

D. GRAHAM BOTHA, Esq.
GUAM POWER AUTHORITY
1911 Route 16, Ste 227
Harmon, Guam 96913
Tel: (671) 648-3203/3002
Fax: (671) 648-3290

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IN THE SUPERIOR COURT OF GUAM

GUAM POWER AUTHORITY,)
)
Petitioner,)
)
vs.)
)
O&M ENERGY, S.A.,)
)
Respondent.)
_____)

CIVIL CASE NO. **CV** 1896-09

SUMMONS

TO RESPONDENT: O&M ENERGY, S.A.

YOU ARE HEREBY summoned and required to serve upon Petitioner's Attorney, D. GRAHAM BOTHA, Esq., whose address is Guam Power Authority, 1911 Route 16, Ste 227, Harmon, Guam 96913, and answer the Verified Complaint which is herewith served upon you within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Verified Complaint.

RICHARD B. MARTINEZ
CLERK OF COURT
SUPERIOR COURT OF GUAM

31 DEC 2009

By Linda M. Perez
DEPUTY CLERK

D. GRAHAM BOTHA, Esq.
GUAM POWER AUTHORITY
1911 Route 16, Ste 227
Harmon, Guam 96913
Tel: (671) 648-3203/3002
Fax: (671) 648-3290

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EX...

Attorney for Petitioner

IN THE SUPERIOR COURT OF GUAM

GUAM POWER AUTHORITY,) CIVIL CASE NO. CV 1896-09
)
Petitioner,)
)
vs.) **VERIFIED COMPLAINT**
)
O&M ENERGY, S.A.,)
)
Respondent.)
_____)

COMES NOW the Petitioner, GUAM POWER AUTHORITY,
(hereinafter referred to as "GPA"), by and through its counsel, D. Graham
Botha, Esq., to file this Complaint and allege as follows that:

I. JURISDICTION

1. The Court has jurisdiction over this matter pursuant to 7 GCA
§3105 and 5 GCA § 5480 which provides, in relevant part:

(a) **Solicitation and Award of Contracts.** The Superior
Court of Guam shall have jurisdiction over an action between
the Territory and a bidder, offeror, or contractor, either actual or
prospective, to determine whether a solicitation or award of a
contract is in accordance with the statutes, regulation, and the
terms and conditions of the solicitation. The Superior Court
shall have jurisdiction in actions at law or in equity, and

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whether the actions are for monetary damages or for declaratory, or other equitable relief.

II.FACTS

2. Petitioner, Guam Power Authority (hereinafter "GPA"), is subject to the Procurement Law pursuant to 5 GCA § 5480.

3. Respondent O&M Energy, S.A. (hereinafter "O&M") submitted a bid on Guam Power Authority's Re-Bid Multi-Step Bid # GPA-013-07 for Performance Management Contract Re. Cabras # 1 and #2 Steam Power Plants and protested GPA's award of Bid #GPA-013-07 to a third party, Taiwan Electrical and Mechanical Engineering Services, Inc. (hereinafter "TEMES").

4. On April 21, 2009, GPA issued Invitation for Multi-Step Bid, GPA-013-07, which was a two step bid process consisting of the technical bid and submissions 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 review process. Prior to submission of technical bids and sealed price proposals, the three bidders had an opportunity to submit questions regarding the IFB.

5. GPA issued amendments I through VII in response to these questions, and other amendments to clarify the IFB.

6. Amendment V, dated June 5, 2009, clarified certain questions raised by prospective bidders and included additional CIPs and PIPs for FY2014.

7. Amendments VI and VII, dated July 31, 2009 and August 25, 2009, respectively, notified prospective bidders of the changes to Bid Milestone dates.

8. GPA's technical review committee qualified all three bidders, TEMES, Korea East West Power and O&M as technically qualified under the multi-step process.

9. 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 copies 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). Each of the three bidders submitted detailed price proposals in accordance with the bid documents.

10. 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 NPV.

11. On September 18, 2009, O&M sent a letter of protest to GPA. In the its Protest Letter, O&M simply alleges that "TEMES, Inc. proposal should be considered irresponsible and non-responsive under the General Terms and Conditions, section 1, which requires all parties involved to act in good faith" and that "a number of facts supporting this petition are clearly stated in these communications." *See* True and Correct Copy of Protest Letter dated September 18, 2009 attached hereto as Exhibit 1. Without citing specific reasons for its protest, in its Protest Letter O&M makes reference to two prior communications with GPA and alleges that TEMES' proposal should be considered irresponsible. *Id.*

12. As required by the Procurement Law, GPA issued a stay of procurement which was sent to all bidders on September 22, 2009.

13. By letter dated October 7, 2009, GPA informed O&M that GPA denied its procurement protest and on October 12, 2009, GPA advised all bidders that the stay of procurement had been lifted. In its October 7, 2009 letter GPA denies O&M's protest for the following reasons:

a. There is no merit to O&M's claim that TEMES' proposal was "irresponsible and non responsive" based on O&M's perception that TEMES was not acting in bad faith as TEMES' proposal was responsive and complied with all the requirements requested by GPA in the bid package.

b. The bid request was a multi-step process and the technical review committee, which was comprised of engineers, qualified all three bidders.

c. The intent to award was made to TEMES as it was deemed to be the lowest, responsive and responsible bidder as it had the lowest price for the five year contract and because it complied with the specifications set forth in the multi-step bid.

14. O&M filed a protest with the Office of Public Accountability on October 23, 2009.

15. In response to O&M's filing of a protest, GPA issued a stay of procurement dated October 26, 2009.

III.CAUSE OF ACTION—FAILURE TO STATE A CLAIM

16. Petitioner hereby adopts and incorporates paragraphs 1 through 15 as paragraphs 1 through 16 of this Section III.

17. Procurement Law requires that GPA award bids to the lowest responsive and responsible bidder.

18. "Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids." 5 GCA § 5201(g). *See also* 2 GAR § 3109(n)(2).

19. "Responsible Bidder or Officer [sic] means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." 5 GCA § 5201(f).

20. Any offer which does not meet the acceptability requirements shall be rejected as non-responsive. 2 GAR § 3109(n)(3)©.

21. In its Protest Letter of September 18, 2009, O&M simply alleges that "TEMES, Inc. proposal should be considered irresponsible and non-responsive under the General Terms and Conditions, section 1, which requires all parties involved to act in good faith" and that "a number of facts supporting this petition are clearly stated in these communications." *See* True and Correct Copy of Protest Letter dated September 18, 2009 attached hereto as Exhibit 1. In addition, without citing specific reasons for its protest, in its Protest Letter O&M makes reference to two prior

communications with GPA and alleges that TEMES' proposal should be considered irresponsible. Id.

22. 2 GAR § 12104(b) and Appendix A, Part IV gives instruction on what needs to be filed for appeals. These are, *inter alia*:

1. A concise, logically arranged, and direct statement of the grounds for appeal;
2. A statement specifying the ruling requested;
3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

23. O&M's September 18, 2009 Protest Letter fails to comply with §12104(b) as it failed to provide a direct statement of the grounds for appeal and it failed to submit with its Protest Letter supporting exhibits, evidence or documents and instead merely makes reference to two prior communications with GPA. On its face, O&M's protest should be dismissed for failure to state a cause of action.

24. In O&M's September 18, 2009, O&M argues, without any supporting evidence or data, that GPA should dismiss the TEMES bid as "irresponsible and non-responsive" based on O&M's mere perception and opinion that TEMES was not acting in good faith and instead award O&M the contract in issue.

25. More specifically, O&M questions whether TEMES would be able to run the plant for the next five (5) years with a proposed efficiency of 90%.

26. By questioning TEMES's ability to run the plant with a proposed efficiency of 90%, but without providing any supporting evidence of its position, O&M asks GPA to speculate as to whether TEMES can comply with the specifications of the Performance Management Contract (hereinafter "PMC").

27. If GPA were to engage in speculation as urged by O&M and did not take TEMES' bid on its face, GPA would be acting contrary to the Procurement Law which requires "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 GAR § 1102.

28. The Abstract of Bids lists the Net Present Value (NPV) of the three bidders and 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). Procurement Record Tab "I". Each of the three bidders submitted detailed price proposals in accordance with the bid documents.

29. The Intent to Award was made to TEMES, as it was deemed by GPA to be the lowest, responsive and responsible bidder and because it complied with the specifications set forth in the multi-step bid.

30. TEMES' five year NPV would render GPA a savings of approximately \$4,000,000.00 as opposed to O&M's NPV.

31. Even O&M's Protest Letter filed with the OPA on October 23, 2009 fails to comply with 2 GAR § 12104(b) wherein O&M states the following:

In summary during the performance of TEMES as PMC contractor during the last 8 years, the O&M expenditures reflected in the Annual Budgets have averaged 3 million USD, and has obtained plant sub-par performances of 84-86% availability. In the new proposal TEMES commits to achieve 90% availability with a diminished Annual Budget of only 1 million USD.

If this is the only ground for appeal then O&M Energy has not proven but merely asserted it as a ground. It has not developed the argument nor has it offered evidence to show why it is not in the realm of probability. If their argument is that the historical data does not support the availability, then they must say so. But even the historical data leaves them at the year 2008 and certain improvements may be brought on-line during 2009. The historical data is also faulty because it is static. The historical data does not take into account that there are improvements to the plant that are on-going and whose impact on the O&M budget is either just now being realized or whose impact is to be realized in the future.

O&M Energy goes on, in the same letter, to state:

We assert the plausible claim that TEMES is not the lowest possible and responsive bidder and did not submit a bid which conforms in all material aspects to this Multi-Step Bid as defined by the General Terms and Conditions found under Section #17 pertaining to Sections (D) and (G) as well as other material deviations which we will further reserve the right to present forthwith after we are afforded a fair opportunity to review the complete Procurement Files of TEMES as well as the GPA Bid review committee findings and analysis.

...

We therefore respectfully request your Good Office to hear our claims and permit us to the opportunity to present our substantive issues of Laws and Facts as we will prepare a full and comprehensive protest after receipt of pertinent procurement records from GPA.

Here, O&M Energy, is using the "Standards for Determination of Lowest Bidder" and trying to turn it into the grounds of this protest. Section D states that it is the "quality of performance of the bidder with regards to awards previously made to him" and Section G states that the "ability of the bidder to provide future maintenance services for the subject of the award." Again, ferreting out what the grounds of appeal for O&M Energy, if Sections D and G are to be taken as grounds for appeal, they are only assertions that TEMES will not be able to meet them and nothing more.

This is not a concise, logically arranged and direct statement of the grounds for appeal.

32. GPA cannot and should not speculate as to reasons for the differences in the bid amounts submitted by the three bidders as said bids are prepared by the bidders and represent the bidders estimate of the costs to manage Cabras #1 and 2 power plants, and to meet the specification contained within the PMC bid specifications.

33. In response to O&M's protests filed with GPA, GPA has determined that O&M's claim that TEMES' bid is irresponsible and non-responsive lacks merit and should be dismissed for failure to state a claim.

34. Most importantly, GPA as the deciding agency, should be given deference as to its determination that TEMES' bid was responsive and responsible as GPA has the expertise and personnel to review the bids and make said determination. *See San Miguel v. Department of Public Works*, 2008 WL 541150, *6, 2008 Guam 3, at ¶ 3 quoting *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 213 (9th Cir.1989). (“Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving engineering and scientific matters.” *See also Carlson v. Guam Telephone Authority*, 2002 WL 2029460, *5, 2002 Guam

15, at ¶ 18 ("Deference is generally given to an agency interpretation when the agency has specialized knowledge in the area.").

35. O&M must allege more than mere allegations and unfounded opinions in order to dispute GPA's decision that TEMES is the lowest and responsive bidder considering GPA's technical expertise and experience in the power generation business and the fact that the reviewing committee was made of two licensed professional engineers.

36. The Court should find that O&M's claim lacks merit and dismiss its protest of GPA's decision to award the Performance Management Contract (PMC) to TEMES.

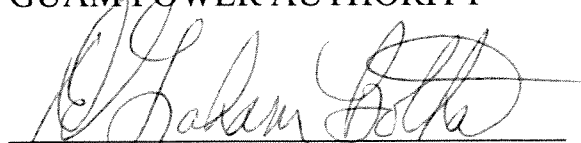
WHEREFORE, Petitioner prays for judgment against the Respondent as follows:

1. Dismissal of O&M's protest with the Office of Public Auditor, and award of Performance Management Contract (PMC) to TEMES.
2. Reasonable attorney fees, costs; and
3. All other such relief available at law and in equity.

Respectfully submitted this 31st day of December, 2009.

GUAM POWER AUTHORITY

By:



D. GRAHAM BOTHA, ESQ.
Legal Counsel

VERIFICATION

GUAM, USA)
(ss:
VILLAGE OF TAMUNING)

ANDRIANO BALAJADIA, being first duly sworn, deposes and states that he is the Assistant General Manager for Operations of GUAM POWER AUTHORITY, Plaintiff in the foregoing Verified Complaint, that he has read said Verified Complaint and knows the contents thereof to be true and correct, except as to those matters which are therein stated upon his information and belief, and as to those matters he believes them to be true and correct.

Dated: December 31, 2009.

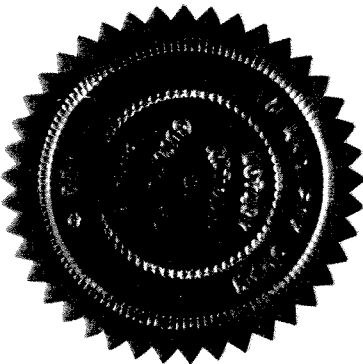


ANDRIANO BALAJADIA

SUBSCRIBED AND SWORN To before me, a Notary Public in and for Guam, USA upon the day and date first above written.



NOTARY PUBLIC



ANTONIO S. GUMATAOTAO
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: Dec. 20, 2010
P.O. Box 2977 Hagatna, Guam 96932