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In the Appeal of JONES & GUERRERO CO., INC., dba J&G CONSTRUCTION, APPELLANT	DOCKET NO. OPA-PA-07-005 ADDITIONAL AUTHORITIES

As Appellee GMHA continues to insist that the Guam Procurement Regulations cited by Appellant in its Notice of Appeal are "not relevant", relying instead on its own Procurement Rules[1], and that the due process *principles* which Appellant elaborated upon in its Comment on Agency Report, as supported by statements from California, the Federal contract law and

[1] Appellee draws attention to "Section 3-301.05.3(1)(b) of the GMHA Procurement Rules and Regulations [which] specifically allows GMHA to reject a bid if *'the bid is not **responsible**, that is, does not conform in all material respects to the Invitation for Bids....*" As pointed out in Appellant's Notice of Appeal, the Guam Procurement Regulations are mistakenly inconsistent with the Model Procurement Code in this respect. Apart from the differences in numbering, the language is the same, and should have been transcribed the same in the Guam regulations: Model Procurement Regulation R3-301.03.3 states: "(a) ... Reasons for rejecting a bid include but are not limited to: (i) the *business* that submitted the bid *is nonresponsible* as determined under Section R3-401.05 (Written Determination of Nonresponsibility Required) of this Chapter; (ii) *the **bid is not responsive**, that is, it does not conform in all material respects to the Invitation for Bids....*" Note, too, another discrepancy in the Guam regulations in 26 GAR §16309 (n)(2), which purports to be the procurement rules for GMHA, which states, "Responsibility of prospective contractors is covered by §16319 (Responsibility) of this Chapter....". However, the correct reference in §16309(n)(2) should be to §16317, which is the identical provision found in 3 GAR §3116 (which Appellee deems irrelevant), which does indeed refer to bidder responsibility, whereas §16319 concerns "Cost or Pricing Data".

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numerous cases from the Maryland State Board of Contract Appeals, which, again without argument, Appellee simply dismisses as "completely irrelevant" to the discussion of Appellant's due process rights to allow post bid-opening determination of matters pertaining to Appellant's responsibility, Appellant offers for consideration the following authorities. As this submission does not argue or pursue any determination of fact but simply offers further matter of law, the Hearing Officer can and should consider it.

Consider *In the Matter of Browning-Ferris Industries of Hawaii, Inc., June 8, 2000, Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii,* www.hawaii.gov/dcca/areas/oah/oah_decisions/Procurement/PCH-2000-004_-_Browning-Ferris.pdf. In this case the Appellant, Browning-Ferris, protested the award to KNG. The solicitation was to provide refuse collection and disposal services at the Honolulu International Airport. KNG was the lowest bid but, at the time of bid opening, "KNG did not own any refuse collection trucks or any refuse collection containers, or own any necessary equipment", nor did it "own or lease a site from which to operate and keep its refuse collection trucks" nor did it have any employees, including any qualified drivers, mechanics, or welders", nor did it "have any insurance covering refuse collection trucks; did not carry any worker's compensation insurance; and did not carry any general commercial liability insurance policy", nor did it have "a commercial vehicle operating permit with the Public Utilities Commission or a City and County of Honolulu refuse collection permit", nor were its intended subcontractors "registered to do business in the State of Hawaii". However, after bid opening, KNG outlined its plans to obtain all those very essential and necessary items to perform the work solicited.

If there were ever a case were a bid might possibly be considered non-responsive *as of the bid opening*, this has to be it. And this is made even more particularly so in this case because specific Hawaiian regulation which stated, "Upon notification of the bidder's intent to submit an offer, the procurement officer shall determine whether the prospective offeror has the ability to perform the work intended." It had additional requirements almost identical to the determination criteria found in the Model Code Regulations and Guam Procurement Regulations.

Based on the solicitation and the regulations above, Browning-Ferris argued the procurement officer was required to make the responsibility determination *prior to bid opening.*

The decision in this case included the following:

> "The determination of bidder responsibility involves an inquiry into the bidder's ability and will to perform the subject contract as promised. Responsibility concerns how a bidder will accomplish conformance with the material provisions of the contract; it addresses the performance capability of the bidder, and normally involves an inquiry into the potential contractor's financial resources, experience, management, past performance, place of performance, and integrity. *Blount, Inc., v. U.S., 22 Cl.Ct. 221 (1990). See also Federal Elec. Corp. V. Fasi, 56 Haw. 54 (1974)* [before the Model Code was written]. "**Responsibility** ... refers to a bidder's apparent ability and capacity to perform the contract requirements and **is**

determined not at bid opening but at any time prior to award based on any information received by the agency up to that time [bold emphasis added]." See *Peterson Accounting-CPA Practice, Comp Gen Decision No. 108,524 (1994)(emphasis added).*

"In contrast, bid responsiveness refers to the question of whether a bidder has promised to perform in the precise manner requested by the government with respect to price, quality, quantity, and deliver. *Blount, supra.* A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. *Bean Dredging Corp. V. U.S. 2 Cl.Ct. 519 (1991).* Matters of responsiveness must be discerned solely by reference to materials submitted with the bid and facts available to the government at the time of the bid opening. *Blount, supra.*"

The decision noted that the principles establishing that the procurement officer is not required to complete the responsibility determination *prior to bid opening* is consistent with the Model Regulations:

"This conclusion is consistent with Regulation 3-401.04 of the Mode [sic] Procurement Code for State and Local Government, Recommended Regulations (American Bar Association)(1997) which provides: 'Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible'." [at footnote 3.] "

The decision continued, "Based upon these considerations, the Hearings Officer concludes that Respondent was not required to arrive at a responsibility determination prior to bid opening but rather, has up to the awarding of the contract within which to determine whether KNG was a responsible bidder."

This case is further instructive because Browning-Ferris alternately argued that KNG could not be a *responsible* bidder (assuming its bid to be responsive) given its apparent lack of business licences and permits, employees, equipment, and business office or other facilities. But this contention, too, was rejected, based on the determination of responsibility regime in Model Regulation 3-401.01 which allows low bidding prospective contractors to demonstrate, after bid opening, availability of necessary equipment and personnel and acceptable plans to subcontract necessary items (which is the same as 2 GAR §3116, which Appellee deems to be irrelevant, and 26 GAR §16317, which purports to be the procurement regulations for GMHA).

And in another case similar to the Maryland cases, this one from South Carolina, it was again held that matters of responsibility are not to be determined prior to bid opening, regardless of what the IFB required. This case is *In the Matter of Palmer Campus Renovation, September 30, 1999, Before the Chief Procurement Officer for Construction, State of South Carolina, County of Richland*, http://www.state.sc.us/mmo/ose/protest/nbm_trid.pdf.

In this case a state college, Trident, solicited certain construction work. Cornerstone was the low

bidder and NBM protested Trident's intent to award to Hitt, alleging since Hitt was arguably not licensed to do the work, its bid was non-responsive. "More specifically, the specification included the requirement that the contractor listed to do the installation work have the acceptance of one of the composite panel manufacturers listed in the bidding documents...." NBM argued that since Cornerstone failed to have this requisite acceptance at the time of bid opening, there was a material deviation from the strict requirements of the bidding documents, and it was therefore, non-responsive.

The procuring authority claimed this failure did not render the bid non-responsive but raised an issue of responsibility, which could be attended to after bid opening. The low bidder, Hitt, argued the issue is responsibility, not responsiveness, and that, anyway, the matter of responsiveness was resolved since it fully completed the Bid Form required in the IFB (similar to Appellant's case).

The decision included the following:

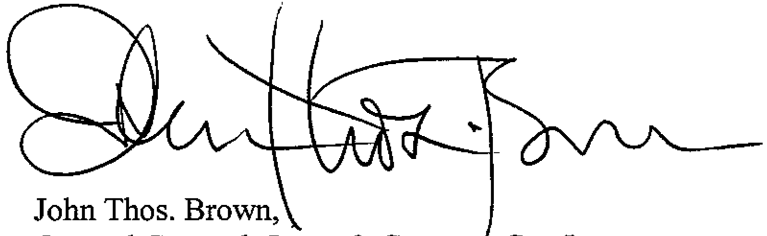
> "NBM also argues that the following statement on page BF-2 defines Cornerstone's qualifications as an element in Hitt's responsiveness:
>
> > Bidder shall list only Subcontractors qualified to perform items of work specified or substitutions approved at the time of bidding.
>
> ...
>
> **"There is nothing in this sentence which should be construed to require a prospective contractor to possess, *in toto*, '...the expertise...necessary to indicate its capability to meet all contractual requirements..." at the time of bid opening. Otherwise, the prospective contractor would have no recourse to the option of demonstrating that it possessed "...the ability to obtain them..."** (Emphasis added)" [Which recourse is also available to Appellant in 2 GAR §3116 and 26 GAR §16317].

The decision noted that there were many references in the bid documents which could be taken to require that Cornerstone submit specific and objective evidence of its qualifications at the time of bidding, including the statement that "Bid shall be rejected for the following, but not limited to:... (5) Failure to list qualified Subcontractors as required by law;..." The decision concluded as follows:

> "NBM's protest is founded on the assertion that Cornerstone did not possess the required [qualifications] <u>at the time of bidding</u> [underlined original]. By statue and Regulation, responsibility is determined not at bid opening but prior to award and is to be based on information provided 'upon request'. [As Appellant argued in its Notice of Appeal.] ...
>
> "It is clear that Regulation 19-445.2125 [the "determination of responsibility" analog] contemplates a dialogue between an agency and prospective contractor...."

July 25, 2007

Respectfully submitted,



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