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THE OFFICE OF PUBLIC ACCOUNTABILITY – GUAM
HAGATNA, GUAM

In the Appeal of) DOCKET NUMBER OPA-PA-11-003
)
)
) **MOTION and COMMENTS IN SUPPORT**
DATA MANAGEMENT RESOURCES,) **OF MOTION FOR AN ORDER ON THE**
13 LLC, Appellant.) **PLEADINGS**
)
)

COMES NOW the Appellant Data Management Resources, LLC (hereinafter “Appellant”) through undersigned counsel and moves the Public Auditor to issue an order on the pleadings in the above-captioned appeal based on Guam Rule Civ. Pro. Rule 12 (c) and the admissions of Department of Education (“GDOE”) to allegations in the petition filed herein.

MEMORANDUM

This Appeal arises out of the decision on Protest of the Method, Solicitation and Award of IFB023-2010 to Micros-Fidelio for Item No.1 of IFB023-2010 related to the specification requiring ‘Internal English Keyboard with Anti-Microbial Protection’ (hereinafter “Anti-

COPY

1 Microbial Specification”) by GDOE. Specifically, GDOE failed to ensure that bidder Micros-
2 Fidelio complied with this Anti-Microbial Specification.

3 On October 4, 2010, Appellant lodged its protest which was subsequently denied by
4 GDOE as to the Anti-Microbial Specification portion on February 10, 2011 (hereinafter
5 “Determination”). On February 25, 2011, Appellant filed its appeal to the GDOE award of
6 GDOE IFB023-2010, Item #1 to Micros-Fidelio. On March 14, 2011, GDOE filed its Agency
7 Report admitting to the allegations in the petition.
8

9 The Public Auditor has the authority to issue a determination on the pleadings as to
10 GDOE’s response in its entirety and to each response to the allegations contained in the
11 petition. Guam Rules Civ. Pro. Rule 12 (c) allows for a determination on the pleadings in
12 instances in which allegations have been admitted to by a responding party. *See* G.R.C.P. 12
13 (c). Prior to granting a Rule 12(c) motion, a movant must clearly establish that no material
14 issue of fact exists and that he is entitled to judgment as a matter of law. McGlinch v. Shell
15 Chem. Co., 845 F.2d 802,810 (9th Cir. 1988). When deciding if judgment on the pleadings is
16 proper, the facts asserted in the pleadings, including all its inferences, must be viewed in the
17 light most favorable to the non-moving part. Madonna v. U.S., 878, F .2d 631 (2nd Cir. 1989).
18

19 Here, Appellant alleges that GDOE procurement regulations were not complied with, in
20 that the awarded bidder, Micros-Fidelio, did not meet the Anti-Microbial Specification.
21 Petition, p. 3. Accordingly, GDOE failed to provide explanation as to how it determined that
22 the Anti-Microbial Specification was an informality pursuant to DOEPR 3.9.13.4 and how such
23 informality, if determined, did not affect the price of the items requested in IFB023-2010.
24 Petition, p. 3. Also, DMR alleges that DOEPR 3.9.13.4 requires that the GDOE Superintendent
25

1 waive any informality. Aside from failing to provide explanation that the Anti-Microbial
2 Specification was informality, GDOE admitted that the Superintendent did not make a waiver
3 to the Anti-Microbial Specification of IFB023-2010.

4 Having reviewed the petition and the responses to allegations contained therein in the
5 GDOE agency report, there is no genuine issue of material fact for the Auditor's determination.
6 Therefore, the appeal may be properly decided based on the record and a hearing on the
7 petition is unnecessary.
8

9 **CONCLUSION**

10 Based on the above, Appellant requests that the Public Auditor grants the motion and
11 issues the proposed order attached herewith granting the prayer of relief requested in the
12 petition. Specifically, that the Public Auditor ratifies and affirms the Appeal of its Protest to
13 IFB023-2010, and that IFB023-2010 be allowed to proceed with the determination that Micros-
14 Fidelio has failed to meet the specifications of IFB023-2010.
15

16
17 Submitted the 1st day of April 2011.

18
19 **LAW OFFICE OF
JACQUELINE TAITANO TERLAJE, P.C.**

20
21
22 By: 

23 **JACQUELINE TAITANO TERLAJE**
24 Attorneys for Appellant
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26

27 **In the Appeal of Data Management Resources, LLC**

OPA-PA-11-003

Page 3
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11 **HAGATNA, GUAM**

12 In the Appeal of) DOCKET NUMBER OPA-PA-11-003
13 DATA MANAGEMENT RESOURCES, LLC)
14 Appellant) **PROPOSED ORDER AND FINDINGS**
15)

16 **I. INTRODUCTION**

17 THIS MATTER came before the Public Auditor pursuant to an appeal filed on February 25,
18 2011 by Appellant DATA MANAGEMENT RESOURCES, LLC (hereinafter "DMR") regarding
19 Government of Guam, Department of Education's (hereinafter "GDOE") award of GDOE IFB023-
20 2010 to Micros-Fidelio Micronesia, Inc. (hereinafter "Micros-Fidelio"). Specifically, DMR protested
21 GDOE's award and waiver of the specification "Internal English Keyboard with Anti-Microbial
22 Protection" (hereinafter "Anti-Microbial Specification"), as required by GDOE IFB023-2010.

23 On March 14, 2011, Respondent GDOE filed its Agency Report admitting to the allegations
24 of Petitioner's Appeal. See Agency Report, Exhibit G. On April 1, 2011, DMR filed its Comments
25 and Motion to the GDOE Agency Report. The Public Auditor holds that GDOE erroneously deemed
26 Interested Party Micros-Fidelio's bid responsive to IFB023-2010, after it had failed to meet the Anti-
27 Microbial Specification. Accordingly, DMR's appeal is GRANTED.

1 The Public Auditor in reaching this Decision has considered and incorporates herein the
2 procurement record and all documents submitted by the parties. Specifically, DMR's Notice of
3 Appeal, Respondent GDOE's Agency Report and admissions, and DMR's Comments and Motion to
4 the GDOE Agency Report, the Public Auditor hereby FINDS and ORDERS the following:

5 **II. FINDINGS OF FACT**

6 (1) On August 16, 2010 GDOE issued IFB 023-2010 Outright Purchase of Computer
7 Systems and Multimedia Equipment Items # 1 - #11, and 16 prospective bidders picked up bid
8 packages.
9

10 (2) On September 14, 2010 the bid closed and 5 bid submittals were received from Micros-
11 Fidelio Micronesia, Inc., ME International Inc., ComPacific, and DMR. GDOE Bid Abstract of the
12 Bids indicate that the lowest responsive responsible bidders for the Items #1 thru # 11 are as follows:

13 Items # 1, # 2, # 6, #8, #9, # 11	Micros-Fidelio Micronesia, Inc.
14 Items # 5, #7	ME International Inc.
15 Items # 4, #10	ComPacific
16 Item # 3	Data Management Resources, LLC.

17 (3) On September 23, 2010 GDOE completed its Bid Analysis & Recommendation.

18 (4) On September 24, 2010 GDOE sent notice to the Bidders of its Intent to Issue Awards
19 as listed in No. 2 above.
20

21 (5) On October 4, 2010 DMR filed a protest to GDOE's intent to award Item # 1 to
22 Micros-Fidelio Micronesia, Inc. (hereinafter "Micros-Fidelio") which required (a) Genuine Windows
23 Professional 32 bit, (b) Internal English Keyboard with Anti-Microbial Protection, and (c)
24 Integrated 10/100/100 Ethernet.
25

26 (6) On February 25, 2011, Petitioner DMR filed its timely appeal to the GDOE award of
27 GDOE IFB023-2010, Item #1 to Micros-Fidelio.
28

1 (6) On March 14, 2011 GDOE admitted in its Agency Report that the Anti-Microbial
2 Specification in GDOE IFB023-2010, Item #1 was material to the bid and not a minor informality
3 that can be waived.

4 (7) The bid proposal of Micros-Fidelio to IFB023-2010, Item # 1 does not meet the Anti-
5 Microbial Specification.

6 (8) The bid proposal of ComPacific to IFB023-2010, Item # 1 does not meet the Anti-
7 Microbial Specification.

8 (9) DMR is the lowest bidder to IFB023-2010, Item # 1 because DMR is the only
9 qualified bidder who submitted a bid responsive to the Anti-Microbial Specification.
10

11 (7) On March 14, 2011, Respondent GDOE filed its Agency Report admitting to the
12 allegations of Petitioner's Appeal. *See* Agency Report, Exhibit G.

13 (8) On April 1, 2011, DMR filed its Comments and Motion to the GDOE Agency Report.

14 **III. ANALYSIS**

15 **A. MICRO FIDELIO MICRONESIA, INC. WAS NON-RESPONSIVE.**

16 As a preliminary matter, the Public Auditor must determine whether Micros-Fidelio met the
17 Anti-Microbial Specification, as required by GDOE IFB023-2010, Item #1. In review of the bid
18 submitted by Micros-Fidelio is it clear that it did not contain the internal keyboard with anti-microbial
19 protection as requested by GDOE IFB023-2010. Thus, the Public Auditor finds that Micros-Fidelio
20 was non-responsive to IFB023-2010, Item #1.
21

22 **B. THE MINIMUM SPECIFICATION REQUIRING ANTI-MICROBIAL**
23 **PROTECTION IS NOT A MINIMUM SPECIFICATION THAT MAY BE**
24 **WAIVED.**

25 On March 14, 2011, GDOE admitted in its Agency Report that the bid specification required
26 an internal keyboard with anti-microbial protection is material to the bid and not a minor informality.
27 *See* Agency Report, Exhibit G. Despite Micros-Fidelio's submission of a bid not conforming to the
28

1 specification, GDOE awarded GDOE IFB023-2010 to Micros-Fidelio. GDOE later advised that it
2 had waived the Minimum Specification of "Internal Keyboard Anti-Microbial Protection" pursuant to
3 Department of Education Procurement Regulations (DOEPR) 3.9.13.4, which provides:

4 Minor informalities are matters of form, rather than substance evident from the bid
5 document, or insignificant mistakes that can be waived or corrected without prejudice
6 to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual
conditions is negligible. The Director of Education shall waive such informalities . . .

7 The waiver of this specification by GDOE was not a minor informality. Clearly, the specification to
8 include or exclude particular characteristics for hardware will affect price, and as such, will be
9 prejudicial to other bidders who have complied with the specifications. Therefore, the Public Auditor
10 finds that the waiver of the Anti-Microbial Protection keyboard is not an informality that may be
11 waived.

12
13 The Public Auditor finds that the next lowest bidder for Item #1 is ComPacific. However,
14 upon a review of the procurement record, it is evident that GDOE further erroneously qualified the bid
15 of ComPacific despite the fact that it was non-responsive for failure to include a keyboard with anti-
16 microbial protection. Therefore, the Public Auditor finds that the next lowest qualified bidder
17 submitting a responsive bid to IFB023-2010, Item #1 is DMR. Furthermore, DMR being the lowest
18 qualified bidder in response to IFB023-2010 Item #1, GDOE shall proceed with the award of IFB023-
19 2010 to DMR in accordance with Guam Procurement Law and Regulations.

21 **C. GDOE ERRONEOUSLY FAILED TO OBTAIN A WRITTEN DETERMINATION**
22 **OF THE WAIVER OF INFORMALITY FROM THE SUPERINTENDENT.**

23 Notwithstanding the finding that the minimum specification for the anti-microbial protection
24 keyboard cannot be waived by DOEPR 3.9.14.4, GDOE failed to obtain a proper waiver, and thus,
25 DMR's appeal is further sustained on this basis. DOEPR 3.9.14.6 provides:

26 When a bid is corrected or withdrawn, or correction or withdrawal is denied, under
27 Subsections 3.9.13.4 (Mistakes Discovered After Opening but Before Award) and
28 3.9.14.5 (Mistakes Discovered After Award) of this Section, the Director of Education

1 shall prepare a written determination showing that the relief was granted or denied in
2 accordance with these Regulations.

3 The Director of Education is the GDOE Superintendent, as provided by DOEPR 1.9, ¶17. No written
4 determination by the Superintendent under of DOEPR 3.9.13.6 was produced with the procurement
5 record, and thus, it is assumed that no written determination was made pursuant to procurement
6 regulations. Therefore, DMR's protest is further sustained and granted in that GDOE erroneously
7 waived the minimum specifications without a proper waiver and written determination by the
8 Superintendent.

9 **IV. CONCLUSION**

10 BASED ON THE FOREGOING, the Public Auditor hereby determines the following:

11 1. GDOE erroneously awarded GDOE IFB023-2010, Item #1 to Micros-Fidelio
12 Micronesia, Inc. because its bid was non-responsive for failing to meet the Anti-Microbial
13 Specification.

14 2. GDOE's award of the contract to Micros-Fidelio Micronesia, Inc. is void, and Micros-
15 Fidelio Micronesia, Inc. should have been disqualified and rejected at the time of bid opening.

16 3. DMR's Appeal is GRANTED.

17 4. The award of IFB023-2010 Item #1 to Micros-Fidelio is hereby declared void.

18 5. DMR being the lowest qualified bidder in response to IFB023-2010 Item #1, GDOE
19 shall proceed with the award of IFB023-2010 to DMR in accordance with Guam Procurement Law
20 and Regulations.

21 6. DMR is hereby awarded, pursuant to 5 G.C.A. §5425(h)(2), its reasonable costs and
22 attorney's fees. GDOE may object to DMR's costs and fees demanded by filing the appropriate
23 motion with the Public Auditor no later than fifteen (15) days after DMR submits such cost demand to
24 GDOE.
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