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 PROCUREMENT APPEALS

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 Guam Memorial Hospital Authority

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In the Appeal of)	APPEAL NO. OPA-PA-07-005
)	
JONES & GUERRERO CO., INC. dba)	
J&G CONSTRUCTION,)	GUAM MEMORIAL HOSPITAL
)	AUTHORITY'S REBUTTAL OF
)	APPELLANT'S COMMENTS
)	TO AGENCY REPORT
)	
Appellant.)	
)	
)	

Appellee Guam Memorial Hospital Authority ("GMHA"), by and through its counsel of record, Maria T. Cenyon-Duenas, Esq. of Mair, Mair, Spade & Thompson, hereby submits its rebuttal of Appellant Jones & Guerrero Co., Inc. dba J&G Construction's (referred to herein as "Appellant" or "J&G") Comments on Agency Report which was filed with the Office of the Public Auditor ("OPA") on July 19, 2007.

REBUTTAL

Appellant continues to argue that GMHA's rejection of its bid was improper because GMHA denied Appellant its "due process" rights, purportedly under 2 GAR §3116, for determining that Appellant was "nonresponsible under the rubric of responsiveness." Appellant continues to ignore the fact that GMHA *did not* reject its bid

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because Appellant was determined to be nonresponsible; rather, GMHA rejected J&G's bid because Appellant was *non-responsive* in that the Appellant failed to submit a bid which "conforms in all material respects to the Invitation for Bids." GMHA's Procurement Rules and Regulations permit the rejection of a bid when it "does not conform in all material respects to the Invitation for Bids." Section 3-301.05.3(1)(b). Thus, GMHA's rejection on the basis of nonresponsiveness, rather than nonresponsibility, does not mandate any further inquiry or provide any "due process" right to Appellant other than a challenge to the rejection pursuant to the provisions governing bid protests.

GMHA *did not* make a determination that Appellant was nonresponsible, as Appellant asserts. Instead, GMHA determined that Appellant did not submit information which was *required* to be "submitted in the bid envelope at the date and time for bid opening" and the failure to so include the information "will mean disqualification and rejection of the bid." No further inquiry or "due process" was owed to Appellant under the circumstances.

DISCUSSION

I. GMHA PROCUREMENT RULES AND REGULATIONS AND PROVISIONS OF THE IFB SUPPORT GMHA'S REJECTION OF APPELLANT'S BID AS NON-RESPONSIVE.

In addition to the numerous provisions of the IFB cited to by Appellee in its Agency Statement, Section 3-301.05.3(1)(b) of the GMHA Procurement Rules and Regulations specifically allows GMHA to reject a bid if "the bid is not responsible, that is, it does not conform in all material respects to the Invitation for Bids; See Section 3-202.14.2 (Bid Evaluation and Award, Responsibility and Responsiveness) of this Chapter." Section 3-202.14.2 provides as follows:

Responsibility of prospective contractors is covered by Section 3-401 (Responsibility) of this Chapter. Responsiveness of bids is covered by Section 6958(g) of the Guam Procurement Act, which defines "responsive bidder" as a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

Section 6958(g) of the Guam Procurement Act (now codified as 5 GCA §5201(g)) defines "Responsive Bidder" as means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids. As discussed in great detail in Appellee's Agency Statement, Appellant simply *did not* submit a bid which "conforms in all material respects to the Invitation for Bids." Consequently, GMHA properly rejected its bid pursuant to the provisions governing rejection of a bid for *nonresponsiveness*, not pursuant to Section 3-401 which governs determinations of *nonresponsibility*, therefore, no further inquiry was required, nor has Appellant cited to any relevant provision that places the onus on GMHA to ensure that a bidder complies with all material respects of the IFB, particularly when they are clearly set forth in the IFB.

As GMHA pointed out in its Agency Statement, the Invitation for Bids includes the "General Terms and Conditions Sealed Bid Solicitation and Award." Paragraph 6 of that documents states, "Bidders **shall comply** with **all** specifications and other requirements of the solicitation." Paragraph 15 of the IFB provides that bids will be considered "only from bidders, who **in the opinion of the Government can show evidence** of their ability, experience, equipment, and facilities to render satisfactory service."

Further to that requirement, Section III, Paragraph F of the Instruction to Bidders states unequivocally that "GMHA **requires** bidders to present **satisfactory evidence** that they have sufficient experience and are fully prepared and therefore,

'responsible,' with necessary capital, material, machinery and skilled workmen and supervisory staff to carry out the contract satisfactorily." GMHA then declares that in order to "enable Bidders to present evidence of meeting the Standards of Responsibility, GMHA has developed a 'Contractor's Qualifying Statement' contained in this Project Manual. Accordingly, each Bidder must submit a **properly executed Contractor's Qualification Statement** utilizing GMHA's form. ...".

Additionally, the Special Reminder to Prospective Bidders makes specific reference to the Contractor's Qualification Statement and states clearly: *"Failure to comply with the requirements will mean disqualification and rejection of the bid."* (Emphasis added). Indeed, J&G's representative executed the Special Reminder in which he stated that he "acknowledge[s] receipt of this special reminder to prospective bidders together with **Bid Invitation/Number GMHA 005-2007** ... and that I have read and understand its intent and implications" which clearly includes rejection for failure to include required documents.

Under the circumstances, it is absolutely ridiculous for J&G to now assert that GMHA had the duty or obligation to make a further inquiry with regard to the Contractor's Qualification Statement after the opening of bids after it clearly acknowledged, by its execution of the Special Reminder, that it was required to submit *all* information enumerated in the Special Reminder to Prospective Bidders, the Instructions to Bidders and the General Conditions of the IFB and that failure to submit all of the required documents together with its bid would result in disqualification and rejection of the bid.

II. GMHA PROCUREMENT REGULATIONS DO NOT PROVIDE APPELLANT WITH ANY ADDITIONAL "DUE PROCESS" RIGHTS THAT IT ALREADY RECEIVED WHEN GMHA MADE THE DETERMINATION THAT IT'S BID WAS NONRESPONSIVE.

Appellant argues that GMHA actually made a determination that it was nonresponsible, rather than nonresponsive and states that GMHA was therefore required to make a further inquiry into responsibility before it is effectively determined to be nonresponsible. Appellant then mistakenly relies on numerous opinions issued by the Maryland State Board of Appeals which are completely irrelevant to the issue of whether GMHA was required to do anything further than it did when it rejected Appellant's bid. For example, Appellant cites the case of Niedenthal Corp., MSBCA 1783, 4 MSBCA ¶353 (1994), for the proposition that a bidder who has omitted information bearing on responsibility should be permitted to cure the failure to provide the information even if the invitation for bid requires that the information be submitted with the bid. (Appellant's Comments at p. 5).

As discussed previously, GMHA did not make a determination of nonresponsibility; however, even if GMHA had determined that Appellant was nonresponsible (which GMHA did not do), the agency was not required to allow J&G to cure the omission of information after the bids had already been opened. Indeed, Section 3-401 of the GMHA Procurement Rules and Regulations provides that "[t]he unreasonable failure of a bidder ... 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...". Further, Section 3-401.02.1 states that factors which are to be considered in determining whether the standard of responsibility

has been met include whether a prospective contractor has "supplied all necessary information in connection with the inquiry concerning responsibility." Interestingly, nothing in the GMHA Regulations requires GMHA to make an inquiry into the responsibility of bidders *after* bids have been opened and it is discovered that a bidder did not submit information relating to its responsibility. Indeed, in this particular instance, 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.

Nothing in Appellant's comments establishes any due process right which would require GMHA to seek the information regarding responsibility *after* bids were opened and GMHA determined that the information was incomplete or otherwise deficient. Moreover, the clear and unequivocal language of the IFB establishes that the "inquiry concerning responsibility" was made by GMHA during the issuance of the IFB, when the agency mandated that bidders submit all such information together with its bid.

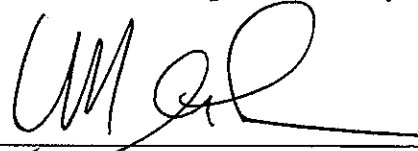
Simply stated, even if GMHA determined that Appellant was nonresponsible -- which GMHA did not -- the procedures under Section 3-401 of GMHA's Procurement Rules and Regulations does not require GMHA to allow J&G to supplement its bid *after* bids have been opened. The inquiry was made at the time the IFB was issued and J&G had the obligation to submit all required information as set forth in the specifications, instructions and other materials which comprised the IFB. The fact that all of the other bidders fully complied with the requirements of the IFB also supports a finding that Appellant's failure to provide the information relating to responsibility was unreasonable and grounds for rejection for nonresponsibility under Section 3-401.02.2 which states:

The prospective contractor shall supply information requested by the Hospital Administrator concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the Hospital Administrator shall base the determination of responsibility upon any available information or **may find the prospective contractor nonresponsible if such failure is unreasonable.**

For these reasons, J&G's protest was properly denied by GMHA. GMHA, therefore, requests that this appeal be dismissed and GMHA awarded the relief it seeks as set forth in its Agency Report.

Dated this 24th day of July, 2007.

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