

Danny Leon Guerrero
Suites #225 & 235
International Trade Center
Tamuning, Guam 96931
Telephone: (671) 477-9111
Mobile: (671) 482-3825

Authorized Representative for
O&M Energy, S.A.

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

MAR 31 2008

TIME: 12:04
BY: Anne Camacho
FILE No. OPA-PA 08-004

OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

IN THE APPEAL OF
O&M ENERGY, S.A.
Appellant.

DOCKET NO. OPA-PA-08-004
COMMENTS ON THE AGENCY
REPORT BY APPELLANT

COMES NOW, Appellant O&M Energy, S.A., and submits its comments on the Agency Report pursuant to the 2 GAR §12104(c)(4).

INTRODUCTION

Appellant O&M Energy, S.A. ("O & M") submitted its APPEAL herein on March 7, 2008. On March 21, 2008, the Guam Power Authority ("GPA") filed its agency report. O&M hereby provides its comments to the Agency Report.

Initially, O&M notes that it served a Sunshine Act Request to GPA (a copy is attached hereto as Exhibit "1") on March 14, 2008. GPA has not responded to said request within the four day time period provided by law. O&M reserves the right to amend these comments upon receipt of GPA's response to the Sunshine Act Request.

GPA's Agency Report does not address the arguments raised by O&M Energy in its STATEMENT OF GROUNDS FOR APPEAL. Appellant incorporates herein all grounds of appeal previously raised. GPA improperly rejected O&M's bid based upon

ORIGINAL

“assumptions” which GPA had already accepted in O&M’s Technical Proposal as “qualified.” O & M’s price bid was fixed, and it was entitled to the bid award as the lowest responsible and responsive bidder.

A. GPA improperly rejected O&M’s Price Bid as non-responsive.

This is not a case where O&M is seeking to “clarify its price proposal.” O&M’s price proposal was a firm, fixed price bid. GPA rejected O&M’s price proposal based upon “assumptions” which were previously contained in O & M’s technical proposal. GPA had been fully aware of all such “assumptions” in the technical proposal, yet nevertheless accepted such assumptions and the technical proposal of O & M as “qualified.” GPA approved and accepted the same assumptions in O&M’s technical proposal which were later included in the price proposal.

GPA cannot be allowed to accept assumptions in a technical proposal but thereafter disqualify a price proposal based upon the same assumptions. Having determined that O&M’s technical proposal was qualified, GPA is not permitted to consider any factor other than price in evaluating the price bids in Phase 2. 2 GAR §3109(v)(2); the contract must be awarded to the bidder evaluated as being qualified and with the best priced proposal. 2.13 of the Commercial Terms and Conditions, Vol. 1. In Phase 2, GPA only evaluates and compares the priced offers for bidder’s technical proposals that were determined during Step O1 to be responsive to the tender document requirements. 2.11.3, Evaluation, Criteria, and Comparison of Price Offers.

In Phase 1, GPA requested clarification of the O&M “assumptions” set forth in Section A.7 of O&M Energy’s technical proposal. In particular, GPA inquired as to whether O&M’s price proposal was contingent upon these assumptions. O&M

responded that price proposal was conditioned on the assumptions. See Exhibits “11” and “12” to the NOTICE OF APPEAL. Notwithstanding the “assumptions”, GPA accepted O&M’s technical proposal as qualified and requested that O&M submit a priced bid.

Essentially, GPA improperly attempted to re-evaluate whether O & M was “qualified” in the Phase 2 Price Bid when it had already determined that O & M was a qualified bidder with regard to its technical proposal. With regard to an “escalation” clause, GPA has not responded to any of the arguments of O&M in its APPEAL. O&M’s price bid proposal did not contain an escalation clause. See Exhibit “3” attached to the NOTICE OF APPEAL. However, the Temes price bid included escalation clauses for both the Fixed Management Fee and the O&M Spending Budget. In addition, O&M’s Price Bid Proposal stated that any escalation was required “to be agreed between both parties.” O&M’s Price Bid did not impose any escalation clause and its price proposal does not contain an escalation clause, unlike that of Temes.

O&M’s Price Proposal was not “non-responsive”. O&M’s Price Bid contained a fixed price bid without any escalation for fixed management fees or operation and maintenance expenses. GPA claims that the bid documents provide that “the PMC is responsible for all maintenance scheduled or unscheduled.” This assertion is untrue. GPA has not pointed to any provision of the bid documents which make the PMC responsible for an unlimited amount of unscheduled maintenance, no matter how frequent or costly. The provisions of the bid documents indicate that GPA will provide “reimbursement payments” for Operations and Maintenance related expenditures as agreed to and scheduled between GPA and the Contractor. 4.17 of the Commercial

Terms and Conditions, Vol.1. There is no requirement in the bid documents that the contractor is responsible for unlimited unscheduled maintenance.

GPA neglects to cite the entire provision of the bid documents relating to “performance testing.” There is an express requirement in Section 9.1.6 of Vol.2 stating that the PMC and GPA will agree on the testing scope and on the selection of the third-party firm to perform the services prior to contracting these services.” The scope and cost of any performance testing was a matter that the bid documents expressly left to further negotiation and agreement by the parties. The amount that a Contractor will spend for performance testing is intended by the bid documents to be negotiated by the parties.

GPA’s Agency Report claims that O&M’s bid was non-responsive based upon grounds that GPA did not include in its rejection of O&M’s bid. In Exhibit “1” p.3, GPA claims that O&M’s price bid was non-responsive based upon the alleged “exclusion” of certain items including office furniture, hazardous waste, tools, and crane/heavy lifting equipment. None of these matters were referred to by GPA as its basis for finding O&M’s bid as “non-responsive.” Only four assumptions were cited by GPA in its rejection (see Exhibits “5” and “7” attached to the NOTICE OF APPEAL). The assumptions referred to including escalation, unscheduled maintenance, performance testing, and cost of management staff vehicles/ utilities. Matters which GPA did not specifically site in its Bid Status/ Notice of Rejection (Exhibit “5”) should not even be considered by the Public Auditor, as they were not relied upon by GPA as a basis for its disqualification determination.

O&M disputes GPA's assertion that these "assumptions" would alter its fixed price bid. O&M's price bid was fixed and not subject to alteration without further agreement by GPA. As to office space and utility costs such as water, 11.1.1 of Vol. II, Technical and Functional Requirements, indicates that office space may be available on site, including the utilization of utilities. O&M's price bid was submitted based upon the assumption contained in the IFB documents that GPA would make office space available to it.

B. GPA has failed to address the materiality of any of the alleged O&M "assumptions" or to demonstrate that such assumptions were "material" and would affect the O&M price proposal.

O&M's proposal contained a fixed price and was not subject to major alteration over the 5 year period, without the agreement of both parties. It would constitute bad faith to allow GPA to reject O&M's price bid proposal based upon "assumptions" which GPA already accepted in O & M's technical proposal. The bid documents did not notify O&M that the inclusion of "assumptions" concerning such matters would be grounds for a finding of "non-responsiveness" and a rejection of its bid. GPA had led O & M to believe that the "assumptions" were not problematic, as GPA had accepted the O & M technical proposal as qualified.

Section 4.15, Vol.1, of the Commercial Terms and Conditions, indicates that whenever GPA requests the contractor to perform "additional services", then "the Contractor is entitled to have the Contract adjusted, to include the reasonable value of the increase in costs as a result of that event." See also 4.24 thereof. Unscheduled events and costs, as well as which party bears such costs, are always subject to negotiations between the parties.

O&M disputes GPA's assertion that these "assumptions" would alter its fixed price bid. O&M's price bid was fixed and not subject to alteration without further agreement by GPA. As to office space and utility costs such as water, 11.1.1 of Vol. II, Technical and Functional Requirements, indicates that office space may be available on site, including the utilization of utilities. O&M's price bid was submitted based upon the assumption contained in the IFB documents that GPA would make office space available to it.

B. GPA has failed to address the materiality of any of the alleged O&M "assumptions" or to demonstrate that such assumptions were "material" and would affect the O&M price proposal.

O&M's proposal contained a fixed price and was not subject to major alteration over the 5 year period, without the agreement of both parties. It would constitute bad faith to allow GPA to reject O&M's price bid proposal based upon "assumptions" which GPA already accepted in O & M's technical proposal. The bid documents did not notify O&M that the inclusion of "assumptions" concerning such matters would be grounds for a finding of "non-responsiveness" and a rejection of its bid. GPA had led O & M to believe that the "assumptions" were not problematic, as GPA had accepted the O & M technical proposal as qualified.

Section 4.15, Vol.1, of the Commercial Terms and Conditions, indicates that whenever GPA requests the contractor to perform "additional services", then "the Contractor is entitled to have the Contract adjusted, to include the reasonable value of the increase in costs as a result of that event." See also 4.24 thereof. Unscheduled events and costs, as well as which party bears such costs, are always subject to negotiations between the parties.

GPA's position that it couldn't discuss any issues whatsoever with O&M after the price bid proposal was submitted is contrary to the IFB documents and law. 2.1.3 of the Commercial Terms and Conditions provides that GPA and a successful bidder, after bid award, will execute a contract with such alterations or additions thereto required to adopt such contract to the circumstances of the proposal. 2.2 of Commercial Terms and Conditions, Vol.1, provides that GPA can request written clarifications to the proposal and that the parties will "resolve and document and differences between the contractor's proposal and the tender documents "prior to entering into a formal agreement." There is a process whereby GPA and the selected contractor can discuss and clarify any issues prior to entering into a formal agreement.

C. GPA has not properly determined or demonstrated that any of the "assumptions" of O & M were "material" or would in fact have affected or increased O&M's price proposal.

In the Agency Report, GPA again asserts that "assumptions" of O&M "would materially affect the O&M fixed price proposal." Id. at p.2. How can GPA allege that price effect is "material" when GPA has not determined the amount thereof? It is O&M's position that its price bid is fixed, and the "assumptions" do not affect the amount thereof. If GPA alleges "materiality" the burden is upon it to determine the amount thereof. The price differential between O&M's price offer and that of Temes is \$6,058,150.20. That amount was the potential savings for the benefit of the rate payers of Guam resulting from O & M's proposal. Before alleging that any price "assumptions" were material, GPA was required to quantify such price assumptions. Otherwise, its claim of "materiality" is pure speculation and completely unsupported.

There is ample support in the IFB documents upholding the authority of GPA to clarify “assumptions” which it believed would impact O&M’s priced bid. See 4.2 and 4.14.1 of the Commercial Terms and Conditions, Vol.1. GPA had already requested clarification of the “assumptions” with regard to O&M Energy’s Technical Proposal in Phase 1. GPA was satisfied with O&M’s explanation thereof, and accepted the technical proposal, with its “assumptions”, as qualified. GPA already determined that O&M’s technical proposal, including all of the price assumptions, were qualified in Phase 1.

CONCLUSION

O&M Energy respectfully requests that the Public Auditor award it all relief sought in the STATEMENT OF GROUNDS FOR APPEAL. The Office of the Public Auditor should uphold the policy of maximizing the purchasing value of public funds by reversing the denial of procurement protest by GPA. OPA should determine that O&M is entitled to the bid award as the lowest responsible bidder. All further relief requested by the Appellant should be awarded by the Public Auditor.

Dated this 31st day of March, 2008.

O & M ENERGY, S.A.

Appellant

By: 

Danny León Guerrero

Appellant’s Duly Authorized Representative

Joaquin C. Flores
General Manager
Guam Power Authority
P.O. Box 2977
Hagatna, Guam 96932

O&M ENERGY
PARQUE EMPRESARIAL LA FINCA
P.º DEL CLUB DEPORTIVO, 1-EDIFICIO 5
28223 POZUELO DE ALARCÓN (MADRID)
ESPAÑA
TEL. (34) 91 210 39 00
FAX (34) 91 210 39 01

March 14, 2008

Re: Request Pursuant to 5 GCA '10101 [The Sunshine Act]

Dear Mr. Flores:

Pursuant to 5 GCA, § 10101 et. seq. and the Sunshine Law, as amended, I request that you provide me with the following documents and public writings:

DEFINITIONS

Agency means the Guam Power Authority ("GPA"), and each staff member, and all other employees whether they be full-time, part-time or independent contractors of any kind or type.

Public Records ("records") is defined herein pursuant to 5 G.C.A. Section 10102(d), and includes, without limitation, any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency in any format, including an electronic format.

SUNSHINE ACT REQUESTS

- (1) All records relative to or in any manner concerning Multi Step Bid #GPA-013-07-IFB FOR PERFORMANCE MANAGEMENT CONTRACT. This request includes, but is not limited to, all files or document related to such IFB.
- (2) The bid records, documents, writings, and relevant materials, including any and all bid review committee findings and evaluations of any and all bidders by anyone within the Guam Power Authority;
- (3) Complete bid evaluation committee's findings and reviews and records of votes or voting concerning the bid or award thereof;
- (4) Any and all correspondence of the agency relating to the aforementioned bid, including intra agency correspondence and all email or other electronic record concerning the bid;
- (5) All comments, writings, and correspondence regarding this bid, including those between the General Manager's Office and any other person or entity
- (6) Any and all procurement memoranda and emails sent from Procurement Office to the General Manager's Office

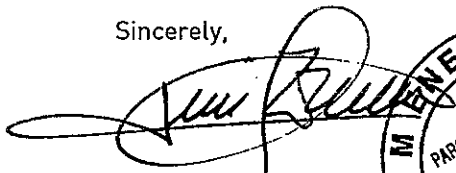


- (7) Engineering Department's records, writings, memoranda, reviews and evaluations of TEMES' and/ O & M bids, all evaluations and ratings at all stages of the bid process, scoring sheets and bid tabulations of GPA's Procurement Division and Engineering Division
- (8) All records and writings concerning technical reviews and pricing reviews;
- (9) Records, writings or memoranda related to recommendations for award of bid;
- (10) Records, writings or memoranda related to rejection of O&M Energy's price proposals.

In accordance with 5 GCA, § 10103(d), you have four (4) working days after the receipt of this request to comply and provide the above requested documents. Please deliver the requested documents to my office at the address indicated above.

If you have any questions please do not hesitate to call me. Thank you for your cooperation.

Sincerely,



Luis Zarauza
General Manager

