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dooik, opa-pa-23-004 gpa hearing brief

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Dear. Mr. Hernandez,

Attached for electronic filing is GPA's hearing brief (7 pages).

Thanks very much,

-Marianne

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9 *Attorney for Guam Power Authority*

10 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
11 **PROCUREMENT APPEAL**

12 **In the Appeal of:**

13 **Appeal Case No. OPA-PA-23-004**

14 **DOOIK ENG., LTD.,**

15 **GPA'S HEARING BRIEF**

16 Appellant.

17 **I. Introduction.**

18
19 The Guam Power Authority (GPA) hereby submits its hearing brief. GPA avers that,
20 because this procurement differs from the earlier procurement, appellant Dooik's award in the
21 earlier procurement does not entitle it to the proceed to the next step of this procurement. Dooik's
22 remaining allegations likewise do not merit the remedy Dooik seeks.

23
24 **II. Facts.**

25
26 GPA issued a multi-step invitation for bids, MS IFB GPA-061-20, in 2020 regarding a
27 performance management contract (PMC) for the Yigo diesel generators. The bid called for the
28 vendor to manage GPA employees, who would staff the facilities. GPA employees had the
29 training and skill set necessary to perform the work. Dooik obtained an acceptable score in the
30 first step of the bid, technical requirements, and proceeded to the next step of the process, pricing.
31
32 GPA awarded the bid to Dooik.

1 GPA cancelled MS IFB GPA-061-20 because GPA needed to change the specifications.
2 Dooik protested the cancellation, then abandoned those claims and withdrew its protest.

3
4 In January 2023, GPA issued a new bid, MS IFB GPA-023-23, regarding the PMC for
5 the Yigo diesel generators. The bid called for the vendor to be prepared to provide its own
6 employees to staff the facility because the vendor would not be able to count on GPA to supply
7 any of GPA's own employees. Dooik submitted its technical proposal. In contrast to the rest of
8 the evaluators, GPA's controller evaluated Dooik and the other bidders solely on their financial
9 documentation. Dooik ultimately earned an unacceptable score.
10

11
12 Another bidder, JBC/ORBIS/GAI, was also eliminated at this stage because of
13 information missing from the ownership and interest affidavits that accompanied its bid
14 proposal. JBC protested that its score should have been deemed potentially acceptable. GPA
15 reconsidered, gave JBC an opportunity to cure the defect in its bid proposal, and JBC ultimately
16 earned an acceptable score allowing it to proceed to the next stage of the procurement.
17

18
19 GPA notified Dooik of its unacceptable score. Dooik initiated a protest. GPA denied
20 Dooik's protest. Dooik then launched this appeal.

21 **III. Legal Argument.**

22
23 In its appeal, Dooik argues that:

- 24 (1) Dooik's ability to staff the project is merely a component of cost and not a
25 technical requirement;
26 (2) GPA violated 5 GCA § 5150 when it failed to consult the Attorney General
27 during all phases of the procurement;
28 (3) GPA did not justify the use of an IFB rather than request for proposals (RFP)
29 for this procurement;
30 (4) GPA violated procurement law by failing to include "potentially acceptable"
31 as scoring category; and
32 (5) one of the evaluators left blanks in her scoresheet, thereby improperly
skewing Dooik's scores.

GPA addresses each of these issues in turn.

1 **A. The ability to provide skilled staff for the PMC is a technical requirement and not**
2 **merely a cost component.**

3 The bid documents in MS IFB GPA-061-20 provided as follows with regard to staffing:

4 Section 3.7 Contractor Staffing

5 The organization shall be composed of CONTRACTOR management and GPA
6 Yigo Diesel Generators Staff.

7 The CONTRACTOR shall provide appropriate staffing levels of
8 CONTRACTOR employees to provide overall management, resident technical
9 expertise for operation and maintenance of the units, procurement & inventory
10 control, engineering, and administrative support as necessary. The Technical
11 Scoring will evaluate the CONTRACTOR's proposed staffing level.

12 Section 3.8 GPA Staffing

13 The CONTRACTOR shall manage the GPA employees assigned to operate and
14 maintain the Yigo Diesel Generators, and ensure that the personnel receive
15 appropriate training, certification and experience to be able to operate and
16 maintain the unit with above-average competence and abilities.

17 The CONTRACTOR shall complete all the requirements stated in Schedule J
18 [Management of GPA Staff] of this bid, and abide by GPA's Rules and
19 Regulations with regards to the management of staff.

20 **Ex. I.**

21 The bid documents in MS IFB GPA-023-23 provide as follows with regard to staffing:

22 Section 3.7 Contractor Staffing

23 The organization shall be composed of CONTRACTOR management and
24 *possibly* GPA Yigo Diesel Generators Staff.

25 The CONTRACTOR shall provide appropriate staffing levels of
26 CONTRACTOR employees to provide overall management, resident technical
27 expertise for operation and maintenance of the units, procurement & inventory
28 control, engineering, and administrative support as necessary. The Technical
29 Scoring will evaluate the CONTRACTOR's proposed staffing level.

30 Section 3.8 GPA Staffing

31 GPA *may assign* GPA employees to operate and maintain the Yigo Diesel
32 Generators. *If GPA assigns* employees for operations of the Yigo Diesel
Generators, the CONTRACTOR shall manage the GPA employees and ensure
that the personnel receive appropriate training, certification and experience to be

1 able to operate and maintain the unit with above-average competence and
2 abilities.

3 Ex. B (emphasis added).

4 In addition, the bidders were given the opportunity to ask questions. In its responses,
5 GPA clarified as to the second procurement that “Bidders shall assume that they will need to
6 completely staff the plant, both in operations and maintenance and that no GPA staffing is
7 available when establishing their bid prices.” Ex. C (R. at 276 of 6970). “For this bid, GPA is
8 not committing any staff to Yigo Diesel. Bidders shall include staff for operations and
9 maintenance in their costs.” Ex. C (R. at 286 of 6970).

10 In the earlier procurement, bidders could count on having GPA employees to staff the
11 plant. In the second procurement, bidders cannot. This means that, in contrast to the earlier
12 procurement, in the second procurement bidders must persuade GPA that they have the
13 necessary experience with the equipment and access to staff to perform the work, because they
14 can no longer rely on GPA’s staff and experience. Because staff cost money, GPA reminded
15 bidders to include the additional cost in their bid price. This reminder, however, does not reduce
16 the staffing factor to a mere cost component of the bid, nor does it negate the experience required.

17
18
19
20
21 **B. GPA complied with section 5150 and consulted with the Attorney General’s designee.**

22 Dooik argues that GPA did not consult with the Attorney General during all phases of
23 MS IFB GPA-023-23. GPA counters that it did not have to consult directly with the Attorney
24 General because its own lawyers had a SAAG appointment throughout the early stages of this
25 procurement that lasts as long as the procurement remains outstanding.

26
27
28
29 Section 5150 of Guam’s Procurement Law provides in pertinent part:
30 Whenever . . . the head of any . . . autonomous agency . . . conducts any
31 solicitation or procurement which is estimated to result in an award of Five
32 Hundred Thousand Dollars (\$500,000) or more, the Attorney General or his
designees, including one (1) or more Special Assistant Attorneys General
[SAAG] who may be so designated or appointed by the Attorney General and
subject to any reasonable requirements or conditions determined by the Attorney

1 General, shall act as legal advisor during all phases of the solicitation or
2 procurement process.

3 5 GCA § 5150.

4 GPA has asked the OPA to take judicial notice of public records showing that GPA's
5 former legal counsel, Graham Botha, was shepherding the procurement process at GPA and
6 appearing before the OPA and the courts as the Attorney General's designee in his capacity as a
7 SAAG until he left GPA in March 2023. Theresa Rojas, GWA's legal counsel, also designated
8 as a SAAG, filled in for Mr. Botha as GPA's legal counsel until GPA hired a replacement for
9 Mr. Botha. Thus, GPA has consulted with the Attorney General's designee, as required by law,
10 during this procurement.
11
12

13
14 **C. Guam law requires this procurement to proceed as an IFB, not an RFP.**

15 Dook complains that GPA did not explain why it was using an MS IFB, rather than an
16 RFP, as the method of solicitation. The explanation, however, lies in Guam's Procurement Law.
17

18 Under section 5210, "all [government] contracts shall be awarded by competitive sealed
19 bidding, pursuant to § 5211 of this Article, except for the procurement of professional services".
20 5 GCA § 5210(a). Section 5211 provides that a multi-step IFB is appropriate "[w]hen it is
21 considered impractical to initially prepare a purchase description to support an award based on
22 price". 5 GCA § 5211(h). In that event, an IFB "may be issued requesting the submission of
23 unpriced offers to be followed by an Invitation for Bids limited to those bidders whose offers
24 have been qualified under the criteria set forth in the first solicitation." *Id.*
25
26

27 An RFP, on the other hand, is the appropriate vehicle for procuring certain services using
28 selective procedures. 5 GCA § 5216(c). These services include "accountants, physicians,
29 lawyers, dentists, licensed nurses, other licensed health professionals and other professionals".
30
31

32 5 GCA § 5121(a).

1 In this case, GPA is procuring a PMC using an MS IFB, as required by law, rather than
2 an RFP. The project at issue here does not entail the procurement of services offered by the
3 licensed professionals listed in the statute. Thus, an RFP would be inappropriate. If true that
4 GPA omitted required information from its procurement documents, this nonetheless does not
5 militate in favor of permitting Dooik, a bidder with an unacceptable score, to proceed to Step 2
6 where it may potentially be awarded the contract based on price alone, in contravention of the
7 MS IFB procurement process.
8

9
10 **D. GPA uses the “potentially acceptable” score category for bids that are reasonably**
11 **susceptible of being made acceptable.**

12 Dooik has argued that GPA should have included “potentially acceptable” among the
13 categories of scores. GPA counters that it did evaluate bid proposals with this category in mind.
14

15 The procurement regulations provide that “[t]he unpriced technical offers submitted by
16 bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for
17 Bids.” 2 GAR § 3109(t)(4). The regulation further provides that “[t]he unpriced technical offers
18 shall be categorized as: (a) acceptable; (b) potentially acceptable, that is, reasonably susceptible
19 of being made acceptable; or (c) unacceptable.” *Id.* Further, the procurement law requires that
20 only responsive bidders be considered. A responsive bidder is one “who has submitted a bid
21 which conforms in all material respects to the Invitation for Bids.” 5 GCA 5201(g); 2 GAR
22 § 3109(n)(2).
23

24 In this case, bidder JBC protested that it should have been considered potentially
25 acceptable because the defect in its bid affidavits could be corrected. Ex. E (R. at 547 of 6970).
26 GPA ultimately agreed and gave JBC an opportunity to cure because JBC has otherwise
27 submitted a conforming bid. Ex. F (R. at 474 of 6970).
28

29 This shows that GPA does rate a bidder as “potentially acceptable” when appropriate. To
30 do so in Dooik’s case, however, would not be appropriate, because Dooik did not submit a bid
31
32

