



OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

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3
4 IN THE APPEAL OF

5 O&M ENERGY, S.A.,

6 Appellant.

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APPEAL NO: OPA-PA-08-004

**FINDINGS AND RECOMMENDATIONS
OF HEARING OFFICER**

I. INTRODUCTION

These are the Findings and Recommendations of the of the Hearing Officer, Robert G.P.Cruz, Esq. on an appeal filed on March 7, 2008, by O&M Energy, S.A. wholly owned subsidiary of Union Fenosa Generacion (hereinafter "O&M") regarding the Guam Power Authority's (hereinafter GPA) solicitation for Performance Management Contract Services for Cabras 1 and 2 Steam Power Plants. A Hearing on this procurement appeal was held on August 26, 2008. At Hearing, GPA was represented by its Counsel of Record, Graham Botha, Esq. O&M Energy was not represented by an attorney at the formal Hearing, but was represented by its local representative, Danny Leon Guerrero and O&M Business Manager, Juan Rodriguez.

II. FINDINGS OF FACT

These findings of fact are based on the Procurement Record and all documents submitted by the parties in the appeal, as well as all testimony and arguments presented at the August 26, 2008, Hearing in this matter.

1. A pre-hearing conference was held before the Hearing Officer and OPA staff on May 27, 2008. Present were Graham Botha, Esq., Andy Balajadia, Jesse R.T. Reyes, and Jamie Pangelinan, employees of GPA, and Danny Leon Guerrero O&M local representative. O&M

Findings and Recommendations - 1

1 Business Manager Juan Rodriguez participated telephonically from Spain. Witnesses were
2 named, issues were narrowed, and a formal Hearing date set.

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4 2. On August 7, 2007, GPA issued Multi-Step Bid GPA-013-07, the Performance
5 Management Contract (PMC) for the Cabras 1 & 2 Steam Power Plant.

6 3. There were two phases of the "multi-step" bid process: (1) submission of technical bid;
7 and (2) submission of price proposal. In phase 1, O&M submitted its 973 page technical bid. On
8 December 27, 2007, GPA informed O&M that its bid had been reviewed and deemed qualified
9 to participate in Phase 2. Letter from Joaquin C. Flores to O&M dated December 27, 2007.
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11 4. Taiwan Electrical and Mechanical Engineering Services Inc. (hereinafter TEMES) was
12 also determined to be a qualified bidder. Note that TEMES is the current contractor, on its
13 second extension as of the formal hearing date. Thus services are ongoing despite this appeal.
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15 5. On December 31, 2007, GPA conducted the bid opening of the price proposals for
16 Phase 2 of the bid process. TEMES submitted a price bid of \$26,899,305.98. O&M submitted a
17 price bid of \$20,841,155.78. O&M's bid was \$6,058,150.20 less than that submitted by TEMES.

18 6. On January 18, 2008, GPA sent O&M a Bid Status letter rejecting their price proposal
19 as "non-responsive" based on four "exceptions." These exceptions included:

- 20 1. A US\$200,00 limit on yearly unscheduled maintenance costs;
- 21 2. A US \$50,000 limit on yearly Performance Testing;
- 22 3. The cost of Management Staff vehicles and utilities are excluded from the
23 proposal; and
24
- 25 4. A budget that is subject to negotiation of the escalation rate.

26 7. In GPA's January 18, 2008, Bid Status letter the bid was recommended for award to
27 TEMES in the amount of \$26,899,305.98.
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III. ANALYSIS

1. O&M protested the award of GPA-013-07 to GPA as provided under 5 G.C.A. Section 5425(a). The appeal was timely and OPA has jurisdiction.

2. Generally the public entity must award the contract to the lowest responsible and responsive bidder. The purpose of statutes, charters or ordinances requiring competitive bidding is to “to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable and they are enacted for the benefit of the property holders and taxpayers, and not for the benefit of enrichment of bidders, and should be construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest.” See Domar Electric, Inc. v. City of Los Angeles, 9 Cal 4th 161, 174 (1994).

3. Under the Guam Procurement law a responsive bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids. 5 G.C.A. Section 5201. The basis of GPA’s rejection of the O&M bid was that O&M was non-responsive, citing four points in a January 18 recommendation for award letter made by the bid evaluation committee. These points included: (a) a \$200,000 limit on yearly unscheduled maintenance costs (b) a \$50,000 limit on yearly performance testing (c) the cost of management staff vehicles and utilities was excluded from the proposal, and (d) a budget that is subject to negotiation of the escalation rate. Our review of the Procurement Record indicates that relatively little analysis was done by GPA before deciding to award the contract to TEMES. Had more substantial analysis been done, it might have shown that the savings to GPA and thus the taxpayers and clients, would have been enough to overcome the lack of responsiveness label given to the response of O&M in its bid. An agency can sometimes waive deficiencies if the omission or irregularity is

1 not significant. MCM Construction, Inc. v. City and County of San Francisco (1998) 65 Cal.
2 App. 4th 359 O& M argues that its price was fixed and that GPA's "assumptions" (of the four
3 exceptions noted) would not have a material impact on its price. Materiality can only be
4 demonstrated if GPA proves that its exceptions in any manner altered or affected the O&M fixed
5 price proposal. O&M's price exceptions would have to be worth more than \$6 million to make
6 its price more expensive than TEMES. GPA did not engage in the required determination of
7 materiality. 2 GAR 3109(m)(4)(B) provides that "Minor Informalities can be waived or
8 corrected by GPA without prejudice. Thus, GPA could have ignored the "exceptions" in the
9 O&M bid and found it to be the lowest responsible and responsive bidder between the two.
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12 4. Generally speaking, if a bidder modifies its price at the day and time set for bid
13 opening, it is late. 2 GAR, Division 4, Chapter 3 Section 3109(k)(2). However, O&M had
14 submitted a bid bond, so the price for its services was fixed. O&M might have argued later that
15 its liability was limited with regard to unscheduled maintenance, performance testing, or claimed
16 additional compensation for a management vehicle and utilities, or attempted to negotiate an
17 escalation rate. Nonetheless, O&M's performance bond provided a fixed amount that GPA
18 would have been compensated. Pre-qualification is a process for determining in advance
19 whether a contractor is a responsible bidder for a specified project. Given the fact that O&M
20 made it through the pre-qualification process (one of two out of four contractors) and posted the
21 necessary bid bond to guarantee performance, the hearing officer recommends that the Public
22 Auditor find that O&M was clearly a *responsible* bidder.
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25 5. GPA may only apply objectively measurable criteria, which are set forth in the
26 Invitation for Bids, in determining the lowest bidder. 2 GAR Section 3109(n)(4). The Invitation
27 for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid
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1 evaluation that are not set forth in the Invitation for Bids. 5 G.C.A. Section 5211 (e). TEMES is
2 the current contractor providing services to GPA. TEMES appears to have been favored over
3 O&M in that TEMES' own non-responsiveness was overlooked. There was testimony given in
4 the briefs and during the formal hearing that TEMES also included an escalation rate.
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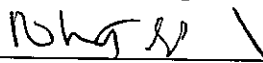
6 In apparent direct violation of the prohibition on an escalation clause in Amendment V,
7 TEMES' bid proposal included a 1.7% escalation rate based on its bid proposal for its Fixed
8 Management Fees. In addition, with regard to O&M's Spending Budget, TEMES' priced bid
9 contained a 3.0% Spending Budget escalation rate for each of the five years of the contract.
10 TEMES was noticeably absent during the hearing despite being a significant party. Perhaps the
11 best approach would have been for GPA to set out a clear acceptable escalation rate, as well as
12 setting out limits on unscheduled maintenance, performance testing and allowances or limits for
13 use of vehicles and utilities, to all prospective bidders if there is no industry standard covering
14 these items.
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17 IV CONCLUSION

18 1. Based upon the foregoing, and given the possibility of saving over \$6 million, the
19 Hearing Officer recommends that the Public Auditor cancel the award to TEMES and have GPA
20 redo the Invitation for Bids in the interest of GPA obtaining the lowest price for management
21 services, and in the interest of the integrity of the procurement process.
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23 2. A copy of these Findings shall be provided to the parties and their respective attorneys,
24 in accordance with 5 G.C.A. Section 5702, and shall be made available for review on the OPA
25 website www.guamopa.org.

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27 RESPECTFULLY SUBMITTED THIS 30th day of September, 2008

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ROBERT G.P. CRUZ, ESQ.
Hearing Officer