OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

BEFORE THE PUBLIC AUDITOR

PROCUREMENT APPEAL

In the Appeal of K Cleaning Services, Appellant	Docket No. OPA-PA-13-004 DECISION

INTRODUCTION

A hearing on this appeal was held on September 26, 2013 before Public Auditor Doris Flores Brooks, CPA, CGFM, and Hearing Officer Peter C. Perez, Esq. Jeffrey A. Cook, Esq. appeared on behalf of and with appellant K Cleaning Services ("K Cleaning") and K Cleaning representative, Dubidato S.M. Conlu, Jr. ("Conlu"). Thomas J. Fisher, Esq., Legal Counsel for the Guam International Airport Authority ("GIAA") appeared on behalf of GIAA with GIAA Supply Management Administrator Frank P. Taitano ("Taitano"). This appeal arises from GIAA's rejection of K Cleaning's Protest. The Protest asserted that GIAA's IFB No. GIAA-001-FY13 ("IFB") statements as to the proper place for bid submissions, was ambiguous, and its bid should be opened, reviewed, and considered. The Protest Decision rejected the Protest and determined that the IFB instructions regarding bid submissions were unambiguous.

FINDINGS OF FACT

The Public Auditor issues this Decision based upon the procurement record, the documents and exhibits submitted by the parties, the oral arguments presented by the parties, and the stipulations of fact made in the record, and makes the following Findings of Fact:

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1. K Cleaning is an offeror which submitted a bid pursuant to the IFB. Mr. Conlu and his wife drafted the K Cleaning bid documents.

2. The IFB pertained to IFB No. GIAA-001-FY13 which sought proposals from interested and qualified individuals/firms to furnish labor, materials, supplies and equipment for custodial services at the A.B. Won Pat International Airport facilities.

3. The IFB stated that the "**Deadline for bid submissions is 2:00 p.m.**, Friday, February 15, 2013 at which time and place all bids will be publicly opened and read aloud at the GIAA Conference Room.[1] All bids received after the deadline of submission specified above, will not be considered." [Agency Procurement Record ("APR"), Tab F, cover letter]. This section of the IFB was ambiguous because it suggested that bids be submitted to the GIAA Conference Room.

4. This ambiguity was reinforced where the IFB stated further, "As described in the bid documents until 2:00 p.m., Friday, February 15, 2013, at GIAA, at which time and place, all bids will be publicly opened and read aloud at the GIAA Conference Room. Bids received after indicated time and date, will not be considered." [APR, Tab F, IFB, General Information, § 2].

5. However, the IFB Instruction[s] to Bidders clarified that, "Sealed bids…will be received at the office of the GIAA Executive Manager as indicated in the INVITATION FOR BID at which time and place, all bids will be publicly opened and read aloud." [APR, Tab F, IFB, Instruction[s] to Bidders, § 1(A)].

6. The IFB Instruction[s] provided, "No bid will be considered unless received at the place specified in the advertisement of this Invitation for Bid before the time specified for

opening all bids…Bids received after the bid opening time will not be accepted and shall be returned to the bidder unopened." [APR, Tab F, IFB, Instruction[s] to Bidders, § 4(A), 6(A)].

7. The IFB Instruction[s] provided, "Bids and modifications shall be opened publicly in the presence of one or more witnesses, the time, date, and place designated in the Invitation for Bids." [APR, Tab F, IFB, Instruction[s] to Bidders, § 6(A)].

8. The "Bid Documents" included all portions of the IFB documents and amendments to the IFB.

9. On February 7, 2013, GIAA held a Mandatory Pre-Bid Conference for Custodial Services. GIAA Supply Management Administrator Frank P. Taitano presided over the conference. Thirty-eight bidders and bidder representatives attended, including K Cleaning [APR, Tab A, lines 9-10].

10. At the Mandatory Pre-Bid Conference, Mr. Taitano clarified the bid submission location requirements when he advised bidders in attendance that bid submissions were required to be made at the GIAA Executive Manager's Office. [APR, Tab C, Audio Recording of Mandatory Pre-Bid Conference]. Bidders were advised that they could submit written questions they might have to GIAA. The audio recording does not reflect that bidders in attendance were unable to hear information provided by Mr. Taitano.

11. K Cleaning, along with other bidders, was given the opportunity to submit written questions and to seek clarifications. K Cleaning availed itself of this opportunity when it transmitted a February 11, 2013 letter to GIAA Executive Manager Charles H. Ada II making a

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(Footnote continued from previous page)

[1] The date was subsequently amended to March 29, 2013.

bid inquiry. [APR, Tab B]. K Cleaning did not seek clarification of bid submission location requirements.

12. GIAA required bid submissions to be submitted to the GIAA Executive Manager's Office.

13. Seven (7) bidders submitted their bids to the GIAA Executive Manager's Office.

14. K Cleaning mistakenly believed that bid submissions were required to be made at the GIAA Conference Room.

15. One (1) or two (2) other bidders also mistakenly believed that bid submissions were required to be made at the GIAA Conference Room.

16. On March 29, 2013, at 1:30 p.m., Mr. Conlu delegated to another K Cleaning representative, Mr. Davis, the responsibility of submitting K Cleaning's bid. Mr. Davis, along with one or two other bidders, went to the GIAA Conference Room to submit their bids. During that time, no GIAA representatives were present at the GIAA Conference Room. K Cleaning did not take action to verify whether or not it was at the proper bid submission location.

17. Shortly after 2:00 p.m. a GIAA representative came to the Conference Room and advised K Cleaning and the other bidders that their bids were late and would not be accepted. Subsequently, Mr. Taitano received K Cleaning's bid but did not open it because it was deemed to have been untimely.

18. K Cleaning's mistake could have been avoided had K Cleaning heeded Mr. Taitano's advisories at the Mandatory Pre-Bid Conference that bid submissions were to be made at the GIAA Executive Manager's Office; had it sought clarification regarding bid submissions through the opportunities provided to bidders by GIAA; had Mr. Conlu himself appeared for the bid submission rather than delegating the submission to Mr. Davis; had Mr. Davis been more

diligent while at GIAA to verify that he was at the correct bid submission location when no GIAA representatives were present at the GIAA Conference Room prior to or near the 2:00 p.m. deadline; and had K Cleaning read more carefully the bid submission location instructions.

19. On April 4, 2013, K Cleaning filed a Protest with GIAA asserting that the IFB bid submission instructions were ambiguous. K Cleaning asserted that the IFB gave conflicting statements about where bids were required to be submitted and requested that its bid be opened, reviewed, and reconsidered for the IFB. [APR, Tab I].

20. On April 22, 2013, K Cleaning received a letter dated April 18, 2013 from GIAA [the "Protest Decision"] which stated that the bid submission instructions were not ambiguous and which rejected K Cleaning's Protest. [APR, Tab J]. GIAA's letter did not advise K Cleaning of its rights to administrative and judicial review of the Protest Decision as was required by 5 G.C.A. § 5425(c).

21. On May 2, 2013, prior to final resolution of K Cleaning's protest procedures, GIAA issued Notices of Award to other bidders to the IFB. [APR, Tab H]

22. On May 8, 2013, K Cleaning filed a Notice of Appeal with the Office of the Public Auditor.

23. On August 27, 2013, the Hearing Officer issued an Order After Hearing/Scheduling Order ordering GIAA to issue a Protest Decision on K Cleaning's Protest compliant with 5 G.C.A. § 5425(c) no later than September 3, 2013. That statute requires agency decisions to inform protestants of their right to administrative and judicial review. GIAA issued a compliant decision by September 3, 2013.

24. K Cleaning's Notice of Appeal was filed prior to GIAA's issuance of the Amended Protest Decision.

25. Both Appellant and Appellee have stipulated to the Public Auditor's jurisdiction over this appeal.

CONCLUSIONS OF LAW

1. K Cleaning's Notice of Appeal was timely filed. GIAA's Amended Protest Decision was issued on September 3, 2013. K Cleaning's Notice of Appeal was filed prior to that date, on May 8, 2013, which in this case was within the fifteen (15) day deadline of the agency's amended decision. 5 G.C.A. § 5425(e).

2. The Public Auditor has jurisdiction over this appeal. The parties have both stipulated to the Public Auditor's jurisdiction over this appeal.

3. While the IFB headings and language in certain locations contained some ambiguities regarding the bid submission location requirements, the specific language of the IFB in the Instruction[s] to Bidders clarified that bids were required to be submitted at the GIAA Executive Manager's Office and would then be opened and read in the GIAA Conference Room. Mr. Taitano also advised bidders of this at the Mandatory Pre-Bid Conference which was attended by K Cleaning. GIAA also provided opportunities for bidders to make written inquiries to GIAA regarding bid clarifications. K Cleaning did not seek clarification regarding bid submission location requirements prior to the bid submission date and did not exercise a reasonable level of diligence at the time it attempted to submit its bid at GIAA approximately 30 minutes before the 2:00 p.m. deadline. K Cleaning was mistaken in its understanding of where bids were required to be submitted resulting in an untimely bid submission. K Cleaning's bid was untimely and GIAA's rejection of K Cleaning's bid submission was proper.

4. However, GIAA violated the automatic stay when on May 2, 2013 it issued Notices of Award to other bidders prior to final resolution of K Cleaning's protest procedures. The award of the IFB by GIAA while this appeal was pending is void. When an appellant files a timely Procurement Protest and subsequently a timely Notice of Appeal, as K Cleaning had done, an automatic stay is triggered and remains in effect until final resolution of the protest. In the event of a timely protest…the Territory shall not proceed further with the solicitation or with the award of the contract prior to its final resolution. Final resolution includes the time period of an appeal after protest. 5 G.C.A. § 5425(g); *In the Appeal of JMI Edison,* OPA-PA-13-010 (Order Granting Motion RE Automatic Stay, September 20, 2013). GIAA is admonished for its disregard of the automatic stay.

DECISION

1. K Cleaning's Notice of Appeal was timely filed.

2. The Public Auditor has jurisdiction over this appeal.

3. K Cleaning's bid submission was untimely and GIAA's rejection of said bid was proper.

4. GIAA violated the automatic stay when on May 2, 2013 it issued contracts/purchase orders shortly after it issued Notices of Award to other bidders, and prior to final resolution of K Cleaning's protest procedures. The awards of the IFB by GIAA while this appeal was pending is void.

5. The Parties shall bear their respective costs and fees associated with this appeal.

This is a Final Administrative Decision. The Parties are hereby informed of their right to appeal from a Decision of the Public Auditor to the Superior Court of Guam in accordance with

Part D of Article 9 of 5 G.C.A. § 5481(a) within fourteen (14) days after receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties and their respective attorneys, in accordance with 5 G.C.A. § 5702, and shall be made available for review on the OPA website at www.guamopa.org.

DATED, this 28th day of October, 2013.

DORIS FLORES BROOKS, CPA, CGFM
Public Auditor of Guam