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RECEIVED
 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS
 DATE: 2/14/13
 TIME: 4:00 AM PM BY: J-h
 FILE NO OPA-PA: 13-001

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

IN THE APPEAL OF)	DOCKET NO. OPA-PA-13-001
)	
)	
MORRICO EQUIPMENT, LLC.)	AGENCY REPORT
)	
Appellant.)	
)	
)	

On November 16, 2012, the General Services Agency, Department of Administration (“GSA”) published Multi-Step Bid No. GSA-005-13; New and Current-Year Custom Cab Forward Pumpers, New and Current Year Urban/Wildland Interface Pumpers, and 5 Year Extended Service/Maintenance Agreements (“Multi-Step Bid”), a solicitation directed to the acquisition of four fire trucks and extended service and maintenance agreements on each vehicle. See the Multi-Step Bid at **Procurement Record, Book 2 of 5, at Tab 4.**

Three bids were received by December 14, 2012 at 10:00 a.m. Bids received were from Morrico Equipment, LLC, (**Procurement Record, Book 1 and 2 of 5, at Tab 3**), Mid Pac Far East (**Procurement Record, Book 3 of 5, Tab 11a**), and Far East Equipment

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Company (**Procurement Record, Book 4 of 5, Tab 11b**). The three bids were reviewed by GSA to determine whether each met minimum requirements of the bid specifications on December 14, 2012. This review included a review of each bid to determine whether the bidder was able to deliver the fire apparatus within the delivery time specified in the Multi-Step Bid. Two bids were found to be non-responsive for failure to meet the delivery date stated in the Multi-Step Bid; the bid from Morrico Equipment, LLC (“Morrico”), and the bid from Mid Pac Far East (“Mid Pac”). See **Exhibit A**, attached hereto (found at **Procurement Record, Book 5 of 5, at Tab 17**). The delivery date specified in the Multi-Step Bid is 240 days upon receipt of Purchase Order.

One bid, from Far East Equipment Company (“Far East”), was determined to be responsive upon the preliminary review by GSA and subsequently evaluated based upon the Technical Bid Evaluation Criteria stated in the Multi-Step Bid (See **Procurement Record, Book 2 of 5, Tab 4, at page 116 of 116**). This evaluation was conducted by a three person technical committee on January 9, 2013, and the Far East bid received an acceptable score. See **Procurement Record, Book 3 of 5, Tab 10**.

On January 23, 2013, Morrico and Mid Pac were advised in writing that their respective bids were being rejected due to non-conformance with the delivery requirement as stated in the Multi-Step Bid. See **Procurement Record, Book 3 of 5, Tab 8**. On January 23, 2013, Far East was advised that its bid proposal for item 1.1 had been deemed acceptable in the technical evaluation process. See **Procurement Record, Book 3 of 5, Tab 8**.

On January 23, 2013, Morrico served its written protest of the bid process on GSA. **Procurement Record, Book 1 of 5, Tab 1**. On January 30, 2013, GSA served Morrico its

written response, denying the protest. **Procurement Record, Book 1, Tab 2.** This appeal by Morrico was filed on January 31, 2013.

Pursuant to 2 GAR, Div. 4 § 12105 the following required documents are found in the Procurement Record, as indicated:

- a. A copy of the protest is found in the **Procurement Record at Book 1 of 5 at Tab 1.**
- b. A copy of the bid of the Appellant is found in the **Procurement Record at Book 1 of 5 at Tab 3.**
- c. A copy of the solicitation, to include the specifications, is found in the **Procurement Record at Book 2 of 5 at Tab 4.**
- d. A copy of the abstract of bids is found in the **Procurement Record at Book 3 or 5 at Tab 5.**
- e. A copy of the decision from which the Appeal is taken is found in the **Procurement Record at Book 1 of 5 at Tab 2.**

A. A Statement Answering the Allegations.

Appellant asserts in its appeal that the Multi-Step Bid requires GSA to first score a bidder's proposal on five separate criteria, as shown on Appellant's "Exhibit A" attached to the Notice of Procurement Appeal filed on January 31, 2013. Appellant's Exhibit A, referred to above, is found at page 116 of 116 of the Multi-Step Bid. **Procurement Record at Book 2 of 5 at Tab 4.** Presumably, Appellant believes that the technical review of a bid would take place prior to any review of a bid to determine its responsiveness to the solicitation request, because Appellant further asserts that GSA rejected the Morrico bid outright, based upon a non-conforming delivery time, failing to even score the Morrico bid proposal on the five criteria listed in the Multi-Step Bid. Morrico seeks a finding that GSA abused its discretion in rejecting the Morrico Bid. Further, Morrico seeks that this matter be remanded back to GSA with an order to score the Morrico Bid proposal pursuant to the step one

Technical Bid Evaluation Criteria. Presumably, if the Morrigo bid is deemed technically acceptable, then GSA will proceed to step two of the Multi-Step Bid with consideration of the Morrigo bid proposal.¹

GSA has not abused its discretion in the rejection of the Morrigo bid proposal. The Morrigo bid proposal is non-responsive for failing to meet a clear and mandatory delivery requirement in the bid. There are at least five mentions of the delivery requirement stated in the Multi-Step Bid.

1. "REQUIRED DELIVERY DATE: 240 Days Upon Receipt of Purchase Order. For a period of one (1) year on an as needed basis. This is an indefinite bid quantity."

Procurement Record at Book 2 of 5 at Tab 4. at page 3 of 116.

2. "Delivery:
240 Days upon receipt of purchase order. Schedule time and quantity will be coordinated between a successful bidder and the requesting department on an as needed basis."

Procurement Record at Book 2 of 5 at Tab 4. at page 4 of 116, under a section entitled SPECIAL PROVISIONS.

3. "39. **JUSTIFICATION OF DELAY:** Bidders who are awarded contracts under this Solicitation, guarantee that the goods will be delivered to their destination or required services rendered within time specified. If the bidder is not able to meet the specified delivery date, he is required to notify the Chief Procurement Officer of such delay. Notification shall be in writing and shall be received by the Chief Procurement Officer at least twenty-four (24) hours before the specified delivery date. Notification of delay shall include an explanation of the causes and reasons for the delay including statements from supplier or shipping company causing the delay. The Government reserves the right to reject delay justification if, in the opinion of the Chief Procurement Officer, such justification is not adequate."

¹ The Mid Pac bid proposal was also rejected as being non-conforming for failing to meet the prescribed delivery time. If the Morrigo assertion is correct, then presumably the Mid Pac bid proposal would require a technical evaluation, and may, as well, proceed to Step Two of the Multi-Step bid.

Procurement Record at Book 2 of 5 at Tab 4, at page 24 of 116.

4. **“DELIVERY TERMS**

The contractor shall deliver the completed apparatus to the agreed upon ocean port for overseas shipping to Guam.

The contractor will deliver the completed apparatus within 240 calendar days upon receipt of purchase order, with all equipment specified, to the current headquarters of the Guam Fire Department, Guam, USA.

The contractor/bidder must submit a firm delivery time (number of days from date of order to date of delivery) of said apparatus with the technical bid. Quoting number of days after receipt of all components is unacceptable. A deduction of per day will be made for each day over and above the stated delivery date. The penalty will also apply if the unit is delivered and rejected, until the unit is returned meeting specifications.”

Procurement Record at Book 2 of 5 at Tab 4, at page 32 of 116.

5. **“DELIVERY TERMS**

The contractor shall deliver the completed apparatus to the agreed ocean port for overseas shipping to Guam.

The contractor will deliver the completed apparatus within 240 calendar days from the date of notice of award, with all equipment specified, to the current headquarters of the Guam Fire Department, Guam, USA.

The contractor must submit a firm delivery time (number of days from date of order to date of delivery) of said apparatus with the technical bid. Quoting number of days after receipt of all components is unacceptable. A deduction of per day will be made for each day over and above the stated delivery date. The penalty will also apply if the unit is delivered and rejected, until the unit is returned meeting specifications.”

Procurement Record at Book 2 of 5 at Tab 4, at page 91 of 116.

It is clear from the Multi-Step Bid that the delivery date is a material requirement of this solicitation. The delivery term is variously **highlighted** and underlined and restated on

five separate occasions. The Morrico bid proposal, in a Letter of Deviation dated 13 December 2012, states in part:

“Page 32. Delivery Terms. The first Pumper Truck and first Interface Truck will be delivered to the Guam Fire Dept office **within 270 days ARO**. All subsequent trucks will be delivered to Guam Fire Dept within 330 days ARO.”

See **Exhibit B**, attached, and at **Procurement Record at Book 2, continuation of Tab 3**.

Because there is at least one bid proposal that met the required delivery time, and passed the technical evaluation stage as acceptable, it would be an abuse of discretion on the part of GSA to waive the clearly stated delivery requirement in favor of Morrico.

To be considered for an award, a bid must comply in all material respects with the invitation to bid. “Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.” 5 GCA § 5201(g). The requirement of responsiveness in a bid proposal enables all bidders to stand on an equal footing and maintains the integrity of the sealed bidding system. Equal footing and integrity in the bidding process are important values established by law.

“This Chapter shall be construed and applied to promote its underlying purposes and policies. ... the underlying purposes and policies of this Chapter are:

...

(3) to provide for increased public confidence in the procedures followed in public procurement;

(4) to ensure fair and equitable treatment of all persons who deal with the procurement system of this Territory;

...

5 GCA § 5001(a) and (b).

As well, a contract is to be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder, that is, the bidder who meets the requirements and criteria set forth in the Invitation for Bids.

“It is well settled that under basic procurement law principles, case law, the Guam Procurement Law and the Guam Administrative Regulations implementing Guam’s Procurement Law that the lowest responsive and responsible bidder must be awarded the contract. 5 GCA § 5211[g]; 2 G.A.R. Div 4 Chap. 3 Section 3109[n]...”

Appeal of Jones and Guerrero, Inc., OPA-PA-07-007, Decision at p.5.

Responsiveness is determined only on the basis of information submitted with the bid proposal, with the facts available at the time of bid opening. Responsiveness is determined on the bid opening date. *Appeal of Jones and Guerrero, Inc.*, OPA-PA-07-007, Decision at page 8. “The Invitation for Bid shall set forth the requirements and criteria which will be used to determine the lowest responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids.”² 2 GAR, Div. 4 § 3109(n) (1).

Delivery time is a material requirement in the Multi-Step Bid. As stated above, the GSA took numerous opportunities to advise prospective bidders of the materiality of delivery time in the Multi-Step Bid. Guam law allows for the government to establish delivery as a material consideration in the determination of responsiveness. Guam law provides:

“Bid Acceptance and Bid Evaluation. Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Chapter. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose.

5 GCA § 5211(e). (Emphasis added). GSA, in concert with the Guam Fire Department, determined in advance of this solicitation that delivery terms were a material consideration and took reasonable steps to apprise prospective bidders that delivery time is a material consideration in this solicitation. Because questions of responsiveness in a solicitation are

² These requirements apply equally to a multi-step bid process. See 2 GAR Div. 4 §§ 3109 (r), (s) and (t).

determined at the time that bids are opened, it is necessary for the solicitation to be clear on what matters are to be considered material.

“Appropriate subject matter for responsiveness decisions pertains to whether or not the bidder J&G, has promised to do precisely what GMHA has requested. Responsiveness is a procurement law area in which contracting officers are accorded very limited discretion. In essence the responsiveness question is simply whether the bidder J&G promised to perform the contract. Formation of Government Contracts pp 537-592. Responsiveness goes to matters of substance evident from the bid document such as conformance to contract conditions. Such conformity must be apparent at bid opening and thus properly determined at that time. In order to implement the competitive procurement process and avoid prejudicing other bidders all prospective contractors must be bidding on the same identical contract. 2 G.A.R. Div 4 Section 3109(m).”

Appeal of Jones and Guerrero, Inc., OPA-PA-07-007, Decision at p 9.

As stated, Guam procurement law clearly provides that delivery time is acceptable as a material consideration in a solicitation. In this solicitation is not a minor informality.

“Minor informalities are matters of form, rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible.”

2 GAR Div 4, § 3109 (m) (4) (B). See also, *Appeal of Guam Publications Inc.*, OPA-PA-08-007, Decision at p. 14 (finding that a ‘Statement of Qualifications’ required by the solicitation was a material requirement, and failure to provide it deems bid proposal as non-responsive), and *Appeal of Pacific Data Systems, Inc.*, OPA-PA-10-005 at p. 13-14 (finding that the Major Shareholders’ Disclosure Affidavit is matter of substance and not mere form, and failure to provide it deems bid as non-responsive).

Federal and state court decisions are consistent with Guam law, as set out here. See, for example, *Blount, Inc. v. United States*, 22 Cl. Ct. 221, 227 (1990) which states:

“Therefore, a bid which contains a material nonconformity must be rejected as nonresponsive. *Honeywell, Inc. v. United States*, 16 Cl.Ct. 173, 181 (1989), *rev'd*

on other grounds, 870 F.2d 644 (Fed.Cir.1989). Material terms and conditions of a solicitation involve price, quality, quantity, and delivery. *Western Roofing Service*, Comp.Gen.Dec. B-234314.2, 89-1 CPD ¶ 486 (1989). The rule is designed to prevent bidders from taking exception to material provisions of the contract in order to gain an unfair advantage over competitors and to assure that the government evaluates all bids on an equal basis. In other words, a bidder cannot receive award by offering a less expensive method of performance than that required by the solicitation. See Cibinic and Nash, *Formation of Government Contracts* (2nd Ed., 1986), p. 394.”

And see *Julian and JJID, Inc. v. Delaware Department of Transportation*, 53 A. 3d 1081, 1083 (Del. Supr. 2012) which states:

“Delaware's procurement statutes have two purposes. First, the laws are designed to “[c]reate a more efficient ... process to better enable the State to obtain the highest quality goods, materials and services at the best possible price....” Competitive bidding accomplishes that purpose. Second, the statutes are intended to assure “fair and equitable treatment” for all bidders. For the process to work fairly, “all bidders must bid upon the same thing and upon substantially the same terms.” Bids must be deemed “responsive” to be considered. A responsive bid is one that, “conform[s] in all material respects to the requirements and criteria set forth in the contract plans and specifications.” The agency has “broad discretion” in determining whether a bid is responsive. Its decision will not be overturned unless it was arbitrary or capricious.”

B. Conclusion.

GSA has not acted in an arbitrary or capricious manner in this solicitation. Having set out a clear requirement in the Multi-Step Bid that the fire truck apparatus be delivered within 240 days of the issuance of a purchase order, it correctly rejected the Morrigo bid proposal which offered to deliver two fire apparatus at 270 days and the remaining fire apparatus in 330 days. For this reason, the Morrigo bid proposal is found non-responsive. So it is under Guam law. This appeal must be denied. It is worth mentioning that there is one fully responsive bid proposal to the Multi-Step Bid.

C. Declaration Re Court Action.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Dated this 14th day of February, 2013.

OFFICE OF THE ATTORNEY GENERAL
Leonardo M. Rapadas, Attorney General

By:

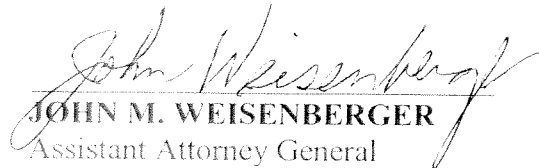

JOHN M. WEISENBERGER
Assistant Attorney General

EXHIBIT A

NOTE TO FILE:

GSA-005-13 (PUMPER TRUCKS /4 X4 INTERFACE TRUCKS)

DECEMBER 14, 2012

10:00 AM

VENDORS NAME:

REMARKS:

1. FAR EAST: 9:41 AM (SUBMITTED) : ** MEET THE DELIVERY REQUIREMENTS (240 DAYS)
** LOD SUBMITTED FOR : PAGE 37,64
** CLARIFICATION : PAGE: 35,37,39,51 & 64
(NOTED: AT TECHNICAL BID)

NOTE: SUBMITTED: 1 ORIGINAL & 1 COPY / 1 ORIGINAL TECHNICAL & 1 COPY.

2. MID PAC: 9:55 AM (SUBMITTED) : ** REJECTED DUE TO DID NOT MEET THE DELIVERY REQUIREMENT.
** OCEAN FREIGHT: THEY WILL NOT BE USING A ROLL-ON/ ROLL-OFF VESSEL TO TRANSPORT.
(NOTED: AT ATTACHED LETTER OF QUALIFICATION)

NOTE: SUBMITTED: 1 ORIGINAL, 3 COPIES & BROCHURES.

3. MORRICO : 9:59 (SUBMITTED): ** REJECTED DUE TO DID NOT MEET THE REQUIRED DELIVERY REQUIREMENT OF 240 DAYS.

OFFERED: 270 DAYS ARO- FIRST PUMPER TRUCK AND FIRST INTERFACE TRUCK.

330 DAYS TO ALL SUBSEQUENT TRUCK (see attach LOD)



BELINDA (BUYER 1)

EXHIBIT A

EXHIBIT B



Sales, Rental, Parts and Service



ADDRESS: 197 Ypao Road Tamuning GUAM 96913

OFFICE: Phone 1-671-649-1946

Fax 1-671-649-1947

SPARE Phone 1-671-646-7914

PARTS Fax 1-671-646-7900

WEB: www.morricoequipment.com



13 December 2012

Robert H. Kono
Chief Procurement Officer (Acting)
GSA General Services Agency
Government of Guam
148 Route 1 Marine Drive
Piti, Guam 96915

Dear Sir,

Re: Letter of Deviation. Bid No. GSA-005-13

- 1) **Page 32. Delivery Terms.** The first Pumper Truck and first Interface Truck will be delivered to the Guam Fire Dept office **within 270 days ARO.**
All subsequent trucks will be delivered to Guam Fire Dept office within 330 days ARO.
- 2) **Page 37. Wheelbase.** Wheelbase will be 188 Inches. A 180 Inch wheel base can be achieved by providing cross lays in lieu of speed lays.
- 3) **Page 54. Mechanical Siren Auxiliary.**
Q2B will be on left side. Front Suction shall be on right side.
- 4) **Page 60. Compartmentation Passenger Side.**
Exceeds height but 29 inches wide to match drivers side.
- 5) **Page 88. Built In USA.** The Mercedes Benz engine Model 900 series is manufactured in Brazil under license for Daimler Trucks North America LLC.
- 6) **Page 105. Interior. Dome Light Cab.** No Theater dimming.
- 7) **Page 105. Gauge Cluster.** No wind shield wiper fluid indicator.

EXHIBIT B

ON-SITE DIESEL DELIVERY





Sales, Rental, Parts and Service



ADDRESS: 197 Ypao Road Tamuning GUAM 96913

OFFICE: Phone 1-671-649-1946

Fax 1-671-649-1947

SPARE: Phone 1-671-646-7914

PARTS: Fax 1-671-646-7900

WEB: www.morricoequipment.com



8) Page 105. Warning System. No audible alarm and no low voltage indicator.

9) Page 105. Oil Temp Gauge. No Oil Temp Gauge available.

10) Page 105. Seat Belt All Red.

3 POINT HIGH VISIBILITY ORANGE RETRACTOR DRIVER, RH FRONT AND LH, CENTER AND RH REAR PASSENGER SEAT BELTS WITH NFPA 1901-2009 COMPLIANT SENSOR AND DASH HARNESS

11) Page 106. Storage Consol Overhead. Molded plastic with retainer nets. No nets.

12) Page 106. Cab Rear Air Suspension.

Not available with front drive axle. We supply :

27,000# FLAT LEAF SPRING REAR SUSPENSION WITH HELPER AND RADIUS ROD FOR FIRE/EMERGENCY SERVICE
SPRING SUSPENSION - 2.25" AXLE SPACER
STANDARD U-BOLT PAD
FORE/AFT CONTROL RODS

13) Page 106. AM/FM Stereo with Clock. The clock is located separately on truck dash. It is not part of radio.

Regards,

Allan Morrison

Allan Morrison

President

Morrigo Equipment LLC

Saved as: GSA-005-13 Deviation Letter 13 Dec 2012

ON-SITE DIESEL DELIVERY

