



OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

1
2
3
4 IN THE APPEAL OF

5 O&M ENERGY, S.A.,

6 Appellant.

APPEAL NO: OPA-PA-08-004

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
DECISION

I. INTRODUCTION

This is a Decision of the Public Auditor Doris Flores Brooks on an appeal filed on March 7, 2008, by O&M Energy, S.A. wholly owned subsidiary of Union Fenosa Generacion (hereinafter "O&M") regarding the Guam Power Authority's (hereinafter GPA) solicitation for Performance Management Contract (PMC) for Cabras 1 and 2 Steam Power Plant. A Hearing on this procurement appeal was held on August 26, 2008. At Hearing, GPA was represented by its Counsel of Record, Graham Botha, Esq. O&M Energy was not represented by an attorney at the formal Hearing, but was represented by its local representative, Danny Leon Guerrero and O&M Business Manager, Juan Rodriguez.

II. FINDINGS OF FACT

This Decision is based on the Procurement Record, all documents submitted by the parties in the appeal, as well as all testimony and arguments presented at the August 26, 2008, Hearing in this matter. The Findings of Fact of the Hearing Officer, Robert G.P. Cruz., Esq. are also adopted, incorporated by reference, and made a part of this Decision.

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

Decision- 1

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

3
4 2. On August 7, 2007, GPA issued Multi-Step Bid GPA-013-07, the Performance
5 Management Contract (PMC) for the Cabras 1 & 2 Steam Power Plant.

6 3. There were two phases of the "multi-step" bid process: (1) submission of technical bid;
7 and (2) submission of price proposal. In phase 1, O&M submitted its 973 page technical bid. On
8 December 27, 2007, GPA informed O&M that its bid had been reviewed and deemed qualified
9 to participate in Phase 2. Letter from Joaquin C. Flores to O&M dated December 27, 2007.
10

11 4. Taiwan Electrical and Mechanical Engineering Services Inc. (hereinafter TEMES) was
12 also determined to be a qualified bidder. Note that TEMES is the current contractor, on its
13 second extension as of the formal hearing date. Thus services are ongoing despite this appeal.

14 5. On December 31, 2007, GPA conducted the bid opening of the price proposals for
15 Phase 2 of the bid process. TEMES submitted a price bid of \$26,899,305.98. O&M submitted a
16 price bid of \$20,841,155.78. O&M's bid was \$6,058,150.20 less than that submitted by TEMES.
17

18 6. On January 18, 2008, GPA's General Manager sent O&M a bid status letter rejecting
19 their price proposal as "non-responsive" based on four "exceptions." These exceptions included:
20

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

26 7. In GPA's January 18, 2008, letter the bid was recommended for award to TEMES in
27 the amount of \$26,899,305.98.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. ANALYSIS

1. O&M protested the award of GPA-013-07 to GPA as provided under 5 G.C.A. Section 5425(a). The appeal was timely and therefore OPA has jurisdiction. Generally a public entity must award the contract to the lowest responsible and responsive bidder. The purpose of statutes, charters or ordinances requiring competitive bidding is to “to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable and they are enacted for the benefit of the property holders and taxpayers, and not for the benefit of enrichment of bidders, and should be construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest.” See Domar Electric, Inc. v. City of Los Angeles, 9 Cal 4th 161, 174 (1994). In this matter, there is a vast difference between the accepted and rejected price proposals as O&M’s bid was \$6,058,150.20 less than the price proposal submitted by TEMES. The fact that TEMES’ bid was six million dollars over O&M’s bid indicates that GPA may not have done sufficient analysis as to the cost of the four items it deemed to be non-responsive in O&M’s bid. In other words, the awarded contract to TEMES rather than O&M may cost the taxpayers and customers of GPA millions of dollars unnecessarily. The Public Auditor finds that this is not acceptable as the fundamental objective of the procurement process is to provide operating departments with the goods and services they need in the right quality and quantity, on a timely basis, as efficiently as possible, and at the lowest overall cost. Watt, Patricia. *An Elected Official’s Guide to Procurement*. Pursuant to 5 G.C.A. Section 5703 appeals made to the Public Auditor are utilized “to promote the integrity of the procurement process and the purposes of 5 G.C.A. Chapter 5.”

1 2. Under the Guam Procurement law a responsive bidder means a person who has
2 submitted a bid which conforms in all material respects to the Invitation for Bids. 5 G.C.A.
3 Section 5201. The basis of GPA's rejection of the O&M bid was that O&M was non-responsive
4 to the IFB, citing four points in a January 18, 2008, recommendation for award letter to the GPA
5 General Manager made by the bid evaluation committee. These included: (a) a \$200,000 limit on
6 yearly unscheduled maintenance costs (b) a \$50,000 limit on yearly performance testing (c) the
7 cost of management staff vehicles and utilities was excluded from the proposal, and (d) a budget
8 that is subject to negotiation of the escalation rate. Our review of the Procurement Record
9 indicates that relatively little analysis was done by GPA before deciding to award the contract to
10 TEMES. The January 18 letter from the bid evaluation committee was the only document
11 presented at the formal Hearing by GPA which offered a written explanation on the rejection of
12 O&M's bid. In the procurement file, we also note that GPA submitted a Denial of Procurement
13 Protest dated February 21, 2008, to O&M, which summarized GPA's rationale for finding O&M
14 to be non-responsive; however, both the January 18 letter from the bid evaluation committee and
15 the February 21 Denial of Procurement Protest failed to demonstrate that O&M's exceptions
16 could not be waived, resulting in an award to a higher bidder, at a cost of more than six million
17 dollars. Had GPA performed a more substantial analysis that showed a savings to GPA, the
18 taxpayers, and clients, this may have been justification for the lack of responsiveness given to
19 O&M in its price bid. An agency can sometimes waive deficiencies if the omission or
20 irregularity is not significant. MCM Construction, Inc. v. City and County of San Francisco
21 (1998) 65 Cal. App. 4th 359. O& M argues that its price was fixed and that GPA's "assumptions"
22 (of the four exceptions noted) would not have a material impact on its price. Materiality can only
23 be demonstrated if GPA proves that its exceptions in any manner altered or affected the O&M
24
25
26
27
28

1 fixed price proposal. O&M's price exceptions would have to be worth more than \$6 million to
2 make its price more expensive than TEMES. GPA did not engage in the required determination
3 of materiality. 2 GAR 3109(m)(4)(B) provides that "Minor Informalities can be waived or
4 corrected by GPA without prejudice. Thus, GPA could have ignored the "exceptions" in the
5 O&M bid and found it to be the lowest responsible and responsive bidder between the two.
6 O&M was clearly a responsible bidder. It was one of four contractors who were initially in
7 competition, two of whom were pre-qualified, TEMES and O&M. It met the pre-qualification
8 screening done by GPA and posted the required bid performance bond to guarantee its
9 performance. Determining if a bidder is "responsible" involves judgments as to fitness, capacity
10 and ability to perform the work. Boydston v. Napa Sanitation District (1990) 222 Cal.App.3d
11 1362.

12
13
14 3. Thus the issue is whether O&M was non-responsive, or whether the irregularities
15 found in their bid submission might be determined to be waiverable irregularities. There is no
16 question that a public contract based on materially non-responsive bid revised after a bid opening
17 is void. Valley Crest Landscape, Inc. v. City Council (1996). 41 Cal.App 4th (1432).

18
19 4. GPA may only apply objectively measurable criteria, which are set forth in the
20 Invitation for Bids, in determining the lowest bidder. 2 GAR Section 3109(n)(4). The Invitation
21 for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid
22 evaluation that are not set forth in the Invitation for Bids. 5 G.C.A. Section 5211 (e). TEMES
23 appears to have been favored over O&M in that TEMES' own non-responsiveness was
24 overlooked. There was testimony given in the briefs and during the formal hearing that TEMES
25 also included an escalation rate. In apparent direct violation of the prohibition on an escalation
26 clause in Amendment V, TEMES' bid proposal included a 1.7% escalation rate based on its bid
27
28

1 proposal for its Fixed Management Fees. In addition, with regard to O&M's Spending Budget,
2 TEMES' priced bid contained a 3.0% Spending Budget escalation rate for each of the five years
3 of the contract. Perhaps the best approach would have been for GPA to set an acceptable
4 escalation rate, (or none at all) as well as limits on unscheduled maintenance, performance
5 testing and allowances or limits for use of vehicles and utilities.
6

7 5. The Public Auditor further finds that the proposed award of the contract was not
8 adequate under the procurement law and regulations to select the lowest responsible bidder
9 submitting a responsive monetary bid. Where, prior to actual award (implementation) of a
10 contract that is awarded in violation of law, 5 G.C.A. Section 5451(a) provides for cancellation.
11 This is probably the best avenue to take in the instant case, rather than awarding the contract to
12 the appellant. If GPA will clarify the limits of escalation rate, performance testing, unscheduled
13 maintenance, or issues regarding cost of a management vehicle and utilities expense with all
14 interested parties, the bid may result in considerable savings to the agency and the public.
15
16

17 6. GPA has had TEMES under contract extension so operations have not been
18 detrimentally affected to date, and should not be affected by a further delay to rebid the contract.
19
20

21 **IV. CONCLUSION**


22 Based upon the foregoing, the Public Auditor determines that the procurement should be
23 cancelled, and the procurement repeated by GPA in the interest of obtaining the lowest
24 responsible bidder with the lowest responsive monetary bid, and in the interest of the integrity of
25 the procurement process.
26

27 This is a Final Administrative Decision. The Parties are hereby informed of their right to
28

1 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
2 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
3 Decision. 5 G.C.A. Section 5481(a).

4 A copy of this Decision shall be provided to the parties and their respective attorneys, in
5 accordance with 5 G.C.A. Section 5702, and shall be made available for review on the OPA
6 Website www.guamopa.org.

7
8 Dated this 30th day of September, 2008

9
10 

11 DORIS FLORES BROOKS, CPA, CGFM
12 PUBLIC AUDITOR