



OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

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5 IN THE APPEAL OF,
6 JONES AND GUERRERO CO., INC., dba
7 J&G CONSTRUCTION,
8 Appellant.

APPEAL NO: OPA-PA-07-005
FINDINGS AND RECOMMENDATIONS
OF HEARING OFFICER

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12 I. INTRODUCTION

13 These are the Findings and Recommendations of the Hearing Officer, CHARLES D.
14 STAKE, ESQ., on an appeal filed on June 21, 2007, by Jones and Guerrero Co. Inc., dba J&G
15 Construction (Hereafter "J&G") regarding the Guam Memorial Hospital Authority's (Hereafter
16 "GMHA") denial of J&G's bid protest concerning an Invitation for Bid for a warehouse
17 extension project. Pre-hearing conferences were held on January 16, 2007, and February 25,
18 2008. The parties waived a formal hearing and requested a decision on the record. John Thos.
19 Brown, Esq. J&G general counsel represented J&G. Aaron R. Jackson, Esq., of Mair, Mair,
20 Spade & Thompson, P.C., represented GMHA. Hearing Officer Stake was assigned this appeal
21 on November 21, 2008.

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23 The Hearing Officer recommends the Public Auditor hold, under applicable Guam
24 procurement laws and regulations, that GMHA improperly rejected J&G's bid on the basis of
25 responsiveness. The information omitted by J&G properly pertained to the issue of
26 responsibility. The case is remanded to GMHA for a determination of either responsibility or
27 non-responsibility and further appropriate agency disposition.
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II. FINDINGS OF FACT

These findings are based on the Procurement Record, all documents submitted by the parties in the appeal, as well as all testimony and arguments presented at the January 16, and February 25, 2008, Pre-Hearings in this matter. The parties waived a formal Hearing and requested a decision on the record at the February 25, 2008, Pre-Hearing.

1. GMHA issued Invitation for Bid No. GMHA 005-2007 for competitive sealed bids for construction services for the GMHA Warehouse Extension Project on February 1, 2007. J&G responded and submitted a timely bid for the project. All the sealed bids were opened by GMHA on March 21, 2007. J&G was the low bidder.

2. The General Terms and Conditions of the Sealed Bid Solicitation and Award item number 11 provided a bid bond requirement in pertinent part as follows:

BID BOND REQUIREMENT: Bidder is required to submit a Bid Guarantee Bond or standby irrevocable Letter of Credit or Certified Check or Cashiers Check in the same bid envelope to be held by the Government pending award.

The timely submitted J&G bid included a cashiers check dated March 21, 2007, number 3808454 drawn on Bank of Hawaii issued by their Hagatna branch providing "pay to the order of Guam Memorial Hospital Authority \$126,424.00." There was a notation on the bottom left front of the check stating warehouse extension project: No: GMHA 005-2007. There was a notation on the bottom left front of the check stating "warehouse extension project: No: GMHA 005-2007".

3. The GMHA bid package, which was provided to all prospective bidders for the warehouse project, contained a warning document entitled Special Reminder to Prospective Bidders which all bidders had to read and sign. The Special Reminder listed a series of seven essential items as "requirements of the bid" which must be completed and "submitted in the bid

1 envelope at the date and time for bid opening”, and that “failure to comply with the requirements
2 will mean disqualification and rejection of the bid.” One of those listed seven essential items was
3 the Bidders Qualification Statement. The Special Reminder is set out below.
4

5 GUAM MEMORIAL HOSPITAL AUTHORITY
850 Gov. Carlos Camacho Rd., Oka Tamuning, Guam 96913

6 **SPECIAL REMINDER TO PROSPECTIVE BIDDERS:**

7 Bidders are reminded to read the Instructions to Bidders and the General Conditions attached to the
8 Bid Invitation to ascertain that all the following requirements of the bid are submitted in the bid
9 envelope at the date and time for bid opening.

- 10 1. Bid Proposal.
- 11 2. ~~Bid bond in the form cashier's check or Surety Bond.~~ Surety Bond, to be valid, must be
12 accompanied by:
- 13 a. Current certificate of authority issued by the Insurance Commissioner.
 - 14 b. Power of Attorney issued by the Surety to the Resident General Agent
 - 15 c. Power of Attorney issued by two (2) major officers of the surety to whoever is
16 signing on their behalf.
- 17 3. Non-Collusion Affidavit.
- 18 4. Bidders Qualifications Statement
- 19 5. Listing of Subcontractors
- 20 6. Major Shareholders Disclosure Affidavit.
- 21 7. Competency of Bidder (See Contractor's Qualification Statement)

22 This reminder must be signed and returned in the bid envelope together with the bid. Failure to
23 comply with the requirements will mean disqualification and rejection of the bid.

24 _____ authorized representative of

25 _____ acknowledge receipt of this special reminder to
26 prospective bidders together with Bid Invitation / Number GMHA 005-2007

27 this _____ day of _____, 20____ and that I have read and understand its intent
28 and implications.

BIDDER REPRESENTATIVE'S SIGNATURE

Special Reminder to Prospective Bidders:
Warehouse Extension Project.
GMHA 005-2007

Page: 1 of 1

EXHIBIT C

1 4. J&G did not fully complete all questions on the Bidders Qualification Statement, but rather
2 left some items blank and submitted the following partially completed form.

3

4 3. President's name: Kenneth T. Jones Jr.

5 4. Vice-President's name(s): Noli C. Cadag

6 _____

7 5. Secretary's name: _____

8 6. Treasurer's name: _____

9 E. If your organization is a partnership, answer the following:

10 1. Date of organization: _____

11 2. Type of partnership (if applicable): _____

12 3. Name(s) of general partner: _____

13 F. If your organization is individually owned, answer the following:

14 1. Date of organization: _____

15 2. Name of owner: _____

16 3. If the form of your organization is other than those listed above, describe it
17 and name the principal: _____

18 _____

19 G. Provide a list of equipment available to your organization to execute the
20 project/work (attach to this Contractor's Qualification Statement).
21 Forklift, Dump Truck

22 H. Provide a resume' of your organization' supervisory personnel and their areas of
23 performance (attach to this Contractor's Qualification Statement).

24 II. LICENSING

25 A. List jurisdictions and trade categories in which your organization is legally
26 qualified to do business, and indicate registration or license numbers, if
27 applicable.

28 General Building Construction

Guam Contractors Lic. # 4575

Contractor's Qualification Statement
Warehouse Extension Project
GMHA 005-2007

Page 2 of 6

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B. List jurisdictions in which your organization's partnership or trade name is filed.

C. Provide copy of your organization's current and appropriate Government of Guam contractor's license.

III. EXPERIENCE

A. List the categories of work that your organization normally performs with its own forces.

B. Claims (e.g. liquidated damages), Suits and Records of Default. (If the answer to any of the questions below is yes, please attach details.)

1. Has your organization ever failed to complete any work awarded to it within the last five years? No

If yes, is your organization currently liable to pay liquidated damages for delay in the completion of the last two (2) works contracted by the Government of Guam? _____

Please provide any records of defaults incurred during the last five (5) years.

2. Are there any other judgements, claims, arbitration proceedings or suits pending or outstanding against your organization or its officers? No

3. Has your organization filed any lawsuits or requested arbitration with regard to construction contracts within the last five years? No

C. Within the last five years, has any officer or principal of your organization ever been an officer or principal of another organization when it failed to complete a construction contract? (If the answer is yes, please attach details.) No

D. On a separate sheet, list major construction projects your organization has in progress, giving the name of project, owner, architect, contract amount, percent complete and scheduled completion date.

Contractor's Qualification Statement
Warehouse Extension Project
GMHA 005-2007

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State total worth of work in progress and under contract.

E. On a separate sheet, list major projects of similar complexity to this bid solicitation that your organization has completed in the past five years, giving the name of projects, owner, architect, contract amount, date of completion and percentage of the cost of the work performed with you own forces.

State average annual amount of construction work performed during the past five years.

F. On a separate sheet, list the construction experience and present commitments of the key individuals of your organization.

IV. REFERENCES

A. Trade References: Benson Guam Ent.
P. O. Box 6157
Tamuning, Guam 96931

B. Bank References: Bank of Hawaii
123 West Soledad Avenue
Hagatna, Guam 96932

C. Surety:

1. Name of bonding company: ✓

2. Name and address of agent: ✓

D. Provide references of projects completed with in the last five (5) years that would reflect good owner-contractor relationships.

Contractor's Qualification Statement
Warehouse Extension Project
GMHA 005-2007

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V. FINANCING

A. Financial Statement:

1. Attach a financial statement, preferably audited, including your organization's latest balance sheet and income statement showing the following items:

Current Assets (e.g., cash, joint venture accounts, accounts receivable, notes receivable, accrued income, deposits, materials inventory and prepaid expenses);

Net Fixed Assets: Please see attached.

Other Assets: _____

Current Liabilities (e.g., accounts payable, notes payable, accrued expenses, provision for income taxes, advances, accrued salaries and accrued payroll taxes);

Other Liabilities (e.g., capital, capital stock, authorized and outstanding shares par values, earned surplus and retained earnings).

2. Name and address of firm preparing attached financial statement, and date thereof:

J & C Construction

3. Is the attached financial statement for the identical organization named on page one? Yes

4. If not, explain the relationship and financial responsibility of the organization whose financial statement is provided (e.g., parent, subsidiary).

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B. Will the organization, whose financial statement is attached, act as guarantor of the construction contract? Yes

VI. SIGNATURE

Dated at _____ this _____ day of _____, 20____

Name of Organization: Jones & Guerrero Co., Inc.
Dba: J & G Construction

By: Noli C. Cadar

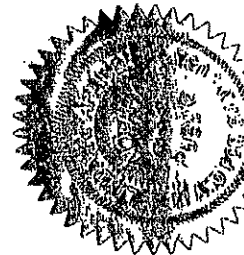
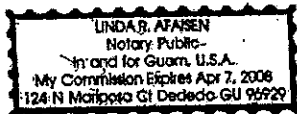
Title: Exec. Vice President

being duly sworn deposed and says that the information provided herein is true and sufficiently complete so as not to be misleading.

Subscribed and sworn before me this 2nd day of March, 2007.

Notary Public: Linda R. Afansen

My Commission Expires: April 7, 2008



Contractor's Qualification Statement
Warehouse Extension Project
GMHA 005-2007

1 5. In a Bid Status Notice dated May 1, 2007, GMHA informed J&G that its bid had been
2 rejected on the basis that it was "non-responsive". J&G responded to GMHA on May 4, 2007,
3 with a notice of protest and request for explanation. On May 7, 2007, the Supply Management
4 Administrator for GMHA informed J&G that the protest letter had been received and that
5 GMHA will make no award of the contract until the protest has been settled.
6

7 6. In a June 11, 2007, letter the GMHA Administrator responded to the J&G protest letter
8 and rejected the protest explaining that the J&G bid was rejected for failing to "complete
9 portions of the [Bidders Qualification] Statement and also failed to submit a detailed listing of
10 availability of personnel and technical equipment to perform the required services," while all
11 other prospective bidders met the requirements. In more detail, a May 9, 2007, memorandum
12 (Hereafter GMHA Memo) from the GMHA Hospital Facilities Maintenance Manager to the
13 GMHA Supply Management Administrator stated that the "failure by the Contractor to complete
14 the required Bidders Qualification Statement is considered significant in determining the most
15 responsive and responsible bidding practices. And in this case the prospective contractor failed to
16 display his/ her company as a responsive and responsible bidder." The GMHA Memo included
17 an attachment listing what it considered critical areas omitted in the Bidders Qualification
18 Statement. The following objections were cited: secretary and treasurers names were left blank;
19 the list of equipment included forklift and dump truck only and "failed to attach a detailed listing
20 of equipment available to execute the project/work."; the response to request for resume of
21 organization's supervisory personnel and their areas of performance was considered incomplete
22 and "not a resume"; the list of jurisdictions in which organization's partnership or trade name is
23 filed was left blank; categories of work that the organization normally performs with its own
24 forces was left blank; name of bonding company and address of agent were left blank. The
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1 GMHA Memo also cited a bid package attachment entitled, "Evaluation Factors for
2 Determination of Qualified Bidders" citing two standards GMHA felt J&G failed to meet in its
3 bid. The two standards were labeled Item 1 and Item 4.
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5 **Item 1.** The bidder has sufficient experience and he is fully prepared with
6 necessary capital, machinery and skilled workmen and supervision staff to carry
7 out the contract satisfactorily.

8 Here GMHA found, "Contractor failed to identify machinery other than a dump truck and
9 forklift and further failed to identify skilled workmen and supervision staff to carry out the
10 contract satisfactorily."
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12 **Item 4.** The bidder submitted resumes for the local office representative, the
13 proposed project manager, as well as the field superintendent and the resumes
14 reflect sufficient experience in projects of this nature and/or other projects of
15 similar complexity.
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17 Here GMHA found, "Contractor failed to submit resumes for local office representatives, the
18 proposed project manager as well as the field superintendent reflecting sufficient experience in
19 projects of this nature and/or other projects of similar complexity. Instead, the contractor
20 submitted a one-page document with a J&G Construction letterhead addressed 'To whom it may
21 concern' from Samuel Cunanan referencing 'Request for additional information for my updated
22 listing of employment, name of employers, addresses, period of employment, and occupation for
23 each employer.' This is not a resume and the document does not detail projects of similar
24 complexity."
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28 III. ANALYSIS

The OPA is presented with an issue of first impression before this forum: responsiveness

1 versus responsibility. In order to arrive at a resolution of this issue we refer to legal scholars,
2 procurement law texts authored by law professors, general procurement law principles, and
3 Guam procurement law and regulations.
4

5 Appellant J&G asserts that the appropriate issue before OPA involves responsibility; that
6 the subject matter of the information which it omitted in its bid pertained to responsibility not
7 responsiveness; and that GMHA was required to make a responsibility or non-responsibility
8 determination rather than rejecting its bid on the basis of responsiveness. GMHA contends that
9 J&G's failure to provide certain information was an issue of responsiveness and was correctly
10 decided on that basis. GMHA notes that the instructions contained in the IFB required the
11 omitted information be submitted with the bid, so it would be unfair to the other bidders to allow
12 J&G to submit the information after the bid opening date.
13

14 It is well settled that under basic procurement law principles, case law, the Guam
15 Procurement Law and the Guam Administrative Regulations implementing Guam's Procurement
16 Law that the lowest responsive and responsible bidder must be awarded the contract. 5 G.C.A.
17 5211[g]; 2 G.A.R. DIV 4 Chap. 3 Section 3109[n]; GMHA Procurement Rules and Regulations
18 Section 3-202.14.1. GMHA rejected the low bidder J&G's bid as "non-responsive" basing their
19 decision on appellant's failure to submit a fully completed Bidders Qualification Statement with
20 its bid on March 21,2007, the sealed bid due date. GMHA contends the omitted information
21 properly resulted in a non-responsive determination and cites the Special Reminder warning
22 statement that failure to submit all required items in the bid envelope at the date and time of bid
23 opening will result in disqualification and bid rejection. Appellant asserts the content of the
24 omitted information dealt only with responsibility and therefore the omission could not result in
25 bid rejection based on non-responsiveness. J&G argues the IFB warning statement could not
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1 convert responsiveness material to responsibility material. Therefore GMHA was required to
2 make a determination of responsibility or non-responsibility based on the criteria set out in Guam
3 procurement law and regulations.
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5 The instant case hinges on the appropriate definition and interpretation of responsive and
6 responsible and the legal distinction between these two terms of art. It is essential to ascertain
7 whether a nonconforming bid involves the responsiveness of the bid or the responsibility of the
8 bidder. Law professors Cibinic and Nash treat the key issue in the instant case in pertinent detail
9 in Formation of Government Contracts, Third Edition, Responsiveness versus Responsibility, at
10 pages 545-546 as follows:
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12 It is critical to determine whether a nonconformity deals with the responsiveness
13 of a bid or the responsibility of a bidder. Responsiveness, an area in which the
14 contracting officer has limited discretion, deals with the question of whether the
15 contractor has promised to do exactly what the Government has requested.
16 Responsibility, however, involves the question of whether the contractor can or
17 will perform as it has promised, and the contracting officer is accorded a great
18 deal of discretion. Questions of responsiveness are determined only on the basis
19 of information submitted with the bid on the facts available at the time of bid
20 opening. Conversely, responsibility determinations are made on the basis of all
21 information that may be submitted or available up to the time of award. These
22 concepts are often confused, particularly when the IFB contains specific
23 requirements concerning bidders' responsibility characteristics such as the
24 requirement for submission of information relating to responsibility. As a general
25 rule, matters that deal with bidder responsibility cannot be converted into matters
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1 of responsiveness merely by inserting a provision in into the IFB requiring
2 rejection of bids that do not comply.

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4 Guam procurement law statutes and administrative regulations also follow the above indicated
5 distinctions between responsiveness and responsibility. These distinctions occur as to; [1] the
6 definition of the two terms of art; [2] the time frame for making a responsibility determination as
7 opposed to a responsiveness decision; and [3] the different subject matter which properly
8 comprises a responsibility decision as opposed to the appropriate subject matter of a
9 responsiveness determination. In essence, responsiveness goes to whether a potential contractor
10 promises to perform the contract and is determined at bid opening from the information provided
11 in the bid documents alone. However, responsibility goes to whether a potential contractor is
12 able to perform and is determined before award from information accessed prior to award. A
13 finding of non-responsibility requires a written determination stating the reasons for the decision
14 which must be promptly provided to the bidder.

17 **A. Definitions Distinguishing Responsiveness and Responsibility.**

18 The Guam Code at 5 G.C.A. 5201[f] defines responsible bidder as, "a person who has the
19 capability in all respects to perform fully the contract requirements, and the integrity and
20 reliability which will assure good faith performance." In contrast a responsive bidder is defined
21 at 5 G.C.A. 5201 [g] as, "a person who has submitted a bid which conforms in all material
22 respects to the Invitation for Bids." Guam Administrative Regulations simply parallel the Guam
23 Code and provide similar distinctions. Guam Procurement Regulations, 2003, 2 G.A.R. DIV 4
24 Chap. 1 Sections 1106.27 and 1106.28; GMHA Procurement Rules and Regulations, 1990, 3-
25 202.14.2.
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1 **B. Distinction Between Time Frames Applicable to Responsiveness and Responsibility**
2 **Determinations.**

3 **1. Responsiveness Is Determined at Bid Opening**

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5 The responsiveness issue is determined only on the basis of information submitted with
6 the bid and facts available at the time of bid opening and is determined at the bid opening date. 5
7 G.C.A. 5201[g]; 2 G.A.R. DIV 4 Chap. 2 Section 3109[n][1] provides, "The Invitation for Bids
8 shall set forth the requirements and criteria which will be used to determine the lowest
9 responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed
10 in the Invitation for Bids." Thus, the agency decision to be made at the bid opening date deadline
11 is straightforward: the bid submitted is either conforming or non-conforming. The information
12 submitted by a bidder/offeror as its response to the Invitation for Bid is the exclusive basis for
13 ascertaining responsiveness and the responsiveness determination occurs at the time of bid
14 opening allowing for little discretion to be exercised by the contracting officer.
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17 **2. Responsibility Is Determined Before Award**

18 Unlike responsiveness decisions, responsibility determinations are based on the
19 information supplied or available up to the time of award. After an inquiry by the contracting
20 officer, the bidder must supply the requested responsibility information in a timely manner.
21 Unreasonable failure by the bidder to reply to the inquiry constitutes grounds for a non-
22 responsibility determination. A bidder/offeror must, "promptly supply information in connection
23 with an inquiry with respect to responsibility." If a bidder fails to supply the information
24 requested by the contracting officer, the procurement official may base the responsibility
25 decision on any available information or find the prospective contractor non-responsible based
26 on its unreasonable failure to promptly comply with the request. All non-responsibility
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1 determinations must be in writing and a copy provided to the bidder. 2 G.A.R. DIV 4 Sections
2 3116 [a], 3116[b][2][B], and 3116[b][3]. "Before awarding a contract the Procurement Officer
3 must be satisfied that the prospective contractor is responsible." [emphasis supplied] 2 G.A.R.
4 DIV 4 Section 3116 [b][4].
5

6 **C. Distinction Between Subject Matter Properly Applicable to Responsiveness and**
7 **Responsibility.**

8 **1. Subject Matter Applicable to Responsiveness**

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10 Appropriate subject matter for responsiveness decisions pertains to whether or not the
11 bidder J&G, has promised to do precisely what GMHA has requested. Responsiveness is a
12 procurement law area in which contracting officers are accorded very limited discretion. In
13 essence the responsiveness question is simply whether the bidder J&G promised to perform the
14 contract. Formation of Government Contracts pp 537-592. Responsiveness goes to matters of
15 substance evident from the bid document such as conformance to the contract conditions. Such
16 conformity must be apparent at bid opening and thus is properly determined at that time. In order
17 to implement the competitive procurement process and avoid prejudicing other bidders all
18 prospective contractors must be bidding to perform the same identical contract. 2 G.A.R. DIV 4
19 Section 3109 [m].
20

21
22 **2. Subject Matter Applicable to Responsibility**

23 Responsibility subject matter concerns whether the bidder can or will perform as
24 promised and thus, as indicated above, is properly determined before award. Formation of
25 Government Contracts pp 245-253. 2 G.A.R. DIV 4 Section 3116 [b][2]. Standards of
26 Responsibility describes in significant detail the appropriate subject matter to be considered in a
27 responsibility determination. Factors to be considered are whether a prospective contractor has
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1 the following:

- 2 i. the appropriate financial, material, equipment, facility, and personnel resources
3 and expertise, or the ability to obtain them, necessary to indicate its capability to
4 meet all contractual requirements;
- 5 ii. a satisfactory record of performance;
- 6 iii. a satisfactory record of integrity;
- 7 iv. qualified legally to contract with the territory; and
- 8 v. supplied all necessary information in connection with the inquiry concerning
9 responsibility." 2 G.A.R. DIV 4 Section 3116 [b] [2] [A].

10 The regulation continues, "[T]he prospective contractor may demonstrate the availability
11 of necessary financing, equipment, facilities, expertise, and personnel by submitting upon
12 request: [A]evidence that such contractor possesses such necessary items; [B]acceptable plans to
13 subcontract for such necessary items; or [C]a documented commitment from, or explicit
14 arrangement with, a satisfactory source to provide the necessary items." 2 G.A.R. DIV 4 Section
15 3116 [3].
16

17 **D. Application of the Relevant Procurement Law and Facts to the J&G Protest.**

18 GMHA bases its rejection of J&G's bid as non-responsive on the bidder's failure to,
19 "complete portions of the Contractors Qualification Statement and also failed to submit a
20 detailed listing of availability of personnel and technical equipment to perform the services,
21 while all other bidders met the requirements." [Fact Findings 6.] GMHA considered these
22 omissions "significant" in deciding to issue the rejection. GMHA cited as critical ; secretary and
23 treasurer's names left blank, list of equipment was incomplete and included only forklift and
24 dump truck; the list of supervisory personnel was not complete and did not amount to a
25 "resume"; jurisdictions where trade name filed was left blank; categories of work normally
26 performed, blank name of bonding company and address of agent blank. GMHA also included in
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1 its June 11, 2007, letter explaining the basis for its rejection of the bid that, "J&G failed to
2 identify skilled workmen and supervisory staff to carry out the contract satisfactorily" and "J&G
3 failed to submit resumes" for local office representatives, project manager, field superintendent
4 showing sufficient experience in projects of this nature.[Fact Findings 6] Although J&G did not
5 fill in the blanks for bonding company and agent, it did so because it substituted a cashiers check
6 for a bond which was acceptable under the terms of the GMHA IFB package.[Fact Findings 2].
7 While these omissions are cited by GMHA as non-responsive, they parallel almost verbatim the
8 factors of responsibility set out in Guam law: appropriate financial, material, equipment, facility,
9 personnel resources, and the expertise or ability to obtain them, needed to demonstrate ability to
10 meet contract requirements including a satisfactory record of performance, integrity, and legal
11 qualification. See 2 G.A.R. DIV 4 Section 3116 [b][2][A] Standards of Responsibility[i]-[v].
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14 The omissions cited above by GMHA as its rational for its rejecting J&G's bid as non-
15 responsive at bid opening are misplaced. The J&G's Bidders Qualification Statement, while
16 substantially complete, was merely not filled to the satisfaction of GMHA. The proper subject
17 matter category for the cited omissions is that of responsibility, not responsiveness. The missing
18 information GMHA sought clearly goes to the potential contractor's ability to perform and falls
19 within the scope of the Standards of Responsibility factors specifically enumerated in 2 G.A.R.
20 DIV 4 Section 3116 [b][2][A][i]-[v] as listed above.
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23 As properly an issue of responsibility the correct time frame for a GMHA determination
24 regarding J&G's bid was prior to award, rather than at bid opening. If GMHA decided to reject
25 the bid, it was required to make a written determination of non-responsibility and provide a copy
26 of that determination to J&G.
27

28 When the actual substance of the bid rejection is responsibility, not responsiveness, the

1 proper procedure for a responsibility determination must be followed. 2 G.A.R. DIV 4 Section
2 3116. The Special Reminder to Prospective Bidders that, "[F]ailure to comply with the
3 requirements [of the bid package] will mean disqualification and rejection of the bid" [See Fact
4 Findings 3] does not act to transform GMHA's requirement to provide in the Bidders
5 Qualification Statement information with responsibility characteristics to a responsiveness
6 requirement. Subject matter dealing with bidder responsibility cannot be metamorphosized into
7 an issue of responsiveness simply by inserting a provision in the IFB requiring rejection of bids
8 that do not comply. The General Services Administration Board of Contract Appeals held in
9 Employers Sec. Co., GSBCA 6917,85-1 BCA 17, 885 that the requirement that a bidder possess
10 an operating license properly goes to an issue of responsibility, despite language in the
11 solicitation stating that it affects responsiveness. The Comptroller General determined in LORS
12 Med. Corp., Comp. Gen. Dec. B-259829, 95-1 CPD 222 that an IFB requiring submission of
13 information relating to a company's policies and procedures pertains to responsibility despite the
14 IFB requirement that the information be submitted with the bid. The responsibility issue could
15 not be converted to one of responsiveness. In Science Applications, Inc., Comp. Gen. Dec. B-
16 193479,79-1 CPD 167 despite language requiring the information be submitted with the bid, the
17 bidder's failure to submit personnel resumes did not render the bid non-responsive.

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22 For the reasons set out above, GMHA's rejection of the J&G bid at bid opening as non-
23 responsive was not in compliance with general procurement law principles and the specific
24 requirements of Guam procurement law and regulations. It is well within the discretionary
25 authority of GMHA to make a responsibility or a non-responsibility determination as to the J&G
26 bid. Consequently this case is returned to GMHA for an appropriate determination of either
27 responsibility or non-responsibility and further agency disposition consistent with their
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1 determination.

2 **IV. CONCLUSION**

3 Based on the foregoing, the Hearing Officer recommends that the Public Auditor
4 determine the following:
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6 1. GMHA's rejection of J&G's bid at bid opening as non-responsive was not in
7 compliance with the applicable Guam procurement law and regulations.

8 2. The case is remanded to GMHA for a determination of either responsibility or non-
9 responsibility and further appropriate agency disposition.
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11 A copy of these Findings and Recommendations shall be provided to the parties and their
12 respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review
13 on the OPA Website www.guamopa.org.
14

15 **DATED** this 12th day of December, 2008.
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19 CHARLES D. STAKE, ESQ.
20 Hearing Officer
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