



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

PROCUREMENT APPEALS

IN THE APPEAL OF,

APPEAL NO: OPA-PA-14-008

IP&E HOLDINGS, L.L.C.,

DECISION

Appellant

I. INTRODUCTION

This is the Decision of the Public Auditor for appeal number OPA-PA-14-008 which was filed by IP&E HOLDINGS, LLC., (Hereafter referred to as “IP&E”) on August 22, 2014 regarding the GUAM POWER AUTHORITY’s (Hereafter referred to as “GPA”) August 15, 2014 denial of IP&E’s August 12, 2014 Protest concerning Multi-Step IFB GPA-029-14 (Supply of Diesel Fuel Oil No. 2 for Baseloads and Peaking Units) (Hereafter referred to as “IFB”). The Public Auditor holds that: (1) The IFB clearly and expressly authorized GPA to award the IFB Contract in whole or per plant location to the qualified bidder with the lowest priced proposal; (2) IP&E’s price bid for the Tenjo Vista Plant contains a mistake, not evident on the face of its bid, and pursuant to 2 G.A.R., Div. 4, Chap. 3, §3109(m)(4)(D)(2), IP&E may withdraw its mistakenly priced bid for the Tenjo Vista Plant if it chooses to do so. Accordingly, IPE’s appeal is hereby DENIED.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, and all arguments made during the October 28, 2014 hearing for Appellant’s Appeal. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

- 1 1. On or about March 13, 2014, GPA issued the IFB.¹
- 2 2. The IFB required, in relevant part, the following:
- 3 a. That the bidders had to submit a price proposal in a sealed package separate
- 4 from their technical proposals.²
- 5 b. That the bidders' technical and price proposals have to be submitted on or
- 6 before the cut-off date for the receipt of proposals specified by GPA.³
- 7 c. That GPA will award the IFB Contract to the Bidder whose proposal yields
- 8 the lowest overall contract price for the contract base year period.⁴
- 9 d. That changes may be made by the Bidders to their Technical and Price
- 10 Proposals prior to the cut-off date, and the proposals including corrections or changes made must
- 11 be resubmitted on or before the cut-off date.⁵
- 12 e. That no changes may be made between the Notification of Acceptable
- 13 Technical Proposals and the Price Proposal Opening date.⁶
- 14 f. All price/cost data submitted with the Bidders' proposals shall remain firm
- 15 and open for acceptance for a period of not less than six (6) months after the price proposal
- 16 opening date and thereafter shall be subject to renewal by mutual agreement between the bidder
- 17 and GPA and that the Bidder shall state the actual date of expiration in their proposal.⁷
- 18 g. That the contract will be awarded in whole or per plant location to the bidder
- 19 evaluated as being qualified and with the best-priced proposal.⁸
- 20 h. That bid prices must be provided for each plant location.⁹
- 21 i. That any modification of a bid received after the time and date set for
- 22 opening of bids at the place designated for opening is late and that no late modification will be
- 23 considered unless received before contract award, and the bid modification would have been
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25 ¹ Page 858, IFB, TAB 2, Procurement Record filed on September 2, 2014.

26 ² Page 872, Paragraph 2.10.2, Price Proposal Requirements, Id.

27 ³ Page 873, Paragraph 2.10.5, Cut-Off Date for Receipt of Proposals, Id.

28 ⁴ Page 886, Paragraph 4.3, Price Proposal Evaluation, Id.

⁵ Page 874, Paragraph 2.10.7, Proposal Changes During Bid Process, Id.

⁶ Page 876, Paragraph 2.12.2, Proposal Changes During Bid Process, Id.

⁷ Page 876, Paragraph 2.12.3, Proposal Validity, Id.

⁸ Page 877, Paragraph 2.13, Award of Contract, Id.

⁹ Page 978, Bid Price Proposal, Id.

1 timely but for the action or inaction the purchasing agency's personnel directly serving the
2 procurement activity.¹⁰

3 j. That the bidders' price proposals would be opened on May 9, 2014 at 2:00
4 p.m.¹¹

5 3. On or about March 20, 2014, GPA issued IFB Amendment No. I, which, in relevant
6 part, changed the May 9, 2014 date for the opening of the bidders' price proposals to May 30,
7 2014 at 2:00 p.m.¹²

8 4. On or about March 25, 2014, IP&E received a copy of the IFB from GPA.¹³

9 5. That same day, IP&E's representative, Fred Keller, attended the IFB's non-
10 mandatory pre-bid conference.¹⁴

11 6. On or about March 26, 2014, GPA issued IFB Amendment No. II, which changed
12 some of the IFB's deadlines, but retained the May 30, 2014 date for the opening of the bidders'
13 price proposals.¹⁵

14 7. On or about April 23, 2014, GPA issued IFB Amendment No. III, which, in relevant
15 part, changed the May 30, 2014 date for the opening of the bidders' price proposals to June 13,
16 2014 at 2:00 p.m.¹⁶

17 8. On or about May 5, 2014, GPA issued IFB Amendment No. IV, which amended the
18 IFB's performance bond requirements.¹⁷

19 9. On that same day, GPA received questions concerning the IFB from IP&E and on
20 May 8, 2014, GPA received questions concerning the IFB from Interested Party MOBIL OIL
21 GUAM (Hereafter Referred to as "MOBIL").¹⁸

22 10. On or about May 14, 2014, GPA issued IFB Amendment No. V, which answered the
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25 ¹⁰ Page 988, Paragraph 7, Sealed Bid Instructions, Id.

26 ¹¹ Page 863, Table 1: Bid Milestones, Id.

27 ¹² Page 856, IFB Amendment No. I, Id.

28 ¹³ Page 839, Bidder's Register, Id.

¹⁴ Page 822, IFB Pre-Bid Conference sign in Sheet, Id.

¹⁵ Page 855, IFB Amendment No. II, Id.

¹⁶ Page 854, IFB Amendment No. III, Id.

¹⁷ Page 853, IFB Amendment No. IV, Id.

¹⁸ Page 843, IFB Amendment No. V, Id.

1 various questions submitted by IP&E and MOBIL, in relevant part said amendment answered
2 several questions made by IPE concerning the IFB's fuel safety stock requirements.¹⁹

3 11. On or about May 22, 2014, GPA issued IFB Amendment No. VI, which, in relevant
4 part, changed the June 13, 2014 date for the opening of the bidders' price proposals to July 14,
5 2014 at 2:00 p.m.²⁰

6 12. On or about June 16, 2014, GPA issued IFB Amendment No. VII, which changed
7 some of the IFB's deadlines, but retained the July 14, 2014 date for the opening of the bidders'
8 price proposals.²¹

9 13. On or about July 1, 2014, GPA issued IFB Amendment No. VIII, which, in relevant
10 part, changed the July 14, 2014 date for the opening of the bidders' price proposals to July 8,
11 2014 at 10:00 a.m.²²

12 14. On or about June 23, 2014, IP&E and MOBIL submitted their proposals, which
13 included their sealed price proposals, to GPA.²³

14 15. On or about July 1, 2014, GPA's IFB evaluation committee completed its evaluation
15 of the technical proposals submitted by IP&E and MOBIL and found them to be acceptable.²⁴

16 16. That same day, GPA advised IP&E that GPA had completed its Phase 1 Evaluation
17 and that IP&E's technical proposal had been deemed qualified to participate in Phase 2 of the
18 IFB's Multi-Step solicitation process and that IP&E's price proposal would be opened at 10:00
19 a.m. on July 8, 2014.²⁵

20 17. On July 8, 2014, GPA opened the bidder's price proposals.

21 a. IP&E bid the amount of \$3.198 per gallon for the Baseload Plants,
22 the Dededo Diesel & CT Plants, the Fast Track Diesel Plants, the Temes CT Plant and Tenjo
23 Vista Plant.

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25 ¹⁹ Page 845 Id.

²⁰ Page 842, IFB Amendment NO. VI, Id.

26 ²¹ Page 841, IFB Amendment No. VII, Id.

²² Page 840, IFB Amendment No. VIII, Id.

27 ²³ Page 839, Bidder's Registrar, Tab 3, Id.

²⁴ Page 83, Memorandum from IFB Evaluation Committee to GPA's General Manager
28 dated July 1, 2014, Tab 21, Id.

²⁵ Page 79, Letter from GPA to Brian Bamba, IP&E's managing director dated
July 1, 2014, Id.

1 b. MOBIL bid the amount of \$3.190 for the Baseload Plants and the Temes
2 CT Plant, the amount of \$3.170 for the Dededo Diesel & CT plants and the Fast Track Diesel
3 Plants, and \$3.310 for the Tenjo Vista Plant.²⁶

4 18. On or about July 25, 2014, GPA's Bid Evaluation Committee recommended that the
5 IFB Contract be awarded to MOBIL for the Baseload Plants, the Dededo Diesel & CT Plants, the
6 Fast Track Diesel Plant, and the Temes CT Plant, and that the IFB Contract be awarded to IP&E
7 for the Tenjo Vista plant and this recommendation was approved by GPA's General Manager.²⁷

8 19. On August 12, 2014, Guam's Consolidated Commission on Utilities (Hereafter
9 Referred to as "CCU"), GPA's elected governing board, authorized GPA's management to
10 award MOBIL the IFB Contract for the Baseload Plants, the Dededo Diesel & CT Plants, the
11 Fast Track Diesel Plants, and the Temes CT Plant, and CCU authorized GPA's management to
12 award IP&E the IFB Contract for the Tenjo Vista Plant.²⁸

13 20. On or about August 12, 2014, which was the same day IP&E learned of the
14 aforementioned CCU Resolution, IP&E sent a letter to GPA protesting the proposed
15 award of the IFB Contract to MOBIL and IP&E, and IP&E alleged that the IFB required GPA to
16 award the contract to the Bidder whose proposal yielded the lowest overall contract price for the
17 contract base year period and it alleged that IP&E's overall contract price, for all of GPA's
18 plants and units, was lower than MOBIL's overall price.²⁹

19 21. On or about August 15, 2014, GPA denied IP&E's August 12, 2014 Protest on the
20 sole ground that the IFB stated that the contract would be awarded in whole or per plant location
21 to the Bidder being evaluated as being qualified with the best-priced proposal and because GPA
22 determined that the per plant location gives the best proposal to GPA because MOBIL was the
23 lowest bidder for all but one (1) plant, and that the IFB contract for that plant was awarded to
24 IP&E.³⁰

26 ²⁶ Page 74, Abstract of Bids, Tab 24, Id.

27 ²⁷ Page 63, Memorandum from Bid Evaluation Committee to General Manager, Tab,
26, Id.

28 ²⁸ Page 57, CCU Resolution dated August 12, 2014, Id.

²⁹ Page 51, IP&E Protest Letter, Tab 28, Id.

³⁰ Page 49, GPA's Protest Denial Letter, Tab 29, Id.

1 opened, the contract shall be awarded with reasonable promptness by written notice to the lowest
2 responsive and responsible bidder whose bid meets the requirements and criteria set forth in the
3 invitation for bids. 5 G.C.A. §5211(g) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(1). Further, the
4 bids will be evaluated to determine which bidder offers the lowest cost to the territory in
5 accordance with the evaluation criteria set forth in the invitation for bids. 2 G.A.R., Div. 4,
6 Chap. 3, §3109(n)(4). As stated above, the IFB clearly required the bidders to provide separate
7 prices for each plant location and the IFB clearly stated that the contract will be awarded in
8 whole or per plant location to the bidder evaluated as being qualified and with the best-priced
9 proposal.³² Here, as stated above, only MOBIL and IP&E submitted technical proposals and
10 priced bids in response to the IFB and GPA determined that both their technical proposals were
11 acceptable in the first phase of the Multi-Step Invitation for Bid Process. Further, as stated
12 above, GPA initiated the second phase of the solicitation process and opened the priced bids
13 submitted by MOBIL and IP&E and determined that MOBIL had submitted the lowest priced
14 bids for the Baseload Plants, the Dededo & CT Plants, the Fast Track Plants, and the Temes CT
15 Plant and GPA determined that IP&E submitted the lowest bid for the Tenjo Vista Plant and
16 recommended the IFB Contract be awarded accordingly. Based on the foregoing, the Public
17 Auditor finds that the IFB clearly and expressly authorized GPA to award the IFB contract in
18 whole or per plant location to the qualified bidder with the lowest priced proposal and the Public
19 Auditor finds that GPA did so by awarding the MOBIL and IP&E the plant locations they
20 respectively submitted the lowest bids for.

21 The Public Auditor is not persuaded by IP&E's argument that it should be awarded all
22 the plant locations because the IFB also states that the IFB Contract will be awarded to the
23 bidder whose proposal yields the lowest overall contract price for the contract base year period.
24 IP&E relied upon this language when developing its bid pricing strategy by submitting the same
25 price for each of the plants to achieve a lower aggregate bid.³³ In contrast, GPA believes that the

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28 ³² Page 978, Bid Price Proposal, and Page 877, Paragraph 2.13, Award of Contract, Tab 2, Id.

³³ October 28, 2014 Testimony of Fred Keller, IP&E's Director of Commercial Sales

1 IFB language permitting them to award the IFB in whole or per plant location, described above,
2 is controlling.³⁴ Albeit, as stated above, the IFB does in fact contain the language cited by
3 IP&E, other provisions in the IFB make it clear that this language was not meant to limit an
4 award to only one (1) bidder who submits the lowest aggregate bid for the base contract year.
5 Specifically, the IFB expressly states that wherever used in the General Conditions or in the
6 other contract documents, the terms used have the meanings indicated which are applicable to
7 both the singular or the plural form of the word.³⁵ Hence, this means that the IFB language cited
8 by IP&E could also mean the IFB Contract will be awarded to the bidders whose proposals yield
9 the lowest overall contract prices for the contract base year period. Based on this, and the
10 express language of the IFB, cited above, that expressly allows GPA to award the IFB Contract
11 in whole or by plant location, and the fact that the bidders had to submit their prices per plant
12 location instead submitting an aggregate price inclusive of all the plants, the Public Auditor finds
13 that the IFB language permitting GPA to make an award in whole or per plant location is
14 controlling and GPA's proposed awards to MOBIL and IP&E of the plants they respectively
15 submitted the lowest bids for must stand.

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17 **B. IP&E is not permitted to change their priced bid for the Tenjo Vista Plant.**

18 The Public Auditor is not persuaded by IP&E's argument that it should be allowed to
19 increase its price for the Tenjo Vista Plant by \$.07 if it is found that the IFB allowed GPA to
20 award the IFB Contract based on the lowest bid submitted per plant. IP&E believes that GPA
21 should not be allowed to benefit from its erroneous reliance on the IFB language, described
22 above, which states that the award will be made to the bidder whose proposal yields the lowest
23 overall contract price for the contract base year period. Generally, after bid opening, no changes
24 in bid prices or other provisions of bids prejudicial to the interests of the Government of Guam
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³⁴ October 28, 2014 Testimony of Alberto Florencio, GPA Engineer

³⁵ Page 887, Paragraph 5.1 Conditions of Contract, Definitions, Tab 2, Id.

1 or fair competition shall be permitted. 5 G.C.A. §5211(f). Here, IP&E is specifically requesting
2 to modify their bid, post-bid opening and prior to bid award, by increasing its bid price by \$0.07
3 per gallon for the Tenjo Vista Plant.³⁶ Ostensibly, this modification would result in a new bid
4 price of \$3.26 per gallon which is higher than its existing \$3.190 bid price. Accordingly, the
5 Public Auditor finds that 5 G.C.A. §5211(f) specifically prohibits the bid modification IP&E is
6 requesting because it prejudices GPA by raising IP&E's original bid price for the Tenjo Vista
7 Plant.
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10 However, IP&E is not without recourse. After bid opening but prior to award, a bidder
11 may be permitted to withdraw a low bid if a bidder submits proof of evidentiary value which
12 clearly and convincingly demonstrates that a mistake was made. 2 G.A.R., Div. 4, Chap. 3,
13 §3109(m)(4)(D)(2). Here, IP&E is identifying its mistake after the opening of the bids and prior
14 to award of the IFB contract. Further, the evidence, which was not refuted by the other parties,
15 clearly and convincingly showed that: (1) As described above, IP&E's pricing strategy was
16 based on its erroneous interpretation that GPA could only award the IFB contract to the bidder
17 who submitted the lowest overall contract price for the contract base year period; (2) The Tenjo
18 Vista Plant is the most difficult of all the plants to deliver fuel to;³⁷ (3) Had IP&E known that
19 GPA would award the IFB Contract to the lowest bids per plant location, it would have bid a
20 higher price for the Tenjo Vista Plant because of the higher level of difficulty involved with
21 delivering fuel to that site.³⁸ Based on the foregoing, the Public Auditor finds this clear and
22 convincing evidence shows that IP&E made a mistake, not evident on the face of its bid, and that
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27 ³⁶ Page 5, Appellant's Closing Brief filed on October 30, 2014

28 ³⁷ October 28, 2014 Testimony of Fred Keller, IP&E's Director of Commercial Sales

³⁸ Id.

1 pursuant to 2 G.A.R., Div. 4, Chap. 3, §3109(m)(4)(D)(2), IP&E must be allowed to withdraw its
2 mistakenly priced bid for the Tenjo Vista Plant if it chooses to do so.

3 4 **IV. CONCLUSION**

5 Based on the foregoing the Public Auditor hereby determines the following:

6 1. The IFB clearly and expressly authorized GPA to award the IFB Contract in whole or
7 per plant location to the qualified bidder with the lowest priced proposal and GPA complied with
8 the IFB by proposing to award MOBIL and IP&E the plant locations they respectively submitted
9 the lowest bids for.

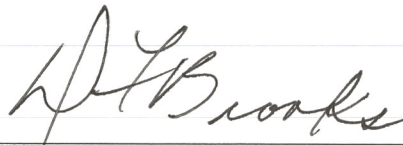
10 2. IP&E's price bid for the Tenjo Vista Plant contains a mistake, not evident on the face
11 of its bid, pursuant to 2 G.A.R., Div. 4, Chap. 3, §3109(m)(4)(D)(2), IP&E has one (1) week
12 from the date of this order to withdraw its mistakenly priced bid for the Tenjo Vista Plant if it
13 chooses to do so.

14 3. IP&E's Appeal is hereby DENIED.

15 This is a Final Administrative Decision. The Parties are hereby informed of their right to
16 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
17 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
18 Decision. 5 G.C.A. §5481(a).

19 A copy of this Decision shall be provided to the parties and their respective attorneys, in
20 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
21 www.guamopa.org.

22 **DATED** this 26th day of November, 2014.

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27 **DORIS FLORES BROOKS, CPA, CGFM**
28 **PUBLIC AUDITOR**