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Attorney for the Guam Power Authority

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PROCUREMENT APPEALS

IN THE APPEAL OF)	DOCKET NO. OPA-PA-08-004
)	
O&M ENERGY, S.A.)	GPA REBUTTAL COMMENTS ON
)	AGENCY REPORT
Appellant.)	
_____)	

COMES NOW, GUAM POWER AUTHORITY (GPA), by and through its attorney, D. GRAHAM BOTHA, ESQ., and hereby files its Rebuttal Comments.

Guam Power Authority has clearly established in its Agency Report that it awarded the IFB to the lowest responsive bidder as required by Guam procurement law. The Multi-step IFB was a two step bid process consisting of the technical bid and submission of a sealed price proposal. The technical proposals were properly evaluated based on technical qualifications, and two bidders proceeded to the next step. The contents of the two sealed price proposals submitted by O&M and TEMES were unknown to GPA, until they were opened in the presence of company representatives from both O&M and TEMES.

DISCUSSION

O&M'S BID WAS APPROPRIATELY REJECTED AS NON-RESPONSIVE, AND THE AWARD FOR THE PMC WAS PROPERLY AWARDED TO TEMES

Guam Procurement law requires that GPA award to the lowest responsible and **responsive** bidders. A responsive bidder is a person who has submitted a bid which conforms in all material respects to the Invitation for Bid. 5 GCA §5201(g) and 2 GAR, Div. 4, Chap. 3, §3109(n)(2). Further, any bidder's offering which does not meet the acceptability requirements shall be rejected as non-responsive. 2 GAR, Div. 4, Chap. 3, §3109(n)(3)(c).

O&M contends that its price proposal "was a firm, fixed price bid.." The sealed O&M proposal is a matter of record, and on its face is definitely not a fixed price bid. O&M now asserts that it should be able to clarify its price proposal after the two bid proposal were opened on December 31, 2008. This is not only contrary to the bid specifications, but also to Guam procurement law which provides for the "fair and equitable treatment of all persons who deal with the procurement system" and provides "safeguards for the maintenance of a procurement system of quality and integrity." 2 G.A.R. §1102. Any modification of a bid received after the time and date set for opening of the bids at the place designated for opening is late. 2 GAR, Div. 4, Chap. 3, §3109(k)(2).

O&M's statement that the same "assumptions" are contained in both the technical proposal and its sealed price proposal is inaccurate. GPA had no knowledge of the contents of the sealed price proposals until they were opened on December 31, 2007. The O&M price proposal opened on December 31, 2007, clearly states "This Budget is in 2007 USD and subject to escalation to be agreed between both Parties. Such index will reflect the escalation of the different costs included in both the Fixed Management Fee and the O&M Spending Budget. ..."

This statement alone, disregarding all of the rest of the deviations from the bid specifications by O&M, is sufficient proof that the O&M bid is non-responsive to the bid documents, amendments, and letters which clearly indicate that GPA requires a price proposal which

contains a fixed price. This is clearly not a “minor informality” as defined in 2 G.A.R.

§3109(m), which is a “matter of form, rather than substance, evident from the bid document or insignificant mistakes that can be waived or corrected without prejudice to other bidders ...”

In addition, the O&M price proposal contained other limitations such as “We assume a CAP for Unscheduled Maintenance of 200,000 USD per year. ... Performance Tests up to a limit of 50,000 USD per year.” There were other exceptions which were not responsive to the GPA bid documents, and these exceptions alone, would materially affect the O&M fixed price proposal.

Amendment V to the IFB clarified that the Fixed Management Fees are fixed for the contract period of five years. There can be no negotiation regarding fixed management fees after the sealed price proposal is opened.

GPA is not required to address the materiality of the O&M’s “assumptions” or to prove that the assumptions were material and would affect the O&M price proposal. The bid documents, amendments, and other letters to bidders clarify that GPA demanded a fixed price proposal. The O&M limitations and assumptions are clearly not minor informalities, and will affect the final fixed price proposal requested by GPA.

GPA had the duty and responsibility to make an award to TEMES, as it was deemed to be the lowest, **responsive** and responsible bidder for the PMC. Their bid was responsive to the multi-step bid and complied with the specifications set forth in the multi-step bid. There is no question that the O&M revised sealed price proposal materially deviates from the fixed price proposal requested by GPA. TEMES provided a responsive bid as required by GPA in its multi-step bid, unlike the bid submitted by O&M.

CONCLUSION

GPA requests that the appeal of O&M be dismissed, and that the Public Auditor award all legal and equitable remedies that GPA may be entitled to as a result.

RESPECTFULLY SUBMITTED this 7th day of April, 2008, by:

A handwritten signature in black ink, appearing to read 'D. Botha', written in a cursive style.

D. GRAHAM BOTHA, ESQ.
Legal Counsel for the Guam Power Authority