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In the Appeal of JONES & GUERRERO CO., INC., dba J&G CONSTRUCTION, APPELLANT	DOCKET NO. OPA-PA-07-005 APPELLANT'S MEMORANDUM OF POINTS and AUTHORITIES

CONTEXT OF DISPUTE

This appeal arises from a competitive sealed bid solicitation for the procurement of construction services for a warehouse expansion project for Appellee, GMHA. Appellant submitted the low bid, which was over $53,000 less than the next highest bid. Appellant's bid was rejected as "non-responsive", and this appeal ensued.

Contentions

Appellee argues that Appellant's "bid submittal was determined to be non-responsive *because* it failed to provide evidence of meeting Standards of Responsibility sufficient to evaluate *whether* it was responsible"[1].

[1] Statement Answering Allegations of Appeal ("Answer"), page 7.

Appellant argues that its bid was wrongly rejected because the reasons cited for rejection solely concern matters of "responsibility", and that it is error to base a determination of responsiveness on issues strictly going to a determination of responsibility.

Appellee argues that Appellant's bid is non-responsive because it failed to provide every detail of information mandated by the Invitation for Bid which was "***required*** to be 'submitted in the bid envelope at the date and time for bid opening'."[2] (Emphasis by underlining added.)

Appellant argues that issues of responsibility are intended to be determined by an inquiry pursuant to specified Standards of Responsibility, which determination includes considering information outside the bid envelope and may be made at any time before award of the contract, which includes the period after bid opening.

Appellee further asserts the "inquiry into responsibility was made by GMHA when it ***mandated*** that the information be made a material part of and included with the bid submittal."[3] and that "[n]o further inquiry or 'due process' was owed to Appellant under the circumstances."[4]

Appellant argues that the determination of responsibility required by the Procurement Law and applicable regulations establishes a process and due process rights which were wrongly denied Appellant.

Appellant contends that its low bid was responsive in that, had GMHA accepted it as submitted, J&G would have been required to perform the exact services required of the bid, and that there was sufficient information in the bid submission and otherwise available to GMHA at bid opening to determine and conclude Appellant was responsible notwithstanding denial of its

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[2] Appellee's Rebuttal of Appellant's Comments to Agency Report ("Rebuttal"), page 2. Also see letter from the Procurement Officer to Appellant's counsel justifying GMHA's rejection and dismissing Appellant's protest (Tab 17 of the Procurement Record), wherein it was said "[t]he Contractor's Qualification Statement which was included in the bid package is the document by which GMHA evaluated such competency [of the bidder]. J&G failed to complete portions of the Statement...." Appellant notes that the Sealed Bid Checklist for J&G Corp included at Tab 7 of the Procurement Record indicates "yes" to the question 4, dealing with the Contractor's Qualification Statement, "Is it Completed/Signed/Notarized", but does not take issue with Appellee's charge that some of the information in the CQS was not provided.

[3] Rebuttal, page 6. See also the letter identified in footnote 2, noting the various requirements in the bid package which require submission of specified information, which "all provide that GMHA shall determine whether a bidder is responsive and responsible based on information provided by the bidders", and that "J&G simply failed to submit documents and or provide information which was mandated by the Bid Package."

[4] Rebuttal, page 2.

claimed due process rights, and that it is thereby entitled to award of the contract.

Facts not in dispute

The Procurement Record is in evidence and the essential facts of it are not disputed. Appellee has catalogued several shortfalls in Appellant's bid submission where some information asked for concerning Appellant's responsibility was not provided; Appellant, on the other hand, has pointed out the extensive information that actually was submitted with its bid by which GMHA could have made a determination that Appellant is responsible, but which it refused to consider.

The GMHA Evaluation Committee reviewed the various bids and the points awarded to J&G's bid were diminished, compared to other bidders, solely due to" availability of personnel and technical equipment"; in all other respects it compared competitively. (See Tab 10, Notice of Filing Procurement Record ("Procurement Record").)

Appellant has admitted that, insofar as providing *all* information *concerning responsibility* "mandated" by the bid package, "Appellant does not claim to have dotted every 'i' nor crossed every 't'"[5]; Appellee has admitted that Appellant's bid was solely determined to be "***nonresponsive*** because it [Appellant] failed to submit information that was material and necessary in order to determine the bidder's reponsibiliity."[6]

QUESTIONS PRESENTED

Generally

The broad question presented in this Appeal is whether a procuring agency within the Government of Guam can override the procurement law and regulations by the "mandates" of an IFB, or whether it is bound to follow the carefully crafted and structured bidding processes in making the various determinations required by the procurement law and regulations. There appears to be some procurement lore within the procuring agency that the procurement law is beside the point and they can fashion the bidding process by the mere construction of "mandates" within the solicitation package.

Applicable law

There is a further, and surprising, threshold question of law that Appellee raises which does not go to the merits of the arguments but to the applicable law. Appellee simply dismisses the Guam

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[5] Notice of Appeal, page 8

[6] Answer, page 11

Procurement Regulations (2 GAR Div 4, §§1101, et seq.) as "**not relevant** here because GMHA has its own established Procurement Rules and Regulations."[7]

Appellee relies, instead, on rules and regulations "adopted pursuant to Official Resolution No. 90-59, on May 9, 1990"[8] (referred to herein as the "Resolution 90-59 rules").

At the core of this dispute is the failure of GMHA to accept the law applicable to Government of Guam public procurement. It prefers procurement lore to procurement law. For this reason, Appellant has felt compelled to go to difficult, tedious and great length to detail and describe this law below.

Appellant denies that GMHA's Resolution 90-59 rules override the Guam Procurement Rules in substance if not in form [9], at least insofar as is pertinent to this Appeal.

In the first place, the Procurement Act clearly requires the Guam Procurement Regulations to be the model by which all agencies are to conduct their procurement. In the second case, GMHA has expressly incorporated into the instant IFB by reference the application of the pertinent provisions of the Procurement Regulations which Appellant relies on.

Guam Procurement Regulations define the model required for GMHA procurement.

The Guam Procurement Regulations found in 2 GAR Div. 4, Chapt. 5 are mirrored by the **GMHA Procurement Regulations contained in 26 GAR Div 2**, Chapt. 16, §§ 16101 et seq., (referred to herein as the "26 GAR procurement regulations" or "26 GAR" in short).

This mirrored application of the Guam Procurement Regulations is consistent with the duties and authorities of the Procurement Policy Office, as set forth in 5 GCA §5102, "to promulgate regulations, consistent with this Chapter, governing the procurement, management, control and disposal of any and all supplies, services and construction to be procured by the Territory", and 5 GCA § 5125, which requires consistency of procurement processes throughout the Government

[7] Answer, page 11.

[8] Answer, page 6.

[9] The official comment to the Guam Procurement Act (see 5 GCA § 5030) states that the Act "is essentially the Model Procurement Code approved by the American Bar Association in 1979.... Because the Act intends the Policy Office adopt implementing regulations, Model Regulations are also avialable, and must be examined and changed to coincide with the version of this Act actually adopted by the Legislature.... The Official Comments to the Model Procurement Code are a part of the Legislative History of this Chapter...."

of Guam[10], and the provisions of 5 GCA § 5130(b), which precludes the Policy Office from delegating its authority to promulgate procurement regulations, and 5 GCA §5131, which requires government agencies, including GMHA, to adopt procurement regulations promulgated by the Policy Office.

26 GAR §16101 states, "The purpose of the Guam Memorial Hospital Authority Procurement Regulations, hereinafter referred to as Regulations, is to provide standard policies and procedures governing the procurement, management, control, and disposal of supplies, services, and construction for the Guam Memorial Hospital Authority in conformity [*with* (word omitted in the official transcribed version)] 5 GCA Chapter 5, hereinafter referred to as the Guam Procurement Act."

It would appear that the 26 GAR procurement regulations, which mirror the general Guam Procurement Regulations (certainly for purposes of this Appeal), pre-empt the Resolution 90-59 rules.

<u>The IFB incorporates the Guam Procurement regulatory model by reference.</u>

Furthermore, the "General Terms and Conditions/ Sealed Bid Solicitation and Award" applicable to the instant IFB[11] (the "General Terms and Conditions") is not consistent with Appellee's claim that the Resolution 90-59 rules control. Rather, such terms expressly state that the provisions of the Guam Procurement Regulations control:

> "1. AUTHORITY: This solicitation is issued subject to all the provisions of the Guam Procurement Act (P.L., 16-124) and the Guam Procurement Regulations/Guam Memorial Hospital Authority Rules and Regulations...."

The General Terms and Conditions of the instant IFB make repeated apparent references to sections of the 26 GAR procurement regulations which are counterparts of the sections of the Guam Procurement Regulations which Appellant referenced in its Notice of Appeal.

For instance, the provision of the General Terms and Conditions concerning the Contractor's

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[10] "... Executive Branch governmental bodies, including autonomous agencies, and other above-named bodies, to be governed to the maximum extent practicable by Chapter 5 of Title 5 of the Guam Code Annotated. This provision requires any governmental body, and each above-named body, to conduct their procurement activities pursuant to Chapter 5 of Title 5 of the Guam Code Annotated, except insofar as said Chapter establishes and effects a system of centralized procurement."

[11] See Tab 1, Procurement Record.

Qualification Statement refers specifically to "Section 16317"[12] of the 26 GAR procurement regulations[13]. §16317 concerns the "Responsibility of Bidders and Offerors". It is word-for-word identical to 2 GAR §3116[14] the substance of which Appellant considers to be a central

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[12] See also, Answer, page 3.

[13] At least, it appears this reference is to 26 GAR; the language is the same.

[14] GAR § 3116. Responsibility of Bidders and Offerors.

(a) Determination of Nonresponsibility. A written determination of Nonresponsibility of a bidder or offeror shall be made in accordance with this Section. The unreasonable failure of a bidder or offeror to promptly supply information ***in connection with an inquiry with respect to responsibility*** may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.

(b)(2) Standards of Responsibility

(A) Standards. **Factors to be considered in determining whether the standard of responsibility has been met include** whether a prospective contractor has:

(i) **available** the appropriate financial, material, **equipment**, facility, **and personnel resources** and expertise, *or the ability to obtain* them, necessary to indicate its capability to meet all contractual requirements;

(ii) a satisfactory *record* of performance;

(iii) a satisfactory *record* of integrity;

(iv) qualified legally to contract with the territory; and

(v) supplied all necessary information **in connection with the inquiry** concerning responsibility.

(B) Information Pertaining to Responsibility. The **prospective contractor** shall supply information *requested by the Procurement Officer* concerning the responsibility of the contractor. **If** such contractor fails to supply the *requested* information, the Procurement Officer shall base the determination of responsibility upon *any available information* or may find the prospective contractor nonresponsible if such failure is unreasonable.

(3) Ability to Meet Standards. **The *prospective contractor may demonstrate* the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request**:

(A) *evidence* that such contractor possesses such necessary items;

(B) acceptable **plans** to subcontract for such necessary items; or

(C) a documented *commitment* from, or explicit *arrangement* with, a satisfactory source *to provide* the necessary items.

(4) Duty Concerning Responsibility. **Before awarding** a contract, the Procurement Officer must be satisfied that the *prospective contractor* is responsible.

(5) Written Determination of Nonresponsibility Required. If a bidder or offeror who otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the Chief Procurement Officer.... A copy of the determination shall be sent promptly to the nonresponsible

plank to its arguments.

Appellee claims that §3116 is irrelevant, which, if true, would mean that 26 GAR §16317 is irrelevant even though that section is expressly referred to in GMHA's General Terms and Conditions (see page 7 of 10) and by that reference made a part of this instant IFB even if the regulation was not applicable by its own authority.

Similarly, the General Terms and Conditions (see page 9 of 10) refer to26 GAR § "16309, [m], [4], [B]", which refers to the right of the agency to waive minor irregularities, and is the same as § 3109(m)(4)(B) of 2 GAR Div. 4, which Appellant cites in its arguments below.

Finally, Appellant points out that the structure and language of the Resolution 90-59 rules identified and quoted by Appellee in its Answer and Rebuttal all track the structure and language of the Model Procurement code and regulations, upon which the Guam Procurement Regulations and the 26 GAR procurement regulations are, in turn, based. And as that observation would suggest, counterparts for provisions of the Guam Procurement Regulations pertinent to this Appeal can be found in near identical language in the Model Code and Regulations. Therefore, there ought not to be any material divergences of substance between the Resolution 90-59 rules Appellee claims are applicable and the GMHA Regulations found in 26 GAR, as well as the Guam Procurement Regulations of 2 GAR.[15]

Appellant was not and is not wrong to refer to the provisions of the Guam Procurement Regulations in the first instance since they are intended by the Procurement Act to be the basis for all other procurement rules across the agencies of the Government of Guam. Appellant

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bidder or offeror. The final determination shall be made part of the procurement file. (Emphasis added.)

[15] Appellant has not made a complete review of all the rules, but on the face of it, they appear to track the Model Procurement Regulations (see, 2002 ABA Model Procurement Code and Regulations, http://kppanigp.org/Docs/Code_and_Regs.pdf, e.g., comparing Rule 3-401(1) of the Resolution 90-59 rules, as identified in Appellee's Answer (page 11), to Model Code section 3-401(1), and likewise comparing Resolution 90-59 rule section 3-202.14, identified in Appellee's Answer (page 6), to Model Regulation R3-202.12, which in both instances contain identical language. It appears, therefore, at least for purposes of this Appeal, that there are no substantive material differences between the Guam Procurement Regulations of both 2 GAR and 26 GAR which are modeled on the Model Code and Regulations, and the Resolution 90-59 rules Appellee identifies, and that they will each track closely the other.

And in this regard, Appellant has pointed out that the Guam regulations contain an apparent error of substance in transcribing the word "nonresponsible" from Model Regulation R3-301.03.3, by instead inserting the word "nonresponsive" in 2 GAR §3115 (e)(3)(A)(i), which error is repeated in 26 GAR §16316 (e)(3)(A)(i), and that there have been various other typographical errors and reference inconsistencies noted in the Guam regulations, as well.

believes that Appellee is wrong to look to the Resolution 90-59 rules and eschew the procurement regulations found in 2 GAR and 26 GAR.

QUESTIONS ON APPEAL

There being no contested issues of fact, the substantive issues of this Appeal are matters of law, namely:

1. Is it error for a Procuring Agency to reject a bid as non-responsive when the justification for a determination of non-responsiveness is the bidder's failure to provide in the bid submission information solely concerning the bidder's responsibility?

2. Where a bidder fails to provide some of the requested information concerning the bidder's responsibility in its submission prior to bid opening, does Guam procurement law and regulation provide for due process to determine the bidder's responsibility before contract award, after bid opening?

3. Did GMHA fail to properly evaluate Appellant's responsibility according to the appropriate standards?

As will be seen, there is some overlap in the analysis and understanding of each of these questions, and because they are interwoven, the analysis builds somewhat like a snowball, but they will each be addressed in turn to see how all the pieces come together.

1. ERROR IN REJECTING BID AS NON-RESPONSIVE BASED ON MATTERS OF NON-RESPONSIBILITY

The distinguishing characteristics of matters of responsive vs. responsible.

First, it must be emphasized that responsive and responsible are substantively independent criteria to be independently ascertained. Matters which are defined as issues of responsibility should not be used to define issues of responsiveness, nor should matters of responsiveness be used to define issues of responsibility. The determination of each of these terms is to be

accorded very different standards and definitions[16] as well as processes[17].

The Procurement Act states that *responsiveness* is determined solely by reference to a standard of "conforming in all material respects" to the Invitation for Bid (5 GCA §5201(g)).
The Procurement Act requires, **in contrast**, that *responsibility* is to be determined "in accordance with regulations promulgated by the Policy Office", and, failure to provide information *"in connection with an inquiry with respect to responsibility may* be grounds for a determination of nonresponsibility" (5 GCA §5230(a).)

As has been thoroughly canvassed by both Appellant and Appellee, Appellant's bid was principally rejected as *nonresponsive* solely over issues of *responsibility*, namely the provision of information regarding availability of certain personnel and equipment. These are factors which are specified by regulation "to be considered in determining whether the standard of *responsibility* has been met" (2 GAR §3116 (b)(2)(A)).

The effect of Appellee's requirement that matters concerning responsibility be determined by the standards of responsiveness at bid opening is that, at that threshold, GMHA never even considers the independent matter of responsibility *according to the unique standards and processes applicable to responsibility.* GMHA purports to use the test of responsiveness to determine the independent matter of responsibility. This is an incorrect understanding of the limited scope of responsiveness, which has the wrongful effect of stripping the determination of responsibility from its regulatory framework.

Appellant's contention that a bid cannot be judged to be nonresponsive based on information relative to responsibility is supported by the analysis of Ms. Karen Murphy Theriault, Esq., C.P.M.[18], in the online article, *Determination of Lowest Responsible Bidder*,

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[16] 2 GAR § 3115 (e)(3)(A) (i) and (ii); 26 GAR §16316 (e)(3)(A)(i) and (ii). See also 5 GCA §5201 (f) and (g) for definitions.

[17] 2 GAR § 3116; 26 GAR §16317.

[18] "The Procurement Connection, Inc., is a California, woman-owned corporation that has been providing consulting and training services to public agencies since 1998. Karen (Murphy) Theriault is the President of The Procurement Connection. Ms. Theriault received her Juris Doctorate from the Santa Barbara College of Law in 1998, and her Lifetime Certified Purchasing Manager (C.P.M.) designation in 1994. She has over twenty-five years of experience in the public sector.

"Ms. Theriault has written and published three editions of a Handbook For Writing Bids and RFPs, which is currently being used by over 1,200 government agencies, and her latest book, Public Procurement For Smarties, is currently being used by the University of New Mexico in its Public Administration graduate program.

http://www.theprocurementconnection.com/articles/defbid.html. Ms. Theriault explains:

> " Before reviewing cases regarding 'responsible bidders,' let's clarify the terms responsive and responsible. A California Court of Appeal case provided a good definition of the difference between responsive and responsible. The court said **"a bid is 'responsive' if it promises to do what the bidding instructions demand; a bidder is 'responsible' if it can perform the contract as promised."** [Footnotes omitted.]
>
> "In other words, **in determining whether a bid is responsive, an awarding body (agency) should look at whether or not the bid offered meets the prescribed specifications**, not at how well the bidder will perform. ***Alternately,*** **in determining whether a bidder is responsible, an agency looks at whether or not the bidder is able to perform as specified,** ***not at whether or not the bid itself meets the specifications***." (Emphasis added.)

The reference book, *"Government Contract Law*, The Deskbook for Procurement Professionals", Second Edition, Section of Public Contract Law, American Bar Association, 1999, at page 65, emphasizes the importance of drawing these distinctions:

> "C. Responsiveness Distinguished from Responsibility.
>
> "*Data Express, Inc.*, B-234685, July 11, 1989, 89-2 CPD ¶ 28.
>
> "1. Bid **responsiveness concerns whether a bidder has offered** *unequivocally* in its bid documents **to provide** supplies in conformity with all material terms and conditions of a solicitation for sealed bids, and is determined as of the time of opening bids.
>
> "2. **Responsibility refers to** a bidder's apparent *ability* and *capacity* **to perform**, and it is determined any time prior to award. *Triton Marine Constr. Corp.*, B-255373, Oct. 20, 1993, 93-2 CPD ¶ 255 **(bidder's failure to submit with its bid pre-**

"Ms. Theriault also wrote four extension courses for the University of Wisconsin, which are offered by UW online and by mail correspondence. The study courses assist purchasing professionals in passing the difficult Accredited Purchasing Practitioner and Certified Purchasing Manager exams.

"Additionally, Ms. Theriault developed a Procedures Manual for the California Uniform Public Construction Cost Accounting Procedures, which is being used by many agencies throughout California."

award information to determine the bidder's ability to perform the work solicited does not render bid nonresponsive). [Bold emphasis added.]

Cases digested in the "*Annotations to the Model Procurement Code for State and Local Governments*", Third Edition, Section of State and Local Government Law, American Bar Association1996, (herein, "Model Code Annotations"), emphasize that the determination of responsiveness does not preclude *nor supplant* the independent requirement of the determination of responsibility :

> **"An IFB requirement to list elevator maintenance personnel and their type of experience raises a responsibility issue, *even though the invitation for bids states that failure to provide the information at the time of bid opening will result in bid rejection as nonresponsive*.** Appeal of the National Elevator Company, Inc., No. **1329** (MSBCA October 1, **1987**)." (Emphasis added.)
>
> "Where the procurement officer awarded a contract to another after finding the low bidder nonresponsive due its failure to provide information concerning its qualifications and experience, the board held **the officer erred in rejecting the otherwise low bid because the information requested related to responsibility (capacity to perform) and not to responsiveness....** Appeal of Nat'l Elevator Co., No. **1252** (MSBCA December 30, **1992**)." (Model Code Annotations at page 40 and 44.) (Emphasis added.)
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> "Where the 'qualification of bidders' section of the specifications required bidders to have at least 5 years experience and to list both the experience of its personnel and any similar services it had provided' ... **'[t]he board reasoned that such information 'relates to the determination of bidder responsibility or capability to perform the contract, *and cannot be made into a question of responsiveness by the terms of the solicitations*.'** ... Appeal of Nat'l Elevator Co., No. **1251** (MSBCA Oct. 17, **1985**)." (Model Code Annotations, at page 41.) (Emphasis added.) [19]

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[19] Appellee also simply dismisses as "irrelevant" the line of digested cases from the Maryland State Board of Contract Appeals. But these reported cases do reflect a long, considered, internally consistent line of reasoning, which is consistent with the provisions and principles of the Guam procurement law and regulations. Furthermore, the Federal Court of Claims case *Blount, Inc. v. U. S.*, 22 Cl.Ct. 221, 226 (1990) noted that these cases are based in the Model Code principles. It was quoted with approval in the *Browning-Ferris* case, *infra*, as follows: "**[c]ases construing Maryland's model code-based procurement law have also reached the same conclusion**", and itself cited several such MSCBA cases in its decision. Appellee is wrong to assert that these cases are "irrelevant". The cases are relevant, on mark and authoritative.

Of similar result is *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. (if this link doesn't work, try http://www.hawaii.gov/dcca/areas/oah/oah_decisions/Procurement/, and scroll down to PCH-2000-004 - Browning-Ferris), where the State of Hawaii Chief Procurement Officer said,

> "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 [responsibility] 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) ...*
>
> **"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 delivery**. *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).*" (Emphasis and indent added.)

The *Browning-Ferris* decision noted that a winning bidder "would be required to comply with the material terms and conditions of the solicitation **regardless of whether the responsibility determination is completed before or after bid opening**", adding the footnote (footnote 4 in the decision), "[t]hus, the bidder would not receive an unfair advantage over the other bidders", and that "[t]his should be **contrasted with the determination of bid responsiveness**", which is determined at bid opening and does not in most cases allow bids to be varied after bid opening.

The result in *Browning-Ferris* is that the bidder with the low bid was found to have a *responsive* bid even though it failed to provide any evidence, required by the solicitation, that it was licensed, equipped or manned to provide the solicited services at the bid opening; *these deficiencies were matters of bidder responsibility, not bid responsiveness, which were curable after bid opening and before award.*

The determination of responsiveness.

In the case, *In the Matter of Palmer Campus Renovation, September 30, 1999, Before the Chief Procurement Officer for Construction, State of South Carolina, County of Richland*, www.state.sc.us/mmo/ose/protest/nbm_trid.pdf., the low bidder submitted a complete Bid Form as part of its bid submission, but failed to provide, before bid opening, evidence required to show

it was properly licensed. The procuring authority claimed this failure did not render the bid non-responsive but did raise an issue of responsibility (and the result was the low bidder was able to rectify its failure to have appropriate licenses to be responsible by curing this defect after bid opening and before award). *The low bidder claimed the fully completed Bid Form satisfied the showing of responsiveness, and the Chief Procurement Officer did not dispute that,* determining the ultimate decision on the issue of responsibility (allowing the matter of licensing to be cured and then determined after bid opening).

Likewise in the instant appeal, Appellant was required to fill out a "Bid Form" as part of its bid submission. The requirements of the "Bid Form" is discussed in the "General Terms" attached to the IFB (Tab 1 of the Procurement Record). Under the heading "Submission of Bids" in the General Terms you will not find any requirement to provide any evidence of responsibility, just a requirement that the bid pricing, signatures and other narrow requirements of the "Bid Form" be completed. It is the information in the Bid Form which determines if the bidder has *committed to providing the exact service or thing solicited*, and its price, *which is to say, whether the bid is responsive.*

Appellant duly and timely filled out and submitted in the bid envelope the required "Bid Form", without objection as to sufficiency of completeness. It was by this Bid Form that Appellant was judged to have the low bid.

The authorities cited above make it clear that *not everything* asked for in an IFB relates to matters of responsiveness, and it is error to reject a bid as non-responsive if the omitted matter relates to issues of bidder responsibility. Indiscriminate and loose language to the effect that "the bid" includes and requires absolutely everything mentioned in the total IFB package simply confuses the matter, but the authorities show that a more critical distinction must be made.

GMHA uses this loose language to define "responsiveness" as an indiscriminate "mandate" to respond to absolutely everything in the IFB bid package at the bid opening. As the authorities take pains to distinguish, public procurement determination of responsive is not so broad as that. The IFB deals with other matters than simply matters of responsiveness. As the cases above stress, issues of responsibility cannot be transformed into a determination of responsiveness by the terms of the IFB.

> **The critical test evidenced in and inferred from all of the authorities is that a determination of bid responsiveness simply answers the questions "what goods or services is the government seeking to buy" and "has the bid unequivocally offered to provide them"?**

Thus, for instance, if the government seeks to buy garbage collection services and the bidder offers unequivocally to provide them, the bid is deemed to be **responsive** *even if*, in the bid submission, the bidder has not demonstrated, nor can not then demonstrate, that it has the licenses, personnel, equipment or facilities to render the services, <u>because such matters are pertinent only to the bidder's **responsibility**</u> which is to be independently determined (*In the*

Matter of Browning-Ferris Industries of Hawaii, Inc., supra.)

Conclusion.

J&G's Bid Form unequivocally promised to perform the warehouse extension services GMHA solicited in the precise manner requested by the government with respect to price, quality, quantity, and delivery.[20] If GMHA had accepted the bid, J&G would thereby have been obliged to perform the exact thing called for in the solicitation. **These are the substantive criteria by which responsiveness is determined** as described by the authorities above. J&G's bid was therefore responsive when judged by the substantive standards applicable to responsiveness. Indeed, GMHA did not rule otherwise. Thus, its decision to reject the bid as "non-responsive" is not supported by the facts of the case.

It is further error for the procuring agency to reject Appellant's bid on the grounds of responsiveness when the only substantive matters objected to concern issues of responsibility. GMHA's application of the test of responsiveness is overly broad, usurping the independent determination of responsibility. Since GMHA did not specifically object to any substantive issue of responsiveness, only referring to substantive issues of responsibility, Appellant's bid was wrongly rejected, and the bid should be awarded to Appellant.

2. THE DUE PROCESS ISSUE

Finding due process within the procurement process.

The way the bidding and evaluation process is meant to play out further underlines the distinction between the determinations of, respectively, responsive and responsible, both substantively and procedurally, and provides the basis for the requirement of due process. The principle of this bidding process is summarized in a submission to the Sunnyvale, California municipal Council

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[20] See "Bid Form", dated Mar. 21, 2007, at Tab 7 of the Procurement Record, duly signed and submitted by Appellant, which provides, in relevant parts:

> "The undersigned ... hereby proposes and agrees to furnish all the necessary labor, materials, equipment, tools and services necessary for the title "GMHA Warehouse Extension Project GMHA 005-2007" all in accordance with the drawings, specifications and other contract documents.... If written notice of the acceptance of this bid is mailed, telegraphed or delivered to the undersigned within Seventy (75 [sic]) calendar days after the opening thereof, the undersigned agrees to execute the form of agreement included as one of the contract documents.... If awarded the contract, the undersigned agrees to complete the work within Two Hundred Ten (210) calendar days ...."

in the following way:

> "One of the foundations of public purchasing is the principle that contracts are awarded to the lowest responsive and responsible bidder, based upon fair and open competition. Any bidder who believes that it has been disadvantaged due to the violation of this principle has the right to question the process.
>
> "*A finding that a bidder is not responsive* simply means that a bid does not respond to all the required elements in the solicitation. It does not reflect on the overall suitability of the bidder and, as a result, *does not trigger the need for due process procedures*. **In contrast, a *finding* that a bidder is not responsible does reflect on the suitability of the bidder and, *therefore, requires an opportunity to present evidence* of qualifications to do the job.**" (SUBJECT: Bid Protests Council Study Issue (RTC #99-463) http://www.sunnyvale.ca.gov/199910/rtcs/99-463.asp.) (Emphasis added.)

The steps in the bidding and evaluation process are outlined in Guam's procurement regulations, starting in 2 GAR §3109(n) and its 26 GAR counterpart: "Bid Evaluation and Award".

First, subsection 1 states the three requirements of the general rule that the contract is to be awarded to the (1) lowest (2) responsible and (3) responsive bidder. Subsection 2 defines separate prongs for determining "responsibility" (which is required to be conducted by way of the determination to be made pursuant to 2 GAR §3116 and its 26 GAR §16317counterpart), and "responsiveness" (which is determined pursuant to its own standard of "conforming in all material respects").

Then begins the ***bid** evaluation*. The first evaluation step is specified in subsection 3: an evaluation is made of **product acceptability** in accordance with the evaluation criteria set forth in the Invitation for Bids. Note that the evaluation criteria is used to evaluate *the product, not the bidder*. This acceptability evaluation is made "only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bids."

Subsection 4 specifies the second item on the evaluation agenda: "*Following* determination of product acceptability ... bids will be evaluated to determine which bidder offers the lowest cost to the territory.... Only objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder...."

Thus, this first part of the bid evaluation process is concerned with determining whether a bid meets the terms of the specifications, i.e., its *responsiveness* to the bid. The second part is concerned with identifying the lowest bidder.

It should be observed that, at this stage in the process, there has not been any mention of actually making any determination of responsibility, simply identifying the lowest responsive bidder, i.e., the prospective contractor.

The next step in the process in straight-forward competitive sealed bids as in the instant case is described in 2 GAR §3115 and its 26 GAR counterpart. In this section the procurement officer is instructed how to cancel solicitations or reject individual bids. It is finally at this stage of the process that the matter of bidder responsibility is addressed. It is here where we determine if the prospective contractor is entitled to the award.

Only three specific reasons are allowed for rejecting individual bids (§3115 (e)(3)): First, the **bidder** ("the business that submitted the bid") is determined to be non<u>responsible</u>[21]; or, second, "the **bid** is non*responsive*, that is, does not conform in all material respects to the Invitation for Bids...,", or, third, the "supply, service, or construction *item offered in the bid* is unacceptable...."

> The three reasons allowed for rejecting bids clearly distinguish between evaluating for rejection of the *bid<u>der</u>, which must be determined by standards of responsibility,* and evaluating for rejection of the *<u>bid</u>, to be determined by standards of responsiveness and acceptability*. The first reason addresses the responsibility of the bidder, <u>which is expressly required to be determined in accordance with §3116</u>. The second and third reasons flow from the evaluation of the bid's responsiveness pursuant to standards set out in §3109(n) discussed above.

The effect of the distinctions made by §3115 (e)(3) is that any rejection of a bidder for any *reason* related to matters of responsibility must be made pursuant to the standards and procedures of 2 GAR §3116 (and its 26 GAR counterpart); the issue of responsibility is to be judged independently from responsiveness, and according to its own standards and processes.

<u>The requirement of an inquiry after the prospective contractor is identified</u>.

The starting point for the determination of responsibility is that matters of responsibility are to be

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[21] As noted in footnote 15, *supra*, the word used in the Guam regulations is "nonresponsive" but should be "nonresponsible", because, first, "nonresponsible" is the actual word used in the Model Rules equivalent and the Guam procurement law and regulations are intended to be consistent with the Model Code and Regulations, and second, but even *more tellingly*, "nonresponsive" is inconsistent with the remainder of the referenced subsection, which *requires the determination to be made "under §3116(e)* ***[Written Determination of <u>Nonresponsibility</u> Required]*** of this Chapter." It simply makes no sense at all to say, as §3115(e)(3)(i) on its face reads, that a bidder is to be determined to be *non<u>responsive</u>* by a determination to be made under the Standards of *Responsibility* and by the <u>written determination of *Nonresponsibility*</u> found in §3116(e). This is a manifest error of transcribing the Model Code and regulations.

determined "in connection with an inquiry": "The unreasonable failure of a bidder or offeror to promptly supply information **in connection with an inquiry** may be grounds for a determination of nonresponsibility...."(2 GAR §3116 (a)). This inquiry requirement is in precisely the same language as required by the Procurement Act, 5 GCA §5230 (a)[22]. Model Procurement Code §3-401 is also in the same language as 5 GCA §5230, and both are the basis of the authority for 2 GAR §3116, which is in turn in identical language as 26 GAR §16317.

The language of the procurement law and regulation does not say, but well and easily could have said if that were the intent, that "the unreasonable failure of a bidder or offeror to promptly supply information in connection with *a bid* is grounds for a determination of nonresponsibility." The importance of the use of the word "inquiry" in the Model Code, Procurement Act and Procurement Regulations cannot be trivialized. "Inquiry" is at the heart of the essential concept of due process.

Even the Resolution 90-59 rule Appellee relied on, 3-401, mentions this "inquiry"[23]. The careful language and the scheme of the regulations clearly sets aside determinations of responsibility to be conducted by an inquiry of some sort, not by a bid submission.

Appellee claims it has the right to mandate that a *bidder* must provide *all* information relative to a determination of the bidder's responsibility in the envelope prior to bid opening. However, §3116 states that "**the *prospective contractor* <u>may demonstrate</u>** the availability of necessary financing, equipment, facilities, expertise, and personnel...." to prove it is responsible.

A "prospective contractor" is not defined in the law or regulations, but must refer to a bidder to whom there is an expectation of being awarded the contract (i.e., a person offering the low bid as discussed in connection with the bid evaluation process described in §3109(n) above). § 3116 describes the low bidder, once the bids are opened and the low bidder identified, in the language of "prospective contractor" and it is, in this capacity, given the due process right *to demonstrate* issues of responsibility if necessary.

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[22] 5 GCA § 5230. Responsibility of Bidders and Offerors.

(a) Determination of Nonresponsibility. A written determination of nonresponsibility of a bidder or offeror shall be made *in accordance with regulations promulgated by the Policy Office*. The unreasonable failure of a bidder or offeror to promptly supply information **in connection with an inquiry with respect to responsibility** may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.

[23] Appellee first attempts to rationalize even this reference to an "inquiry" away with the *non sequitur* that GMHA considered the bid submission to be non-responsive because it didn't contain information Appellee deemed necessary to make the determination of responsibility (Answer, page 11). Alternatively, Appellee characterizes the bid itself as the "inquiry" (Rebuttal, page 6). GMHA is obviously struggling to understand the public procurement processes.

If the right to demonstrate responsibility was intended to be restricted to matters within the envelope at bid opening, there would be no purpose to provide for a "prospective contractor's" right to demonstrate it as so clearly intended by the regulation. **The only way this provision can be interpreted in any reasonable and rational manner is to allow a low bidder to survive the bid opening where it is evaluated as offering the low bid to thereafter, as a "prospective contractor", demonstrate its responsibility.** Any other interpretation guts the regulation of any effect. That is not the appropriate approach to statutory interpretation.

If the determination of responsibility is foreclosed after bid opening, as GMHA asserts, this would be a right granted without any purpose, effect or substance. But there is purpose and intent behind §3116's presence in the regulations: its intent and purpose is to give the person offering a low bid due process rights to establish its responsibility after bids are opened.

As was stated in *In the Matter of Palmer Campus Renovation, supra*, a bidder cannot be required to provide all matters concerning its responsibility in the bid envelope at the 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)

In the instant case, Appellant was the low bidder and thereby the "**prospective contractor**" pending determination of the issue of responsibility. If there is any question whether J&G was the prospective contractor, one need only look to the Memorandum of Craig T. Guevara, Hospital Facilities Maintenance Manager, to the Supply Management Administrator, in support of rejecting Appellant's bid. He said, "in this case, the prospective Contractor failed to display his/her company as a responsive and responsible bidder." (Procurement Record, Tab 16.)

Appellant contends if Appellee truly lacked the information in the bid submission to make the determination of responsibility, Appellee was required to make a post-bid-opening inquiry to obtain the information, and Appellant should have been granted the right to demonstrate it. Appellee wrongly contends the mandates of the IFB constituted "all the due process to which Appellee was entitled."

Moreover, the due process right granted by §3116 is both substantive as well as procedural. It also specifies the Standards of Responsibility. The regulation contemplates, in the determination of responsibility, consideration of **"satisfactory records"** of integrity and performance that exist quite apart from the contents of the IFB[24]. How could these records be considered if Appellant is limited to proving responsibility only "in the bid envelope" as asserted by Appellee?

And further to the point, **the regulation states that the Procurement Officer "must be**

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[24] 2 GAR §3116 (b)(2)(A)(ii) and (iii), set out in footnote 14, above, and 26 GAR counterpart. See also discussion below.

satisfied that the prospective contractor is responsible" - when? - "*Before awarding* the contract". <u>Not before the bid is opened but before awarding the contract</u>. (§3116 (b)(4) and its 26 GAR counterpart.) This language is too carefully constructed to support any reasonable interpretation that responsibility must be determined at bid opening and that Appellant is not entitled to any further due process.

Appellee argues that it has mandated in its Invitation for Bids that information concerning responsibility be included as a material part of the bid submittal, *which satisfies any need of* ***an inquiry***.[25] Patently, **an "inquiry" is not a bid submission**. An inquiry is even more than an *evaluation*, which connotes a one-sided assessment.[26] An inquiry connotes a dialogue, otherwise there would be no purpose to the repeated use of the qualifying word "**requested**", twice in §3116 (b)(2)(B) and again in (b)(3) (see footnote 14, *supra*):

> "It is clear that Regulation 19-445.2125 [the "determination of responsibility" analog] contemplates a dialogue between an agency and prospective contractor...." *In the Matter of Palmer Campus Renovation, supra.*

There is nothing in the Procurement Act or regulations that in any way suggests that the Invitation for Bids is an "inquiry"[27], and it is preposterous for Appellee to suggest so. GMHA is powerless, by the mere contracting process of public procurement, to write the inquiry requirements of the procurement laws and regulations out of the bidding process.

Thus, in Federal contracting is it provided,

> "Responsibility is determined **at any time prior to award**. Therefore, the bidder may provide responsibility information to the contracting officer at any time before award.... (**Bidder's failure to submit security clearance documentation with its bid is not a basis for rejection of bid**)...." (*"Government Contract Law,* The Deskbook for Procurement Professionals", *supra*, at page 72.)

<u>Determinations of responsibility do not prejudice other bidders</u>.

In answer to any suggestion that it is prejudicial to the higher bidders to consider matters of the

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[25] Rebuttal, page 6.

[26] Which, again, underlines the distinction between responsive and responsible. *Bidder* responsibility is determined by means of an *inquiry* pursuant to §3116; a *bid* is determined by *evaluation* as provided in §3109 (n).

[27] "*Invitation for Bids* means all documents, whether attached or incorporated by reference, utilized for soliciting bids." 5 GCA §5201 (c).

low bidder's responsibility after bid opening (e.g., Answer, page 10), caselaw has declared that the right to demonstrate responsibility simply does not prejudice other bidders. Their own higher bids already determined their relative competitive positions, and issues of responsibility do not change that order. Turning the accusation around, it could as easily be said that ensuring the responsibility of the prospective contractor after the low bid is assessed prevents a windfall to a higher bidder at the expense of the government.

The notion is that bidders are not prejudiced, so long as the thing they are bidding for is not modified, because only the specifications of the product or service solicited affects the price they are prepared to bid; they are not pricing other bidders' responsibility. That notion is buttressed by the best interest of the government to attempt to avail itself of the lowest price bid, not to set up unnecessary obstacles to achieving that policy goal (5 GCA §5001 (b)(5)).

The determination of responsibility does not give the prospective contractor an opportunity to obtain advantage over another bidder's price nor to provide a product or service other than the one specified in the solicitation, so does not prejudice them. This lack of prejudice is reflected in the provisions of §3109 (m)(4)(B), which requires minor irregularities in a bid to be cured or waived by the procurement officer because there is no prejudice, "that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible." (See footnote 32 and accompanying discussion, *infra.*)

Thus, in *In the Appeal of Jailcraft, Inc.*, No. 2147 (MSBCA Oct. 27, 1999, http://www.msbca.state.md.us/decisions/pdf/jailcraft.pdf), it was said:

> "Although Certified (who offered the low bid) failed to submit this information [going to issues of responsibility] with its bid, such an omission may be considered a minor irregularity, and a procurement officer may accept, at any time prior to award, information necessary to establish the bidder's responsibility. Covington Machine and Welding Company, MSBCA 2051, 5MSBCA ¶436(1998); Peninsula General Hospital Medical Center, MSBCA 1248, 1 MSBCA ¶109(1985); Construction Management Associates, Inc. ("Construction Management"), MSBCA 1238, 1 MSBCA ¶108 (1985). This Board stated the rationale for this rule in Construction Management at page 4:
>
> > Since **an issue of responsibility does not affect the competitive position of the bidders**, *it is appropriate for the procurement officer to invite a bidder to cure an omission of information bearing on responsibility* through [the time established for] receipt and *evaluation* of such information **after bid opening**.
> >
> > **Furthermore, such an omission may be cured after bid opening even when the solicitation purports to require that the information must be submitted with the bid**. [Emphasis added.]

Niedenthal Corp., MSBCA 1783, 4 MSBCA ¶353 (1994);
Aquatel Industries, Inc., MSBCA 1192, 1 MSBCA ¶82."

It is part of the *effect* of the due process review of prospective contractor responsibility described above, if not an express purpose, to give the government the opportunity to avail itself of the savings from low bids and not dismiss them out of hand for simple failure to provide information that can easily be obtained or confirmed prior to bid award.[28]

It is obviously in the interest of the government to facilitate a further demonstration of the low bidder's responsibility once the low bidder is on the hook to provide the thing or service solicited and thereby avoid, if possible, the unnecessary expense of a higher bid offering. Achieving that result was behind the results in the following cases.

In the Appeal of Century Construction, Inc., MSBCA 2385, March 26, 2004, http://www.msbca.state.md.us/decisions/pdf/2385century.pdf, the IFB included a set of blank bid forms and affidavits which were to be filled in by the contractors submitting their bids. The low bidder failed to properly complete the forms and provide the required information. The Board's decision stated:

> "We have observed that, ***in contrast to matters of responsiveness,*** *which concerns a bidder's "legal obligation to perform the required services in exact conformity with the IFB specifications,"* **responsibility concerns "a bidder's capability to perform a contract," and information concerning a bidder's responsibility may be submitted after bid opening.** National Elevator, MSBCA 1252, 2 MSBCA ¶114 (1985) citing Carpet Land, Inc., MSBCA 1093, 1 MSBCA ¶34 (1983). So long as the bid unequivocally demonstrates the bidder's intent to pursue the requirements of the contract, affidavits accompanying a bid that pertain to such requirements will relate to the issue of responsibility, not responsiveness.... **The bidder may supply such requested information after bid opening but before award of the contract**'."

In the *Browning-Ferris* case, *supra*, which is the ultimate case of a bidder failing to provide or have any information about its facilities, personnel, equipment, etc. as of the bid opening, it was

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[28] It must be remembered that there are three essential elements that the law and regulations look for in a solicitation: the well canvassed "responsive" and "responsible", but thirdly as well, the economic savings to the public purse to be found in choosing the lowest cost to the government. As Karen Theriault has noted in her article first mentioned in the text at footnote 18 above, "[t]heses statutory and case laws are designed to ensure that the taxpayers receive the most for their money...." Note also, §3109(m)(4)(B), to the effect "[m]inor informalities [in a bid] are matters of form ... or insignificant mistakes that can be corrected **without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery or contractual conditions is negligible**", as also discussed at footnote 32, *infra*.

ruled,

> 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 ....* "**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).*

<u>The due process inquiry need not be burdonsome.</u>

It should be pointed out that the inquiry and dialogue that §3116 contemplates is not necessarily a a burdensome task for the procuring agency to undertake. The inquiry required of §3116 need not be formal. It simply must be fair, transparent and without favor.

Karen Theriault's article (see text at footnote 18 above) affirms the principle that a bidder must be permitted some due process opportunity to present evidence of responsibility to perform the contract after bid opening. She says, however, **"[a]lthough the court does not mandate the actual format for these procedures, it does say that they do not need to be done in an official judicial-type proceeding (such as a hearing)"** and that the "[a]warding agencies are also not limited to the information presented in the original bid...."

The Comments to the Model Code indicate an inquiry may not even required in every instance, such as where the record of the public and private performance of the bidder is already known without any further need of a request for information[29].

If GMHA had only *considered* that it already had knowledge of J&G's capability to perform the contract arising from the work J&G had recently performed for GMHA under a prior solicitation, it could have relied on that record without necessity of adding to the information it already had at hand, without resort to any further inquiry, and still doing justice to the Standards of Responsibility further discussed below.

<u>Conclusion.</u>

All of the careful analysis and authorities are to the effect that a low bidder, as the prospective contractor, is entitled to procedural and substantive due processes, which involves the procuring officer making an inquiry to open a dialogue to enable the prospective contractor to then demonstrate that it can meet the substantive due process requirements of the Standards of

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[29] See Comment to Model Code set out in footnote 31, *infra*.

Responsibility, all in accordance with §3116. It refutes entirely Appellee's assertion that the bid can be constructed in such fashion as to negate this due process requirement, as well as Appellee's assertion that "nothing ... requires GMHA to make an inquiry into responsibility of bidders after bids have been opened and it is discovered that a bidder did not submit information relating to responsibility." (Answer, page 6.)

GMHA admits that it *failed, indeed refused,* to make any substantive determination of responsibility. (See Rebuttal, page 2.) As shown above, there was no substantive reason to reject the bid as non-responsive.

GMHA could have made a determination of responsibility, *and should have* done so. As §3115(e)(3)(A)(i) demands, any reason to reject a bidder on the basis of responsibility *must* be substantiated, evidenced by a written determination, and conducted pursuant to the provisions of §3116. Appellant was entitled to a full and fair post-bid-opening inquiry into and consideration of matters going to the issue of its responsibility before its bid was rejected for reasons solely related to that determination. It was wrongly denied the due process to which it is entitled.

3. GMHA DID NOT PROPERLY EVALUATE THE INFORMATION IT HAD AT HAND CONCERNING APPELLANT'S RESPONSIBILITY.

The determination of responsibility requires a qualitative test, not the quantitative one used by GMHA. GMHA desires to determine responsibility by a punch-list approach, but the Standards of Responsibility are meant to elicit a more considered qualitative determination consistent with the statutory definition of "responsible bidder". The procurement officer is encouraged to draw out the information by requests and inquiry (see discussion above).

Appellee has noted in "painstaking detail" (Answer, page 7) the various IFB provisions demanding information which Appellant overlooked in its bid submission, but has not said one word about all the information that Appellant did in fact submit, underscoring that what GMHA required by way of information concerning Appellant's responsibility was not an issue of quality but of specific quantity.

The test GMHA applies sets up a sort of "gotcha" test of formality rather than the considered determination of "the *capability* in all respects to perform faithfully the contract requirements, and the *integrity and reliability* which will assure good faith performance" that the procurement law defines and requires.

This standard, this definition of a responsible bidder, does not seek a guarantee of performance outcome, it merely seeks a determination that the prospective contractor will perform *faithfully and in good faith*, not if the bidder does or does not name its company treasurer and secretary or

if it can give a complete count and description of the number of power drills and saws it has on had for the job. GMHA does not have the authority to rewrite either the standards or the process by which the determination of responsibility is to be made.

For instance, Appellee complains that, in failing to provide the name of J&G's company secretary, "Appellant was non-responsive in that the Appellant failed to submit a bid which 'conforms in all material respects to the Invitation for Bids'." (Rebuttal, page 2.) Appellant acknowledges that Appellee complains of more omissions than that one, but Appellee also failed to indicate which amongst all the information it sought was more material that the rest, suggesting rather that *each* item of information called for in the Contractor's Qualification Statement was so material that a determination of responsibility simply could not be conducted without it. Appellee repeatedly identified this particular omission as one material reason the bid submission was alleged to be deficient. (Tabs 16 and 17, Procurement Record, and Answer, page 8.)

GMHA has also complained it was a material omission that Appellant failed to to provide surety references by not naming its bonding company and agent on the Contractor's Qualification Statement (see Tabs 16 and 17, and Appellant's Contractor's Qualification Statement at Tab 7, Procurement Record). This, again, shows GMHA was blindly ticking boxes and not making a considered determination because Appellant did not supply a performance bond; rather, it gave a Bank of Hawaii certified cashier's check instead (see Tab 7, *supra*), as it was entitled to do (see General Terms and Conditions, ¶ 11, "Bid Bond Requirement"). It was not asked to provide a bank reference, but could and would if requested.

It can also be argued that the information GMHA requests is overly broad, vague and uncertain. For instance, the letter of Rejection of Protest complains that J&G did not provide a list of equipment available to execute the project, and failed to detail the machinery and equipment available (see Procurement Record, Tab17). Does this require an inventory of shovels, hammers, ladders, welding sets, etc.? How much and what kind of information is required to quantify and identify this information? It's a nonsense to require such an open-ended "list". The list doesn't even indicate what condition the equipment and machinery is in. All it seeks is quantity of information, not quality. No wonder Appellant's bid preparer didn't spend much time with that request.

A more appropriate question to determine capability would be to ask if the bidder had recently engaged in other construction works, from which it could be inferred which equipment and machinery the bidder could muster for a project. In fact, Appellant did submit precisely that sort of information with the bid, but it was not even considered by GMHA; its precious lists were considered so much more material that it could not determine J&G's responsibility without them.

GMHA cannot escape its duty to make a determination of the statutorily-defined "responsibility" of J&G in accordance with the inquiry, and pursuant to the Standards of Responsibility, even if Appellant had presented *no* significant evidence of responsibility in its bid submission: that is the rule of the *Browning-Ferris* case, *supra*, and other authorities cited.

§3115 (e)(3)(A) is to the effect that a procurement officer cannot reject a bidder on substantive grounds relating solely to the bidder's responsibility unless it conducts an inquiry and makes a determination in accordance with §3116. That is an affirmative duty that cannot be swept under the rug by the separate activity of evaluating a bid's responsiveness.

Appellee complains that since Appellant failed to fully complete the Contractor's Qualification Statement, that "leaves GMHA with no adequate basis by which to determine whether it [Appellant] has met the requisite Standards [of Responsibility]." (Answer, page 7.)

That complaint is baseless on any number of levels, one of which is that, as pointed out above, GMHA's own Instructions to Bidders specifically incorporated, or at least gave bidders reason to rely upon, the expectation of an inquiry into responsibility according to the standards provided by the law and regulations, and the right to demonstrate it, as well as the statutory definition by which that responsibility would be judged.[30] On another and more import level it shows GMHA did not even attempt such a determination based on the information it did possess, which is a violation of the obligation to make the determination of responsibility by the standards and processes required.

The matters which GMHA was required to consider go beyond the bid documents.

It is not absolutely essential in this case that GMHA has incorporated the regulations by reference, although it did do so. The Procurement Act (5 GCA § 5320) is to the effect that *matters of responsibility **must** be judged by regulations promulgated by the Policy Office*. The determination required by the regulations (§ 3116/16317, and see Model Procurement Regulation R3-401.02), requires that

> "factors considered in determining whether the standard of responsibility has been met include whether a prospective contractor has [in addition to available finances, equipment, personnel, facilities, etc.]:
>
> **(ii) a satisfactory *record* of performance;**
> **(iii) a satisfactory *record* of integrity;"**

The requirement of considering satisfactory *records* of performance and integrity clearly calls for an evaluation of factors going beyond the strict bid submissions, which belies Appellee's assertion that determination of responsibility can only be made by reference to matters sought

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[30] See discussion at footnote 12 and following. See also, "Acceptance of Bid (Award) in Instructions to Bidders, page 9 of 10, at Tab 1 of the Procurement Record: "1. It is the intent of GMHA to award a Contract to the lowest responsive and responsible Bidder...(you may refer to the Guam Administrative Rules and Regulations, Section 16317; and the Guam Procurement Act within the Guam Code Annotated, Section 5201)."

from the bid submission ("in the envelope").

Moreover, §3116 doesn't seek to limit the determination of responsibility to how much personnel, equipment and machinery the prospective bidder has on hand at the time of the bid submission, which is the limit of the information required by the IFB, it says the procuring agency is also supposed to inquire if the prospective bidder has any ability (§3116 (b)(2)(A)(i) or plans (§3116 (b)(3)(B) to obtain them. This requires a consideration of information also beyond the realm of the bid documents.

Appellant contends that the "material in all respects" standard by which Appellee judged Appellant's provision of information to determine responsibility is inapplicable to a determination of responsibility even if the information must be provided at bid opening. Appellant contends that much of what Appellee required is not material in *any* respect to making a determination of responsibility, e.g., company secretary.

Appellant contends that the information which Appellant did submit with its bid was, in and of itself, and within the Standards of Responsibility established by applicable regulations, *even without a further inquiry*[31], entirely adequate to enable and compel a finding by the Procurement Officer that J&G "has the capability in all respects to perform faithfully the contract requirements, and the integrity and reliability which will assure good faith performance" (5 GCA § 5201 (f)).

Capability, integrity and reliability of performance: those are the key ingredients of the essential finding of responsibility and it is error on the part of GMHA to require and rely on information in the IFB which is simply incidental, if at all relevant, to such a determination to the exclusion of other information in the submission which is sufficient to make such a determination. Determination of capability, integrity and reliability of performance requires a judgment call that cannot be supplanted by a "tic-the-box, one-size-fits-all" scorecard that GMHA wrongly demands.

Moreover, GMHA must look beyond the bid documents to J&G's **record of integrity and reliability and its plans and abilities** in any event before it makes any conclusion about responsibility, including the one conclusion it did make: that it lacks sufficient information to make the finding that J&G "has the capability in all respects to perform faithfully the contract requirements, and the integrity and reliability which will assure good faith performance". (See footnote 1 above and text accompanying.)

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[31] The comments to Model Procurement Code §3-401 explain: "An inquiry is not required in every case. The extent to which a review or investigation should be conducted will depend on the value and size of the procurement, and ***the bidder's or offeror's past record of performance in the public and private sectors***." This Comment also dovetails with and expands the scope of the provisions quoted above requiring a consideration of the prospective contractor's satisfactory record of performance and integrity.

In the Appeal of Jailcraft, Inc., supra, a higher bidder challenged the proposed award to the low bidder because the low bidder didn't have, so couldn't submit evidence of it with its bid, necessary licensing to perform the work. The decision held such failure would be a "minor irregularity"[32], which is the alternative way of achieving the result that matters of responsibility are not to be judged by the rigorous standards of responsiveness. The decision stated, "Since **an issue of responsibility does not affect the competitive position of the bidders**, it is appropriate for the procurement officer to invite a bidder to cure an omission of information bearing on responsibility."

A similar holding was made *In the Appeal of Century Construction, Inc., supra*, where it was said, " **Where matters of responsibility are concerned, 'even where solicitation documents mandate submission of an item'**, [a] procurement officer may waive *as a minor informality* the failure to supply requested documents or information at time of bid opening bearing on responsibility."

These cases illustrate that the fundamental result, where issues of responsibility are concerned, is that responsibility is not to be subsumed under a finding of non-responsiveness. While the preferred method of dealing with the issue is by way of an appropriate determination of responsibility, the procuring officer might reach the same result by waiving, as a minor irregularity, defects in the bid submission going to matters of responsibility, including, as noted above, waiving the requirement that the bidder hold particularl licenses at the time the bid is submitted, if such matter may be cured before award of the contract.[33] (But, cf., *In the Appeal of Emission Technologies, Inc.*, Guam OPA, OPA-PA-07-002, Aug. 1, 2007, http://www.guamopa.org/docs/07-002_decisions_aug_1.pdf.)

Thus, in the instant case, the Procurement Officer should have waived or allowed Appellant to correct the minor irregularities in its Qualifying Contractor's Certificate to include omitted information, but it chose not to, notwithstanding the directive requirements of 2 GAR § 3109(m)(4)(B) that it **shall** waive or allow correction of minor irregularities, or its 26 GAR counterpart, §16309 (m)(4)(B), which, as pointed out above in the discussion of "Applicable

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[32] "Minor irregularities are matters of form, rather than substance evident from the bid document [i.e., the Bid Form], or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Procurement Officer ***shall*** *waive* such informalities *or allow the bidder to correct* them..." (2 GAR §3109(m)(4)(B).)

[33] It bears remembering that if the prospective contractor cannot obtain licensure, or otherwise cure an omission, before the reasonable time allowed for awarding the contract, it will be determined to be non-responsible and its bid then rejected. Being judged responsive in the first instance is neither an award of the contract nor immunity from the requirement to be determined responsible.

Law", GMHA incorporated by reference in its General Terms and Conditions.

Rather than giving any consideration to taking advantage of J&G's low bid, GMHA preferred to spend an extra $53,000.00 on the solicited project and play "gotcha" with Appellant's bid submission. It steadfastly refuses to waive or inquire into any matter of responsibility or otherwise evaluate the information it had or should take notice of.

Although there is authority to the effect that matters of responsibility may be considered to be "minor irregularities", because responsibility does not prejudice other bidders (its effect on price, etc. is negligible), Appellant maintains the Procurement Law (5 GCA 5230), the Regulations (2 GAR 3116), and the incorporation by reference to 26 GAR 16317 in the General Terms and Conditions all require the Standards of Responsibility to be governed by the provisions specified in §3116 and not the responsiveness standard implicit in the "minor irregularities" exception.

GMHA was required to make a determination of responsibility based on the information available.

But even by Appellee's own alleged rules of the game restricting any consideration to matters "in the envelope", had GMHA at all considered the information available to it, as well as the records of reliability and integrity to which it was obliged to turn, there was more than adequate material to make a determination that J&G "has the capability in all respects to perform faithfully the contract requirements, and the integrity and reliability which will assure good faith performance" within the Standards of Responsibility of §3116. There is no reason to refuse to attempt such a determination, as GMHA did, simply because *some* of the information requested, such as the name of J&G's company secretary, was not provided.

As detailed in Appellant's Notice of Appeal[34], there was a significant amount of material information included with its bid[35], including many references from prior works and details of numerous recent construction contracts, indeed, including details of having performed construction services for GMHA in the recent past. This is all exactly the sort of information which is contemplated by the §3116 determination of responsibility standards.

GMHA focused, instead, on the information that was not in the bid package. GMHA did not need to know the name of J&G's company secretary in order to make the inquiry and determination from the information submitted that J&G was responsible to perform the instant work. And it could have saved the public purse over $53,000.00 if it had done so, and will save that amount if it is now determined to award the contract to Appellant.

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[34] See "Discussion of Appellant's Responsibility" in its Notice of Appeal at pages 10 to 12.

[35] See J&G's complete submission, including Bid Form, Contractor's Qualification Statement, and attachments required or allowed by the CQS at Tab 7, Procurement Record.

As explained above, the manner and matter of the determination of the standard of responsibility is a requirement of the Model Code, 3-401, which is the basis of and in the same language of the Procurement Act, 5 GCA §5230, which is also the basis of the Regulations 2 GAR §3116 and 26 GAR §16317, incorporated by reference into the IFB. These are the authorities also behind the requirement of §3115(e) that a bidder *must* first be determined to be nonresponsive in accordance with §3116 before the bid is rejected for any reason related to bidder responsibility (see discussion at footnote 21, *supra*). These requirements are not meant to be overridden by technicalities and "gotcha" traps set up by a procuring agency's construction of an IFB, nor are they intended to be ignored by the procuring agency as "irrelevant".

The Official Comments to the Model Code, incorporated by the Procurement Act, state that the inquiry into responsibility is not required in every instance, but rather is dependent on the extent to which "*the bidder's or offeror's* ***past record of performance*** ***in the public and private sectors***" can be ascertained. (See footnote 31 above and text accompanying.) After all, ascertaining the bidder's capacity for performance of the work solicited is what the determination of responsibility is all about, and the elements that go to that determination will vary from case to case.

J&G is not an unknown entity on Guam. Even the comments of the GMHA evaluator suggests a familiar acquaintance:

> "I feel that although J&G submitted the lowest bid, they sold themselves short meeting the bid submittal requirements."[36]

Appellant asserts that it has a reputation on Guam and a record more than satisfactorily showing that it is capable "in all respects to perform faithfully the contract requirements" and that it has "the integrity and reliability which will assure good faith performance", and that this measure of responsibility, in this instance, is not too high a hurdle for GMHA to jump. Even if J&G sold itself short in the bid submission, (which Appellant denies - it contends there was adequate information in the submission to support a determination of responsibility), it is in the best interests of the government to take advantage of its low bid if it knows or has reason to suspect J&G's capacity for responsible performance is better than its submission suggested. The evaluator's comment suggests that it had that knowledge and refused to consider it.

J&G's past record of performance and integrity, and its reputation for seeing jobs through is widely known and discussed on Guam. There are few families on Guam who have not had at least one member employed at some point by J&G. There are few families on Guam who have not been customers of at least one of its many businesses over the years.

There are many families, tourists, businesses and community organizations which find shelter in

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[36] See comment, apparently of Mr. Craig T. Guevara, Hospital Facilities Maintenance Manager, dated 03.23.07, at Tab 10, Procurement Record.

building and other structures it has constructed, including the many steel frame warehouses that J&G and its many occupy.

Its founder and current President, who was identified in the Contractor's Qualification Statement, is in the Hall of Fame of the Guam Chamber of Commerce. J&G and Mr. Jones have frequently been written about and profiled in Guam newspapers and magazines. Indeed, Mr. Jones was not too long ago featured on the cover of another Guam magazine, *Directions* magazine, copies of which are still found in many locations around Guam, including business, professional and government waiting areas.

From Oka to Tumon, surrounding GMH and beyond, the evidence and record of J&G's achievements on Guam and elsewhere are plentiful and well known.

J&G "has the capability in all respects to perform faithfully the contract requirements, and the integrity and reliability which will assure good faith performance" of the instant solicited work. If GMHA believed or believes otherwise, J&G must be given the opportunity to demonstrate that it can. Appellant contends, however, that, fairly judging J&G by the definition of "responsible bidder in 5 GCA §5201 (f), as determined by the Standards of Responsibility of 2 GAR §3116, the evidence available compels a finding that J&G is responsible to perform the IFB.

Conclusion.

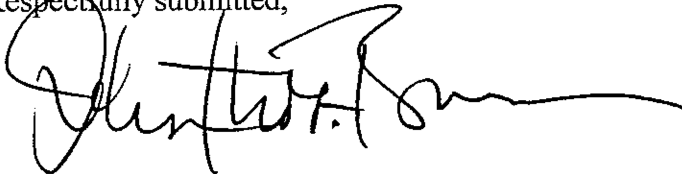
J&G is the prospective contractor under the instant IFB. J&G clearly is obliged, when and if its bid is accepted, to provide GMHA the precise warehouse extension work it specified in the IFB. Substantively, there was nothing nonresponsive about J&G's bid, and GMHA did not identify any objection to its bid other than failure to provide information going to issues of responsibility. The analysis of the law, regulations and authorities make it clear that failure to provide information having to do with responsibility does not render a bid non-responsive and that it is error for GMHA to reject J&G's bid as non-responsive on that ground. It must follow that J&G's bid was responsive.

GMHA was blinded by its tick-the-box, one-size-fits-all scorecard and failed to make the independent judgment of responsibility pursuant to the process and by reference to the Standards of Responsibility defined by the procurement law and regulations that is required of it. GMHA had everything the law and regulations required to make the determination of responsibility both "in the envelope" and at opening of bids, and failed its duty to do so. Moreover, as prospective contractor, J&G still has the right to demonstrate any matter of responsibility requested by GMHA, and GMHA still has the opportunity to engage in any inquiry into J&G's responsibility to the extent it is not satisfied with the information it has and is charged to consider, since the bid is yet to be awarded.

The rejection of J&G's bid by GMHA has been a triumph of form over substance, and a regulatory train wreck between procurement lore and procurement law. It was a recipe to add unnecessary costs to the warehouse extension project and diminish the meager funds otherwise available to Guam Memorial Hospital by over $53,000.00.

J&G could have and should have been awarded the contract at bid opening. It is not too late to do so now, indeed it is appropriate to do so. Appellant respectfully requests the Public Auditor to do so or direct GMHA to do so.

Respectfully submitted,



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