:50- 4:13:30, February 4, 2022).

21. The RFP contained two (2) separate criteria, one a standard to determine the "Most Qualified Offeror" (Appellant's exhibit "1", § 2.3) and a second standard limited to evaluating an bidder's qualifications (Appellant's exhibit "1", § 5.0).

22. § 2.3 of the RFP contained four (4) categories while § 5.0 of the RFP contained five (5) categories. (Appellant's trial exhibit "1").

23. § 2.3 and 5.0 shared but one (1) common word: "Quality". (Appellant's trial exhibit "1").

24. Ms. Fejeran testified that § 2.3 was placed in the RFP "...to determine the most qualified applicant...". (Testimony of Dawn Fejeran, Digital recording at 3:09:00 -10:30, February 4, 2022).

25. On direct examination, Mr. Kim testified that the committee utilized § 2.3 of the RFP to evaluate the bidders and their bids and not § 5.0 (Testimony of John Kim, Digital Recording at 2:18:30 – 20:20; 2:30:01 –31:15, February 4, 2022).

26. On cross-examination Mr. Kim reversed his testimony stating that the committee utilized § 5.0 of the RFP to evaluate the bidders and their bids and not § 2.3 (Testimony of John Kim, Digital recording at 2:40:20 – 41:43, February 4, 2022).

27. Mr. Kim was unable to explain the reason G.P.A. chose § 5.0 and not § 2.3 of the RFP to evaluate the bidders and their responses (Testimony of John Kim, Digital recording at 2:40:20 – 41:43, February 4, 2022).

28. James Borja, an evaluator, testified that the committee discussed both criteria (Testimony of James Borja, Digital recording 1:40:40 –41:45, February 4, 2022) and merged the two in evaluating the bidders and their bids (Testimony of James Borja, Digital recording 1:41:50 – 42:22, February 4, 2022).

29. However, under further direct examination comparing the criteria of § 2.3 and § 5.0, Mr. Borja admitted that the § 5.0 criteria did not "address" the criterion in § 2.3 (A) (Testimony of James Borja, Digital recording 1:53:30 –57:20, February 4, 2022), the criterion in § 2.3 (B) (Testimony of James Borja, Digital recording 1:46:15 –47:13, February 4, 2022) or the criterion in § 2.3 (D) (Testimony of James Borja, Digital recording 1:59:00 –59:30, February 4, 2022).

30. Mr. Borja testified that the committee, of which he was a member, sought a clarification from Infosend of Infosend's ability, capacity and skill to timely render its billing services from California to G.P.A.'s customer base on Guam (Testimony of James Borja, Digital recording 1:49:20 – 52:40, February 4, 2022; Appellant's exhibit "9"), a customer base of which ninety-three (93%) percent receive paper billing statements (Testimony of Chris Biolchino, Digital recording 1:41:50 – 42:22, February 4, 2022).

31. Mr. Borja conceded that GPA sought a clarification from Infosend because of its concern for the time-sensitive nature of the services sought and its concern that Infosend, based in California, had the ability, capacity and skill to timely perform. (Testimony of James Borja, Digital recording 1:49:20 –52:40, February 4, 2022; Testimony of John Kim, Digital recording 2:47:30 –48:22, February 4, 2022).

32. Mr. Borja further conceded that the § 5.0 criteria did not address G.P.A.'s concern about the timely delivery of billing statements to customers on Guam (Appellant's exhibit "9"), nor the impact that the delayed receipt of monthly billing statements shall have on G.P.A. monthly cash flow and its customer satisfaction. (Testimony of James Borja, Digital recording 1:49:20 –52:40, February 4, 2022).

33. The Postmaster emphasized the delivery times from the U.S. Mainland exceed normal 5-day delivery and are currently, for a host of reasons, "severely delayed". (Testimony of Chris Biolchino, Digital recording 1:25:00 –28:00, February 4, 2022; appellant's exhibit "20").

34. Mr. Borja testified that none of the Committee members contacted Infosend's references or inspected Infosend's facilities (Testimony of James Borja, Digital recording 1:58:52 –59:42, February 4, 2022; Testimony of John Kim, Digital recording 2:47:00 –48:22, February 4, 2022), yet curiously each committee member gave Infosend the maximum score in the "references" category

and one committee member ranked Infosend higher in that category than Graphic, a known entity to G.P.A based on their 6-year-working relationship.

35. Both Mr. Kim and Mr. Borja testified that the committee, in awarding the bid to Infosend, placed great value on its familiarity with G.P.A.'s Oracle CC & B billing system (Testimony of James Borja, Digital recording 2:03:00 – 05:00, February 4, 2022; testimony of John Kim, Digital recording at 2:36:00 – 36:25, February 4, 2022;).

36. Graphic has provided processing and billing services for G.P.A. (Testimony of Chris Biolchino, Digital recording at 41:50-42:11, February 4, 2022) for approximately six (6) years while utilizing and operating in tandem with G.P.A.'s Oracle CC & B billing system. (Testimony of Chris Biolchino, Digital recording at 4:15:20– 17:40, February 4, 2022).

37. Graphic has also developed a companion system to catch erroneous billing amounts that G.P.A. generates which Graphic described as frequent and excessive. (Testimony of Chris Biolchino, Digital recording at 4:15:20 – 19:55, February 4, 2022).

38. The RFP's 5.0 criterion did not permit quantifying Graphic's extant and operational processing and billing system (which required six (6) months to develop) on G.P.A's cash flow and its customer satisfaction and conversely (Testimony of Chris Biolchino, Digital recording at 43:45-45, February 4, 2022) on Infosend's ability, capacity and skill to bring a comparable and operational system on line and the impact of such a delay shall have G.P.A's monthly cash flow and its customer satisfaction. (Appellant's Trial exhibit "12"; Testimony of Chris Biolchino, Digital recording at 38:30-40.40;4:15:20 – 17:40, February 4, 2022).

39. Because G.P.A. requires that Graphic cease its processing and printing operation pending the resolution of an erroneous billing (which Graphic's system detects), an expedited resolution requires the service provider's physical presence on Guam to avoid further undue delays. (Testimony

of Chris Biolchino, Digital recording at 4:17:40 – 19:55, February4, 2022).

40. Other than the Committee's evaluation sheets (Appellant's exhibit 12"), no record of the Committee's meetings and evaluation of the bidders to the RFP exists. (Testimony of James Borja Digital recording at 1:26:25 – 37:20, February4, 2022).

CONCLUSIONS OF LAW

41. As a Responsive Bidder is one who submits a bid that conforms in all material respects to the Invitation to bids (2 GAR, Div.4, § 1006, 28), Infosend's failure to include the Amendment and answer the questions posed in it renders Infosend an unresponsive bidder.

42. A responsible bidder is a person who has the capability to fully perform the contract requirements with integrity and reliability that demonstrates a good-faith performance. 2 GAR, Div. 4, § 1006, 27.

43. Despite testimony from G.P.A.'s Procurement office that § 2.3 of the RFP was to determine the most qualified applicant, § 2.3 of the RFP was either overlooked, not utilized or somehow partially merged into the § 5.0 of the RFP which is not susceptible to review or validation which diminishes and conflicts with the stated policy of "...providing for increased public confidence in the procedures followed in public procurement." 5 G.C.A., § 5001 (b)(3). See 2 GAR, Div. 4 § 1101 (2)(same).

44. G.P.A.'s failure to adhere to the terms and conditions of its own RFP in exempting Infosend from submitting a required form under § 2.12. of the RFP (Amendment "A"), exempting Infosend from the required submission of written answers in its bid to the Amendment questions, its failure in granting Infosend a waiver that is not susceptible to public review, its disparate, summary disqualification of a Moonlight BPO for its failing to submit a required form designated in § 2.12 of

the RFP in its bid, G.P.A.'s failure to utilize the evaluation criterion (§ 2.3) in the RFP and G.P.A.'s utilization of an evaluation criterion that does not address G.P.A.'s stated interests and concerns to permit a thorough and a substantive evaluation of the bidders constitute acts and omissions in the procurement process that undermine, not increase, public confidence in the procedures followed in public procurement." See 5 G.C.A., § 5001 (b)(3). See 2 GAR, Div. 4 § 1101 (2)(same).

45. The procurement statute and Guam Administrative Rules and Regulations require the Public Auditor's final decision to recite the evidence relied upon which "...contemplates real analysis of the issues." Teleguam Holdings LLC and Territory of Guam; Department of Administration et.al., Guam 2018 Guam 5, § 35.

Dated this 25th day of February, 2022.

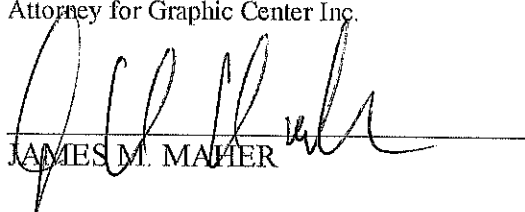
The evidence presented at trial affirms Graphic's Findings of Fact and Conclusions of Law. For the reasons stated herein and the matters-of-record, the Tribunal Finds in favor of Graphic Center, Inc and hereby disqualifies Infosend, Inc. from eligibility for an award under GPA-RFP-21-002 as a non-responsive bidder, hold that Infosend, Inc was non-responsible under § 2.3 of the RFP and award GPA-RFP-21-002 to Graphic Center, Inc as the next lowest responsive and responsible bidder.

Benjamin J.F. Cruz
Public Auditor of Guam

SUBMITTED BY:

LAW OFFICE OF JAMES M. MAHER
Attorney for Graphic Center Inc.

By:



JAMES M. MAHER