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PROCUREMENT APPEALS

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OFFICE OF THE PUBLIC ACCOUNTABILITY

GUAM

IN THE APPEAL OF
JRN AIR CONDITIONING &
REFRIGERATION, INC.

Appellant.

APPEAL NO. OPA-PA-10-007

**JRN AIR-CONDITIONING &
REFRIGERATION, INC.'S HEARING
BRIEF**

Appellant JRN Air-Conditioning and Refrigeration, Inc., (hereinafter "JRN") hereby submits its Hearing Brief discussing the issues before the Office of Public Accountability (hereinafter "OPA") in the above captioned appeal of Guam Department of Education's (hereinafter "GDOE") GDOE IFB 007-2010 for Preventive Maintenance and Repair of Central Air Conditioning Equipment for all GDOE Public Schools and Support Facilities (hereinafter "IFB").

I. LIST OF ISSUES

- A. **Whether GDOE violated the Guam Procurement Law § 5211(b) by failing to require bidders to demonstrate compliance with §§ 5801 and 5802 (Wage Determination).**

COPY

1. Factual Contentions.

The IFB specifications require all bidders to comply with U.S. D.O.L. Wage Determination, but failed to "recite" the most recent Wage Determination issued by the U.S. Department of Labor. GDOE also failed to require bidders to demonstrate compliance with §§ 5801 and 5802 (Wage Determination) as required by the procurement law; instead GDOE relies on a Declaration of Compliance (FORM E).

2. Legal Issues.

The underlying purpose and policy of the Guam Procurement Law is to ensure the fair and equitable treatment of all persons who deal with the procurement system and to provide for the maintenance of a procurement system of quality and integrity. 5 G.C.A. § 5001(b)(4) & (7). This policy is further codified in 5 G.C.A. § 5211(b) and requires the procuring agency to (1) recite the actual Wage Determination most recently issued by the U.S. Department of Labor, and (2) obtain a demonstration of compliance with §§ 5801 and 5802 (Wage Determination).

Failure to recite the applicable Wage Determination in the IFB, does not provide for fair and equitable treatment of all the bidders and places into question the quality and integrity of the procurement process. Without reciting the applicable Wage Determination GDOE cannot fairly provide equitable treatment to all bidders because each bidder may apply a different Wage Determination which in effect would not allow for an objective evaluation of the bids. GDOE's failure to recite the most recent Wage Determination in the IFB violates § 5211(b) of the procurement law.

Not requiring a bidder to demonstrate compliance allows potential bidders to submit a bid below the prevailing wage and benefit requirements to obtain the award and later request for a change order to comply with the Wage Determination. Relying solely on FORM E to satisfy the

"demonstration of compliance" requirement of § 5211(b) also does not provide for fair and equitable treatment of all bidders and also calls into question the quality and integrity of the procurement process and violates § 5211(b) of the procurement law.

B. Whether GDOE violated the Guam Procurement Law § 5211(e) by failing to properly identify the specific occupations that bidders are required to employ in order to perform the requirements of the IFB.

1. Factual Contentions.

Item 1 of the IFB Specification (page 18) states that all bidders shall submit labor costs requirements for (a) preventive maintenance of air-conditioning equipment; (b) minor repairs of the air-conditioning equipment; and (c) major repairs, installation, relocation, and replacement of central air-conditioning equipment. The aggregate labor cost based on 1500 hours is the sole basis for the award of the contract.

Item 4D of the IFB Specifications (page 20) states that bidders must provide a minimum of two (2) crews for installation and three (3) crews for repair and preventive maintenance **per district**. There are four (4) districts in Guam requiring the bidder to provide a total of ten (10) persons **per district**. Each crew must include one (1) technician and one (1) helper.

The proper occupation code for an air-conditioning technician is 23410 requiring a minimum wage rate of \$15.76 per hour. As for the helper, the IFB does not specify which type of "helper" is required. The Wage Determination contains at least three somewhat similar positions, it includes (a) a general maintenance worker which requires a minimum wage of \$11.95 per hour; (b) a laborer which requires a minimum wage of \$10.65 per hour; and (c) a maintenance trades helper which requires a minimum wage of \$9.92 per hour.

2. Legal Issues.

As previously stated the underlying purpose and policy of the Guam Procurement Law is to ensure the fair and equitable treatment of all persons. 5 G.C.A. § 5001(b)(4). The purpose of a specification is to serve as a basis for obtaining a service item adequate and suitable for the territory's needs in a cost effective manner. 2 G.A.R. § 4102(a)(1). The policy of the territory requires that specifications permit maximum practicable competition consistent with the purpose of the specification and that the specifications be drafted with the objective of clearly describing the territory's requirements. *Id.* The procurement law further requires that criteria that affects bid price must be objectively measurable. 5 G.C.A. § 5211(e).

Failing to identify the specific "occupation code" required to fulfill the requirements of this procurement violates the procurement law because it does not allow the bids to be evaluated objectively as required by 5 G.C.A. § 5211(e). The IFB states that the sole criteria used in evaluating the bids is labor cost, and because the hourly labor rate (at a minimum) must comply with §§ 5801 and 5802 (Wage Determination), failing to specify the exact occupation code does not allow for an objective evaluation as required by the statute. For instance, one bidder may apply the wage rate for a "laborer" another may apply the wage rate for "general maintenance helper", and yet another bidder may apply the wage rate for "general trades helper". GDOE cannot be certain the bids are cost effective because each bid is based on different wage rates.

C. Whether GDOE violated the Guam Procurement law § 5211(g) by failing to ensure that the lowest bidder met the requirements and criteria set forth in the IFB and by failing to ensure that the bid amount is sufficient to comply with the Wage Determination requirements of §§ 5801 and 5802 prior to awarding the contract.

1. Whether GDOE is required to conduct a responsibility inquiry when informed that the lowest bid may not conform with §§ 5801 and 5802 (Wage Determination) prior to award.
 - a. Factual Contentions.

Item 16 (a-h) of the IFB General Terms and Conditions (page 13) states that in determining the lowest responsible offer, the Administrator, Supply Management shall be guided by the price of items offered and compliance with all of the conditions of the IFB. On September 7, 2010 JRN sent via facsimile a request for clarification on the appropriate "occupation code" used in the IFB evaluation process for the position of air-condition technician. JRN also requested that GDOE review the lowest bid to determine if the submitted bid complied with §§ 5801 and 5802 (Wage Determination). On the same day the Supply Management Administrator instructed staff to request a breakdown of the bid prices submitted from all bidders to verify whether the bids comply with the Wage Determination rates. The instruction further stated that the breakdown must be submitted prior to the award of the contract. JRN was never asked to submit a breakdown of its bid price and the procurement record does not include any evidence that a request to submit breakdown of bids was ever made of the other bidders prior to award on October 15, 2010.

- b. Legal Issues.

Guam law requires that a contract be awarded to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the IFB and whose bid amount is sufficient to comply with §§ 5801 and 5802 (Wage Determination). The procurement regulations also require that prior to awarding a contract, the procurement officer must be satisfied that the prospective contractor is responsible. 2 G.A.R. § 3116(b)(4). This requirement has been interpreted to mean

that if an agency has reason to suspect that an issue affecting a bidder's determination of responsibility exists, failure to conduct a responsibility inquiry constitutes serious error and grounds for sustaining a protest. In the Appeal of Latte Treatment Center, Inc., OPA-08-008. Entering into a contract without determining if a bidder is responsible violates the procurement law and voids the award (contract) by operation of law.¹

GDOE acknowledged that the lowest bid appeared to be low and did not conduct an inquiry to determine whether the lowest bid did in fact comply with the wage determination requirements. Instead, GDOE hangs its hat on the fact the lowest bidder submitted FORM E. Even more alarming is GDOE's position that regardless of whether the bid submitted complies with the wage determination requirements, the bidder must pay the prevailing wages therefore it is not GDOE's responsibility to enforce the application of §§ 5801 and 5802. GDOE Agency Report OPA Case OPA-PA-10-007. This position is contrary to the requirements of § 5211 in its entirety because § 5211(g) clearly states that GDOE cannot award a contract unless the bid amount is sufficient to comply with the Wage Determination requirements. Failing to conduct this responsibility inquiry is serious error and is in violation of § 5211(g), and as a result the contract entered into with the lowest bidder is void by operation of law.

2. Whether GDOE is required to conduct a responsibility inquiry when GDOE has knowledge that the lowest bidder did not meet the crew (personnel) requirements of the IFB prior to award.
 - a. Factual Contentions.

Item 4D of the IFB Specifications (page 20) states that a bidder must provide a minimum of two (2) crews for installation and three (3) crews for repair and preventive maintenance **per**

¹ All contracts in violation of law, whether willful or negligent are against the policy of the law. 18 G.C.A. § 88102. Where a contract has but a single subject, and such object is unlawful whether in whole or in part, ... the entire contract is void. 18 G.C.A. § 85404.

district. There are four (4) districts in Guam. Each crew must include one (1) technician and one (1) helper. The Bidder is required to provide a total of ten (10) persons **per district**.

On September 1, 2010, (at the bid opening) GDOE became aware that the lowest bidder did not have a sufficient personnel to comply with the requirements of the IFB when it reviewed the lowest bidder's bid packet. The lowest bidder's packet stated that the bidder employed a total of 22 employees (8 air-condition technicians and 14 general helpers). On September 27, 2010 (by response to request by GDOE) GDOE was again made aware that the lowest bidder did not have sufficient personnel to comply with the requirements when it received a copy of the lowest bidder's payroll register. At this time, the lowest bidder only employed 11 employees (3 air-condition technicians and 2 general helpers). The procurement record does not provide any evidence that GDOE conducted further inquiry prior to the award on October 15, 2010.

b. Legal Issues.

Guam law requires that a contract be awarded to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the IFB. 5 G.C.A. § 5211(g). The procurement regulations also require that prior to awarding a contract, the procurement officer must be satisfied that the prospective contractor is responsible. 2 G.A.R. § 3116(b)(4). This requirement has been interpreted to mean that the failure of an agency to conduct a responsibility inquiry constitutes serious error and grounds for sustaining a protest, if the agency had reason to suspect that an issue affecting a bidder's determination of responsibility exists. In the Appeal of Latte Treatment Center, Inc., OPA-08-008. Failing to determine if the lowest bidder meets the requirements and criteria of set forth in the IFB clearly violates the procurement law and any contract awarded is void by operation of law.

On two separate occasions GDOE had notice that the lowest bidder did not employ sufficient personnel to comply with the crew requirements of the IFB. Yet even armed with this information GDOE did not conduct a responsibility inquiry *prior to awarding the contract* to determine if the bidder met the personnel requirements set forth in the IFB. The procurement record does not reflect that any inquiry regarding personnel was ever made prior to the award. Awarding the contract without conducting a responsibility inquiry violates the procurement law and the contract award to the lowest bidder is void by operation of law.

II. RESPONSE TO GDOE'S DETERMINATION

In its Agency Report, GDOE states that it made a determination that the award to the lowest bidder is proper because the vendor has complied with the U.S. Department of Labor Wage Determination. This determination was made based solely on the fact that the lowest bidder signed FORM E (Declaration Re: Compliance with U.S. Department of Labor Wage Determination). GDOE Agency Report OPA Case OPA-PA-10-007, Ex. H.

JRN contends that GDOE's determination was made in error because the procurement record reflects that, (1) GDOE failed to properly recite the Wage Determination that will be used in the IFB; (2) GDOE failed to require the bidders to demonstrate compliance with the requirements set forth in §§ 5801 and 5802; (3) GDOE failed to specify the proper occupation code required for performance of the IFB; (4) GDOE failed to conduct a responsibility inquiry as to whether the lowest bid was sufficient to comply with §§ 5801 and 5802 prior to award; and (5) GDOE failed to conduct a responsibility inquiry as to whether the lowest bidder has sufficient personnel to comply with the crew requirements of the IFB.

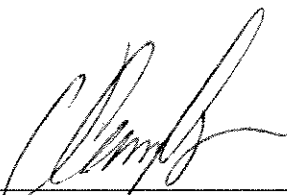
III. REMEDIES

JRN will defer at this time any discussion related to its ability to obtain fees and costs,

and the amount of fees and costs, related to this appeal until after the hearing, as allowed by the December 16, 2010 Scheduling Order.

DATED: Hagåtña, Guam, January 6, 2011.

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