

affidavit, converts a matter dealing with bidder responsibility into an issue of responsiveness, thereby overcoming the J&G Construction holding. For example, Guam has a statute requiring a Major Shareholders Disclosure affidavit, and another statute requiring contractors to have a business license to operate on Guam. Both are statutory requirements. Both are matters of responsibility. See In the Appeal of Emission Technologies, OPA-PA-07-002.

Second, the correct distinction to determine if a bid requirement is a matter of bidder responsibility is whether the contractor can perform as promised. In the Appeal of J&G Construction, OPA-PA-07-005. A “responsible bidder” is one who is **capable in all respects to fully perform the contract requirements**, and the **integrity and reliability** which will assure good faith performance.” 5 G.C.A. § 5201(f) (emphasis added). Capability is determined **at the time of award**. 2 G.A.R. § 3101(1) (emphasis added). Responsibility relates to **whether the contractor can perform as promised**. In the Appeal of J&G Construction, OPA-PA-07-005. Matters of responsibility speak to the identity, integrity, capability and reliability of the bidder.

Matters of responsiveness involve issues of price, quantity, quality, delivery or contractual conditions, and prejudice other bidders. 2 G.A.R. § 3109(m)(4)(B). A Major Shareholders Disclosure affidavit does not involve issues of price, quantity, quality, delivery or contractual conditions. Additionally, TeleGuam corrected any mistake in the affidavit after GCC sent an inquiry and TeleGuam responded accordingly. Therefore Appellant is not prejudiced.

TeleGuam is capable in all respects to fully perform the contract requirements. Compliance with the Major Shareholders Disclosure affidavit ensures TeleGuam’s

integrity and reliability to perform the contract. TeleGuam complied with Major Shareholders Disclosure affidavit before the time of awarding the contract, so TeleGuam was determined responsible by the time the award issued. TeleGuam can perform as promised. Therefore the Major Shareholders Disclosure affidavit is a matter of bidder responsibility and TeleGuam is a responsible bidder.

Third, even if the Public Auditor determines that the Major Shareholders Disclosure affidavit is an issue of responsiveness, and not responsibility, TeleGuam's original Major Shareholders Disclosure affidavit materially conformed. It was not "materially false" as Appellant suggests. In TeleGuam's Comments on the Agency Report, TeleGuam asserts that the original Major Shareholders Disclosure affidavit was "technically correct" and there was a "clerical mistake." TeleGuam's Comments on the Agency Report page 2. Minor mistakes in a bid are not material and don't make a bid non-responsive. 2 G.A.R. § 3109(m). Minor mistakes can be corrected and do not prejudice other bidders. *Id.* The Procurement Officer **shall** waive or allow a bidder to correct minor mistakes. *Id.* (emphasis added). TeleGuam's mistake was a minor clerical error and GCC allowed TeleGuam to correct it before the award was issued. Furthermore, PDS was informed through written correspondence that GCC conducted an inquiry into this matter. Therefore, PDS was not prejudiced.

PDS also asserts that the award to TeleGuam was issued in bad faith. Appellant cites 5 G.C.A. § 5452(a)(2), which states that if the person awarded the contract has acted fraudulently or in bad faith, the contract can be declared null and void. As addressed above, TeleGuam did not act fraudulently or in bad faith. TeleGuam asserts that the original Major Shareholders Disclosure affidavit was "technically correct" and

there was a "clerical mistake." TeleGuam's Comments on the Agency Report page 2. To confirm they did not act in bad faith, GCC conducted an inquiry, which resulted in a more accurate Major Shareholders Disclosure affidavit, which shows that TeleGuam intended to act in good faith by providing additional documentation.

CONCLUSION

Therefore, the Major Shareholders Disclosure Affidavit is a matter of bidder responsibility, not responsiveness. Regardless, TeleGuam is a responsible and responsive bidder. Any mistakes in their bid were minor and corrected before the award was issued. GCC should not be required to cancel the award to TeleGuam, and award a more expensive contract to PDS just because there were minor flaws in TeleGuam's Major Shareholders Disclosure Affidavit. To do so would go against the letter and purpose of Guam Procurement Law.

Respectfully submitted this 12th day of November, 2010.

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By:


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