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IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

IN THE APPEAL OF
G4S SECURITY SYSTEMS (GUAM) INC.,
Appellant.

Docket No. OPA-PA-13-013

**ORION CONSTRUCTION
CORPORATION (GUAM)'S HEARING
BRIEF**

The Office of Public Accountability should deny the appeal of Appellant G4S Security Systems (Guam) Inc.'s protest, and reinstate the award to Interested Party Orion Construction Corporation (Guam) because: (1) G4S is not a responsive bidder under Guam law, the relevant procurement regulations, and the language of the IFB; (2) G4S' mistake cannot be waived as a minor informality, as the information G4S failed to consider in Amendment # 2 and Clarification # 2 affected price, quantity, quality, delivery, and/or contractual conditions; (3) waiver is not in the best interests of the Department of Education; (4) waiver prejudices Orion who bid on the additional work; and (5) it is in the best interests of the Department of Education to reinstate the contract with Orion.

I. G4S is Non-Responsive

A "responsive bidder" is defined as one who has submitted a bid which conforms in all material respects to the IFB. 5 GCA § 5201(g). The language of the IFB specifies that bidders acknowledge in writing the receipt of any amendments to the IFB, and a failure to do so may result in a bidder being deemed as non-responsive. IFB § 2.8. Thus, on its face, all amendments are material to the bid. DOE's Procurement Regulations also required the acknowledgement of the receipt of amendments. DOE Procurement Regulations ("DOEPR") § 3.9.3.6.

G4S admits that it did not acknowledge receipt of Amendment # 2 or Clarification # 2. On its face and based on the language of the regulations, G4S did not conform to a material portion of the bid. G4S was therefore not a responsive bidder.

II. G4S made a mistake which cannot be waived as a minor informality.

Tied into responsiveness is the issue of whether G4S made a mistake which materially affects its bid. In such cases, in which a mistake is discovered after the opening of bids, and before the award, the Director of Education shall waive "minor informalities" if it is in the "best interest" of DOE. DOEPR § 3.9.13.4.(1); 2 GAR Div. 4 § 3109(m)(4). Therefore, before any waiver, two questions must be addressed: first, whether the mistake was a minor informality, and second, whether waiver is in the best interest of DOE.

"Minor informalities are matters of form, rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery or contractual conditions is negligible." DOEPR § 3.9.13.4.(1); 2 GAR Div. 4 § 3109(m)(4). DOE's Procurement Regulations offer a few examples of the types of actions which are considered "minor informalities," such as a bidder's failure to return the required number of signed bids; failure to sign the bid as long as the bid contains material indicating an intent to be bound; and failure to acknowledge receipt of an amendment to the IFB only if it is clear that the bidder received the

amendment and intended to be bound by its terms, or the amendment had a negligible effect on price, quantity, quality or delivery. DOEPR § 3.9.13.4.(1); 2 GAR Div. 4 § 3109(m)(4)(B).

A. G4S failed to acknowledge receipt of Amendment # 2 and Clarification # 2 and did not receive either document.

G4S admits that it did not acknowledge receipt of an amendment to the IFB. *See* Appellant's Admissions of Fact, No. 23 (filed Nov. 22, 2013). G4S also contends that it did not receive proper notice of Amendment # 2 or Clarification # 2. *See* Comments on Agency Statement (filed Oct. 29, 2013).

Based on G4S' admissions, its mistake does not satisfy the test of a "minor informality" as specifically described in DOEPR § 3.9.13.4.(1). Under that test, in order to qualify as a minor informality, the bidder must fail to acknowledge receipt of an amendment to the IFB, but must have received the amendment and intended to be bound by its terms. Having not received the amendment and therefore not intending to be bound by its terms, G4S cannot claim that its failures constitute a minor informality and cannot compare its situation to that in section 3.9.13.4(1).

Of course, DOE contends, and Orion agrees, that G4S in fact received Amendment # 2 and Clarification # 2, but never expressed an intent to be bound by them. Even in having received the amendment and clarification, G4S did not express an intent to be bound by either document. Again, that signifies that G4S has not satisfied the "minor informality" test as specifically described in the example provided in DOEPR § 3.9.13.4.(1).

The key act that the example excuses is a mistake in form whereby a bidder knows of an amendment, will comply with it, but just fails to say so in its bid submission. That is not the circumstance here, and thus, the example provided by DOEPR § 3.9.13.4.(1) does not apply.

B. Amendment #2 and Clarification # 2 significantly affected price, delivery, and contractual conditions.

The documents to which G4S claimed were not material to the bid - Amendment # 2 and Clarification # 2 - in fact provide various new information that affected price, quantity, quality delivery, and/or the contractual conditions.

First, as a preliminary matter, bidders had only ten calendar days to review the IFB and prepare a response. In addition, bidders were given less than three working days to prepare the bid using basic floor plans and designs. Those floor plans and designs were provided along with Amendment # 2, and specifically, Question # 1. Within the short timeframe, the provided floor plans and designs - which G4S claims it did not receive and therefore did not use - greatly enhanced the information upon which bidders prepared their bids, particularly pricing. Without the floor plans and designs in hand, bidders worked off a number of assumptions, such as how many rooms needed fire alarms, how much conduit and wiring was needed, the sizes of the buildings, and the quantities of devices needed. When Orion received the floor plans and designs, it was able to specifically understand the number of rooms and some of the layout of the existing system, it was able to conduct a detailed and informed site inspection within the three remaining days to devise a more accurate proposal. G4S' proposal failed to incorporate this same critical information, which it could not have discovered on its own, particularly given the short timeframe in which to submit a bid. This is far from a mistake of form; the failure to utilize the floor plans and designs substantively affected G4S' bid as it was based on assumptions rather than information.

Other aspects of Amendment # 2 influenced pricing, quantity, quality, delivery, and/or contractual conditions. Question # 3 of Amendment # 2 advised bidders that they had to alter the structure of existing strobe and pull stations to meet the current fire code. The work that now had to be done according to this amendment included adjusting the mounting height of the pull

station by cutting and chipping the concrete wall, installing a new back box, intercepting the existing conduit, patching disturbed areas and finally, painting to match the existing paint. G4S did not acknowledge receipt of Amendment # 2, and therefore did not indicate it would be bound by it. It is therefore questionable whether G4S contends it would do the same work of altering the existing strobe and pull stations which Orion has bid on and agreed to perform. Meanwhile, Orion incorporated the information and added work under Question # 3 as a factor in its bid, thereby adjusting its price to account for the additional services and supply quantities. Again, omitting this amendment was not a mistake of form, as it substantively impacted the scope of work.

Question # 5 of Amendment # 2 informed bidders that most work had to be performed when school was not in session. This meant that bidders such as Orion had to expect to pay night differential pay, provide special lighting, and take the extra safety precautions needed during night work. Each of these affects the price of a bidder's bid, the quality of the work, and the delivery/timeline upon which a bidder can complete work. G4S cannot claim this is a mistake of form; Question # 5 advised bidders that the delivery of services had to be done within the 270 day timeframe with even further limited hours and circumstances.

Finally, Clarification # 2 materially affected the bids by partially rescinding an original exclusion to the scope of work. The IFB's scope of work specifically excluded the gym and auditorium. However, Question # 1 of Clarification # 2 informed bidders of the requirement to connect the gym and auditorium to the rest of the school campus. This was not anticipated as part of the scope or work until Clarification # 2 was issued. With the Clarification, bidders were now expected to include the added work of digging and installing conduit and wires to these two buildings to an added length of 800 feet, and then ensuring compatibility of the entire campus'

systems. In addition, the Department of Public Works was now needed to inspect the site prior to digging, thereby affecting the timeline and sequence of work. All of this of course impacted the bid's price, the quantity of materials, the delivery of the work, and even the contractual conditions.

C. It is in the Government's best interests to not waive G4S' mistakes.

As noted, DOE may waive a minor informality only if it is in DOE's best interests. DOEPR § 3.9.13.4.(1). In DOE's procurement regulations, "best interests" includes the progress made toward performing the whole contract and the costs of a terminated contract. DOEPR § 9.7.1.2.(2)(c). DOE IFB 032-2013 involves both the design and the build of the upgrade and replacement of Southern High School's fire alarm system. There are therefore two phases of the work: the design of the system, and the building/installation of the system. After DOE awarded the contract to Orion in late September 2013, Orion initiated and has almost completed all of Phase I, the design. Such work has included, per the terms of the contract:

- obtaining performance and payment bonds, an installation risk policy, contractual liability insurance, and annual transit insurance;
- performing field investigations and actual measurements of the entire school facility consisting of 16 buildings to determine the as-built conditions and floor layout of each building;
- completing the design and engineering of the system including electronic drafting of preliminary design drawings by a Cadd operator, obtaining approval of the design by a professional electrical engineer, final drafting of the approved design drawing and a drawing reproduction for the required building permit;

- submitting the building permit application to the Department of Public Works, and obtaining the approval of the Department of Land Management;
- preparing all material and equipment submittals that will require approval by DOE;
- evaluating quotations and product data from material suppliers and manufacturers to ensure they meet the project timeline, budget and specifications;
- and preparing various technical submittals such as safety plans, quality control plans, schedules and other construction preparatory works, which is the preparatory work for Phase II.

If DOE were to begin a new contract with a new contractor, that contractor would have to reinitiate all of Phase I, as the contract is a design-build. Orion notes that its design is specific to the system it proposed to install, and that not all systems are compatible. Orion suspects that G4S intended to use a different system which would have required a different design. Orion's design is therefore not transferrable. In any event, even if the design aspect can be transferred, Orion expects to be compensated for all the work done as part of Phase I. How to allocate the costs of the design and the build phases of the contract would be challenging for DOE given that the contract was intended for one entity to conduct both phases. Of course, Orion expects to be compensated for completing Phase I, to the cost of at least \$67,000.

D. DOE cannot waive G4S' mistakes without prejudicing Orion.

Orion submitted a bid in reliance on all the representations in Amendment # 2 and Clarification # 2, which required additional labor and supplies that originally stated in the IFB.

Orion adjusted its bid price accordingly. G4S submitted on a different scope of work: one that did not have an understanding of the work site without the floor plans and designs; one that did not incorporate having to alter existing strobe and pull stations to make them fire code compliant; one that did not indicate that a majority work would likely have to be done in the evenings; and one that did not include having to connect the gym and auditorium to the rest of the campus. G4S' bid price is lower because it did not contemplate the extra work. Therefore, DOE cannot excuse G4S' mistakes without prejudicing Orion.

III. The OPA Should Rescind its Voiding of the Contract

A. The Best Interests of DOE Require Proceeding with Contract

In a post-award situation in which the contractor has not committed bad faith, a contract may be ratified and affirmed provided that doing so is in the best interests of the Territory; or the contract may be terminated the person award the contract shall be compensated for the actual expenses reasonable incurred under the contract, plus a reasonable profit, prior to the termination. 5 GCA § 5452(a). DOE's Procurement Regulations supplement section 5452, particularly the "best interests" factors. As already defined, a "best interests" analysis involves examining the Department's costs to terminate and the progress made toward performing the whole contract. DOEPR § 9.7.1.2.(2)(c).

The OPA's November 12 decision voids the DOE-Orion contract without examining any of the best interests factors. Based on the above analysis, however, it is clear that the Government's best interests favor a reinstatement of the contract so that Orion can complete Phase II.

B. Remedies

In the event the OPA finds in favor of G4S, as already explained, the contract should still be reinstated. Even if the OPA is considering standing by the voiding of the contract, the issue

of whether the OPA has the jurisdiction to terminate a contract is before the Guam Supreme Court in *Xerox Corp. v. The Office of Public Accountability*, Sup. Ct. Guam CVA13-018. The appropriate remedies, including whether the OPA may terminate the DOE-Orion contract, will be addressed in Orion's Remedies Brief.

IV. Conclusion.

The OPA may deny G4S' appeal on a number of grounds. First, G4S is not a responsive bidder under Guam law, the relevant procurement regulations, and the language of the IFB, as it failed to intend to be bound by Amendment # 2 and Clarification # 2. Second, G4S' mistake cannot be waived as a minor informality, as the information G4S failed to consider affected price, quantity, quality, delivery, and/or contractual conditions. Third, waiving those mistakes is not in the best interests of the Department of Education. Fourth, waiving those mistakes prejudices Orion which bid based on the additional work specified by Amendment # 2 and Clarification # 2. Finally, the best interests of the Department of Education require a reinstatement of the contract with Orion.

DATED: Hagåtña, Guam, November 29, 2013.

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