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OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

IN THE APPEAL OF	)	DOCKET NO. OPA-PA-09-008
	)	
O&M ENERGY, S.A.	)	**AGENCY REPORT**
	)	
Appellant.	)	
	)	

Appellee GUAM POWER AUTHORITY (GPA), by and through its attorney, D. GRAHAM BOTHA, ESQ., hereby submits its Agency Report in the form required under 2 G.A.R. §12105:

(a) A copy of the protest: ***Previously submitted to the Office of the Public Auditor ("OPA") on November 5, 2009, by GPA.***

(b) A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer that is being considered for award or whose bid or offer is being protested, if any had been submitted prior to the protest: ***Previously submitted to the Office of the Public Auditor ("OPA") on November 5, 2009, by GPA.***

(c) A copy of the solicitation, including the specification or portions thereof relevant to the protest: ***Previously submitted to the Office of the Public Auditor ("OPA") on November 5, 2009, by GPA.***

(d) A copy of the abstract of bids or offers or relevant or portions thereof relevant to the protest: ***Previously submitted to the Office of the Public Auditor ("OPA") on November 5, 2009, by GPA.***

(e) Any other documents which are relevant to the protest, including the contract, if one has been awarded, pertinent amendments, and plans and drawings: ***Previously submitted to the Office of the Public Auditor ("OPA") on November 5, 2009, by GPA.***

(f) The decision from which the Appeal is taken, if different than the decision submitted by Appellant: ***Previously submitted to the Office of the Public Auditor ("OPA") on November 5, 2009, by GPA.***

(g) A statement answering the allegation of the Appeal and setting forth findings, actions, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the Appeal. The statement shall be fully responsive to the allegations of the Appeal: ***Please see attached.***

(h) If the award was made after receipt of the protest, the report will include the determination required under 2 G.A.R. §9101(e): ***Not applicable. The bid award is stayed pending a decision on the protest.***

(i) A statement in substantially the same format as Appendix B to this Chapter, indicating whether the matter is the subject of a court proceeding: ***Please see attached.***

RESPECTFULLY SUBMITTED this 11th day of November, 2009, by:

D. GRAHAM BOTHA, ESQ.
Legal Counsel for the Guam Power Authority

EXHIBIT “1”

STATEMENT ANSWERING ALLEGATIONS OF APPEAL

(As required by 2 G.A.R. §12105(g))

I. RELEVANT BACKGROUND

A. GPA SOLICITS BIDS FOR MULTI-STEP BID GPA-013-07, PERFORMANCE MANAGEMENT CONTRACT (PMC) FOR CABRAS 1 & 2 STEAM POWER PLANT

On April 21, 2009, Guam Power Authority ("GPA") issued Invitation for Multi-Step Bid, GPA-013-07, Re-Bid Performance Management Contract (PMC) for Cabras I and II Steam Power Plant. Procurement Record, Tab"B". The IFB was a two step bid process consisting of the technical bid and submission of a sealed price proposal. Three companies submitted bids in response to the IFB, and all three companies were qualified in the phase I technical bid review process. Prior to submission of technical bids and sealed price proposals, the three bidders had an opportunity to submit questions regarding the IFB. GPA issued amendments I to VII in response to these questions, and other amendments to clarify the IFB. Procurement Record, Tab "C".

Amendment V, dated June 5, 2009, clarified certain questions raised by prospective bidders, and included additional CIPs and PIPs for FY2014. Amendment VI and Amendment VII, dated July 31, 2009 and August 25, 2009 respectively, notified prospective bidders of the changes to Bid Milestone dates.

The technical review committee qualified all three bidders, TEMES, Korea East West Power, and O&M Energy as technically qualified under the multi-step process. On July 22, 2009, at 2:00 p.m., the sealed bid proposals of the three qualified bidders were opened in the presence of company representatives. The representatives were provided a copy of the Abstract of Bids which lists the Net Present Value (NPV) of the three bidders. TEMES had the highest 5 year

NPV ($9,394,142.33) followed by O&M ($5,353,457.28), and then Korea East ($4,939,222.46). The bid abstract, O&M, TEMES, and Korea East West Power Price Proposals, are contained in the procurement record at Tab "I." Each of the three bidders submitted detailed price proposals in accordance with the bid documents.

On September 9, 2009, GPA provided the bidders with a Notice of Intent of Possible Award to TEMES, and advised O&M and Korea East that their bids were rejected due to Low Positive Net Present Value (NPV). Procurement Record, Tab "J". On September 18, 2009, O&M sent a letter of protest to GPA. GPA issued a stay of procurement which was sent to all bidders on September 22, 2009. Procurement Record, Tab "G". GPA advised O&M by letter dated October 7, 2009, that its procurement protest was denied, and on October 12, 2009, advised all bidders that the Stay of Procurement had been lifted. Procurement Record, Tab "F". O&M filed a protest with the Office of Public Auditor on October 23, 2009. In response to the O&M protest with the OPA, GPA issued a Stay of Procurement dated October 26, 2009. Procurement Record, Tab "E".

II. DISCUSSION

A. THE TEMES BID WAS RESPONSIVE, AND THE AWARD FOR THE PMC WAS PROPERLY AWARDED TO TEMES

Procurement law requires that GPA award to the lowest responsible and **responsive** bidders. A responsive bidder is a person who has submitted a bid which conforms in all material respects to the Invitation for Bid. 5 GCA §5201(g) and 2 GAR, Div. 4, Chap. 3, §3109(n)(2). Further, any bidder's offering which does not meet the acceptability requirements shall be rejected as non-responsive. 2 GAR, Div. 4, Chap. 3, §3109(n)(3)(c).

O&M contends that GPA should dismiss the TEMES bid as "irresponsible and non

responsive" based on O&M's perception that TEMES was not acting in good faith. Rejecting the TEMES bid, which has the lowest Net Present Value (NPV), would result in an award to the next lowest bidder, O&M. The O&M protest questions whether TEMES would be able to run the plant for the next five years with a proposed efficiency rate of 90%. O&M is asking GPA to speculate as to whether TEMES can comply with the specifications of the PMC contract. TEMES has had the PMC contract with GPA for the last 8 years and has knowledge of the costs to run the plant for GPA. If GPA engaged in speculation as to the costs proposed by TEMES, and did not take the bid as a legitimate bid on its face, this would be contrary to Guam procurement law which provides for the "fair and equitable treatment of all persons who deal with the procurement system" and provides "safeguards for the maintenance of a procurement system of quality and integrity." 2 G.A.R. §1102.

The Abstract of Bids lists the Net Present Value (NPV) of the three bidders, TEMES, O&M, and Korea East. TEMES had the highest 5 year NPV ($9,394,142.33) followed by O&M ($5,353,457.28), and then Korea East ($4,939,222.46). The intent to award was made to TEMES, as it was deemed to be the lowest, responsive and responsible bidder under the Multi-Step bid for the Performance Management Contract (PMC) for Cabras 1 & 2 Steam Power plants. The TEMES bid was responsive to the multi-step bid in GPA-13-07, and complied with the specifications set forth in the multi-step bid. TEMES provided a responsive bid as required by GPA in its multi-step bid, and had the lowest price for the five year contract, as reflected in the highest net present value. The five year net present value for TEMES was calculated at $9,394,142.33 and the net present value for the next highest bidder, O&M, was calculated at $5,393,497.28, which represents a savings to GPA of approximately $4 million dollars over five years. GPA can not speculate as to the differences in the bids submitted by the different bidders,

as those bids are prepared by the individual bidders and represent their estimate of the costs to manage the Cabras 1 & 2 power plants, and to meet the specification contained within the PMC bid specifications. GPA has determined that there is no merit to O&M's claim that the TEMES bid is irresponsible and non-responsive.

GPA had the duty and responsibility to make an award to TEMES, as it was deemed to be the lowest, **responsive** and responsible bidder for the PMC. Their bid was responsive to the multi-step bid and complied with the specifications set forth in the multi-step bid. TEMES provided a responsive bid as required by GPA in its multi-step bid, and the TEMES bid had the highest Net Present Value (NPV), which represents a savings to GPA of approximately $4 million dollars over a five year period.

CONCLUSION

GPA requests that the appeal of O&M be dismissed, and that the Public Auditor award all legal and equitable remedies that GPA may be entitled to as a result.

RESPECTFULLY SUBMITTED this 11th day of November, 2009, by:

D. GRAHAM BOTHA, ESQ.
Legal Counsel for the Guam Power Authority

EXHIBIT "2"

D. GRAHAM BOTHA, ESQ.
LEGAL COUNSEL FOR GPA
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OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

IN THE APPEAL OF	)	DOCKET NO. OPA-PA-09-008
	)	
O&M ENERGY, S.A.	)	**DECLARATION REGARDING COURT ACTION**
	)	
Appellant.	)	
	)	

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 11th day of November, 2009.

GUAM POWER AUTHORITY (GPA)

By: _____
JOAQUIN C. FLORES, P.E.
General Manger