

(d) A copy of abstract of bids or offers or relevant or portions thereof relevant to the protest: *Previously submitted to the OPA on January 22, 2008, by the GSA under Tab 4.*

(e) Any other documents which are relevant to the protest; including the contract, if one has been awarded, pertinent amendments, and plans and drawings: *Previously submitted to the OPA on January 22, 2008, by the GSA under Tab 5.*

(f) The decision from which the Appeal is taken, if different than the decision submitted by the Appellant: *Previously submitted to the OPA on January 22, 2008, by the GSA under Tab 1.*

The statement prepared by the GSA as required by §12105(g) is attached hereto as *Exhibit 1.*

The statement required by §12105(i) is attached hereto as *Exhibit 2.*

Submitted this 29th day of January 2008.

GENERAL SERVICES AGENCY



CLAUDIA S. ACFALLE
Chief Procurement Officer

EXHIBIT “1”

STATEMENT ANSWERING ALLEGATIONS OF APPEAL

(As required by 2 GAR §12106(g))

RELEVANT BACKGROUND

A. GSA/PAG SOLICITS BIDS FOR INVITATION FOR BID NO. GSA/PAG 07-007
(New Dockside Container Handling Gantry Crane)

Pursuant to Invitation for Bid No. GSA/PAG 07-007 (the “IFB”), the Jose D. Leon Guerrero Commercial Port (Port Authority of Guam) (“PAG”), through the General Services Agency (“GSA”) of the Government of Guam, solicited bids for the purchase of a New Dockside Container Handling Gantry Crane.

A pre-bid conference was held on August 27, 2007 at 10:00 a.m., at the GSA Conference Room in Piti. The bid was administratively handled and coordinated by both the GSA and PAG.

B. BID OPENING, DECISION, AND PROTEST

In response to the solicitation, GSA/PAG received only one bid namely: Far East Equipment Company, LLC. On October 08, 2007 the bid was publicly opened and subsequently evaluated. The Far East submitted a bid price in the total amount of \$9,698,250.00.

On November 16, 2007, Far East, sent an email to GSA. The email sent by Far East, was explaining that negotiations are allowable under the bid solicitation as it relates to §3109 Competitive Sealed Bidding, Award. Far East, further stated that the bid required progress payments based on construction milestones and the requirements for a performance bond indicate that this bid is a construction contract and should be subject to the negotiation exemption.

On November 26, 2007, GSA responded through email to Far East that the process that was used for acquisition of the crane was an invitation for bid, not for construction. GSA furthered advised Far East that their comments regarding negotiation in the competitive sealed bid process is inappropriate.

On November 27, 2007, GSA, received a memorandum from the General Manager, PAG recommending to reject the bid submitted by Far East, on the bases of unacceptable deviations, high price, and review of the deviations and terms and conditions would result in a drastic change of the bid’s general terms and conditions as originally issued.

On November 28, 2007, GSA, issued a Bid Status notification to Far East. The Bid Status notified Far East of its rejection of its bid because non-conformance with the

specifications/requirements, high price, and recommended deviations and commercial contract terms are not in compliance with the Guam Procurement Rules and Regulations.

On December 21, 2007, Far East filed a protest with GSA. On December 28, 2007, GSA responded to the protest. In GSA's letter, the agency found Far East's protest to be without merit based on the following:

1. The budgeted amount for the purchase of a New Dockside Container Handling Gantry Crane is \$7M. Far East submitted a bid price in the amount of \$9,698,250.00
2. Bid rejected due to non-conformance with specifications/requirements: The bid submitted by Far East Equipment Company, LLC did not meet required specifications as follows: (Clause numbers are noted for reference)

Technical Deviation – Electrical Part

1. Clause No. 1.5.3.1 & 1.5.3.2 – Deviation is not acceptable. ZPMC is meeting this requirement for the Virginia Port Authority STS cranes which is a current project. Project must have written description of control logic.
2. Clause No. 1.5.4 – Deviation is not acceptable, did not meet specification.
3. Clause No. 3.8.1 - Deviation is not acceptable, did not meet specification.
4. Clause No. 3.9.15 – Deviation is not applicable as cable reels with fiber optics is not used on cable reel.
5. Clause No. 5.5.2 – Outboxes refers to conduit outlet boxes. Galvanized cast iron boxes are acceptable. Aluminum is not acceptable.
6. Clause No. 5.6.5 – Deviation is not acceptable, flexible conduits must be grounded.
7. Clause No. 5.6.6.2 – Deviation is not acceptable, provide fiber optic run for future communication system as specified.
8. Clause No. 5.6.7 – Deviation is not acceptable, provide XLPE as specified.

9. Clause No. 5.6.7 – Deviation 4 is not acceptable, both ends of spare cable are to be labeled per specification.
10. Clause No. 5.6.8 – Deviation is not acceptable, stay with specification.
11. Clause No. 5.6.23 – Deviation is not acceptable, written confirmation by control supplier is required.
12. Clause No. 5.6.25 – Deviation is not acceptable for 600 V insulation rating; a 2000 V minimum insulation for gantry motor wiring is required per specification.
13. Clause No. 5.11.14 – Deviation is not acceptable, maintain software specification.
14. Clause No. 6.6.10 – Deviation is not acceptable, stay with specified maximum noise level in electrical room.
15. Clause No. 8.3.3.3 – Deviation is not acceptable, include in maintenance manual per specification.
16. Clause No. 9.4.3 – Deviation is not acceptable, the definition of trouble free shall be negotiated between PAG and ZPMC.

Technical Deviation – Mechanical Part

1. Clause No. 1.7 – Deviation is not acceptable, the gantry shall have eight wheels per corner and the stowed wind load factor shall be 1.6 for stability and LRFD wheel loads.
2. Clause No. 4.4.1.1 – Deviation is not acceptable, the allowable stress shall be 1.11 x the base stress.
3. Clause No. 6.4.9 – Deviation is not acceptable, stay with specified maximum noise level.

Technical Clarification – Electrical Part

1. Clause No. 5.6.16 – Clarification is not acceptable, GRF series does not meet the specification.
2. Clause No. 5.17.5.1 – Clarification is not acceptable, floodlights must be rapid start so lighting can be restored when power loss is corrected.

3. Clause No. 5.17.6 – Clarification is not acceptable, emergency aggress lighting must meet specification which includes outside lights down to ground level.
4. Clause No. 5.18.9.15 – Clarification is not acceptable, stay with specification.

Technical Clarification – Mechanical Part

1. Clause No. 1.7.7 – Clarification is not acceptable, most of the structure will likely be governed by the stowed wind condition, not earthquake loading. Some local reinforcement may be required at the leg-to-portal tie beam connection to meet the seismic strength requirements.

The earthquake wheel load combination, WOP6x and WS1x, are included for the Manufacturer to submit calculated loads, for reference only. Any allowable wheel loads shown in the specification for the earthquake combinations may be exceeded.

2. Clause No. 3.4.25 – Clarification is not acceptable, rail clips and pads shall be provided according to the specifications. Rail clips at hinge where Gantrex pad is not used may be ZPMC rail clips.

Technical Deviation from TMGE electrical control system

1. Clause No. 5.4.4 – Deviation is not acceptable, this refers to the maintenance manual which will be jointly assembled between TMGE and ZPMC. The contents of this paragraph must be considered.
2. Clause No. 5.5.8 – Deviation is not acceptable, the time to review the panels shall be included in the project schedule.
3. Clause No. 5.6.1 – Deviation is not acceptable, wiring is till subject to review.
4. Clause No. 5.9.3 – Deviation is not acceptable, provide totally enclosed motors as specified. Cooling shall be external.
5. Clause No. 6.26.2 – Deviation is not acceptable, use specified fiber optic for communication.

Commercial Contract Terms.

No. 1 of the proposed Commercial Contract Term: “**Effectiveness of the Contract**” states in part:

- 2) Two parties provide a Letter of Credit (by the Buyer) and the Performance Bond (by the Seller) to each other as stipulated in the Contract.
- 3) The Seller has received Advance Payment paid by the Buyer per the Contract.

Far East Equipment Company, LLC proposed Commercial Contract Term item number 2 & 3 under “Effectiveness of the Contract” is rejected due to non-compliance with item number 23 of the General Terms and Conditions of the bid. Item number 23 states in part: “No award shall be made under this solicitation which shall require advance payment or irrevocable letter of credit from the government”.

In addition, Pursuant to 5GCA §5007 Policy Against, Advance Payments: states in part: “With the exception of off-island orders of the Department of Education, no procurement shall be made under this Chapter which shall require advance payment.”

Performance Bond Requirement

Far East Equipment Company, LLC proposed Commercial Contract Term indicated a performance bond in the amount of ten percent (10%) of the total contract price.

Based on USDA requirements, a one hundred percent (100%) performance bond is required as a part of the loan agreement. Therefore, the proposed Commercial Contract Term offered by Far East Equipment Company, LLC is rejected.

Liquidated Damages of the Late Delivery

Pursuant to 2GAR §6101(9)(a) states in part: “When the Contractor is given notice of delay or nonperformance as specified in Paragraph (1) (Default) of the Termination for Default Clause of this contract and fails to cure in the time specified, the contractor shall be liable for damages for delay in the amount of one-fourth of one-percent (1%)” Therefore, your proposed percentage of 0.1% of the contract price per week is rejected.

The justification stated above is the reason for rejecting the bid submitted by Far East for non-conformance with the specifications, 5GCA §5007 Policy Against Advance Payment, Item #23 Bid Solicitation General Terms and Conditions, and high price, due to budgetary constraints.

Detailed analysis submitted to the Office of the Public Auditor (“OPA”) on January 22, 2008, on Tab 1.¹

DISCUSSION

- A. FAR EAST’S BID WAS APPROPRIATELY REJECTED AS NON-CONFORMING WITH SPECIFICATIONS/REQUIREMENTS, HIGH PRICE, AND RECOMMENDED COMMERCIAL DEVIATIONS AND COMMERCIAL CONTRACT TERMS ARE NOT IN COMPLIANCE WITH THE GUAM PROCUREMENT RULES AND REGULATIONS.

Both the law and the IFB permit the GSA/PAG to unilaterally reject any or all bids. The provision of the procurement law is 5 GCA § 5225, which states:

An Invitation for Bids, a Request for Proposals, or other solicitation may be cancelled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the Territory in accordance with regulations promulgated by the Policy Office. The reasons therefor shall be made part of the contract file.

Furthermore, in at least five places, the IFB puts bidders on notice that GSA/PAG may reject any and/or all bids, and/or cancel the IFB outright. On page 2 of the IFB, it is stated (emphasis added):

The Jose D. Leon Guerrero Commercial Port *reserves the right to* accept and/or *reject any and all bids*, to waive any defects (sic) irregularities, or specification discrepancies and to award the bid as council (sic) deems to be in the best interest of the Authority (sic).

At § IV, ¶ 9 of the IFB it is stated (emphasis added):

¹ Indeed, in a memorandum dated November 6, 2007, the PAG’s consultant Liftech, summarized its findings regarding the bid and concluded that “[a]lthough the proposed Far East crane bid generally conforms to the specification requirements, they have taken many deviations and present clarifications. Many of the deviations are acceptable, but some are not.” Procurement Record at Tab 1. Liftech listed 14 examples of unacceptable deviations and concluded that “strictly speaking, the bid does not comply with the specifications.”

The Government of Guam *reserves the unqualified right, in its sole and absolute discretion, to reject any and all bids*, or to accept that bid or combination of bids, if any, which in its sole and absolute judgment will under all circumstances best serve the Government's interests....

And at § VII, ¶¶ 3, 5, and 6, it is stated (emphasis added):

3. Right to Amend or Cancel.

The Government *reserves the right to amend, supplement, or cancel the Bid*, in whole or in part at any time, *when this action serves the best interest of the Government*.

....

5. Right to Reject Bids

The Government *reserves the rights (sic) to reject any or all Bids* and to waive informalities and minor irregularities in the Bids. *The Government reserves the sole right to determine what constitutes irregularities in the Bids*.

6. Right to Reissue

The Government may, *at its discretion, cancel and/or reissue the Bid*.

Furthermore, on Page 20 of 23 of the IFB General Terms and Conditions (Item #23), the IFB advises potential bidders that award shall be made to the lowest responsible and responsive bidder, whose bid is determined to be advantageous to the government. It also indicates that the GSA Chief Procurement Officer shall have the right to award, cancel or reject bids, in whole or in part for any one or more items, if he determines it is in the public interest.

The authority to reject the bid is also supported by the 2 G.A.R. § 3115(e). It requires at ¶ (e)(2) that:

Each solicitation issued by the territory shall provide that any bid or proposal may be rejected in whole or in part when in the best interest of the Territory as provided in these Regulations.

Among the non-exhaustive reasons that justify the rejection of a bid is that "the bid is not responsive, that is, it does not conform in all material respects to the Invitation for Bids." 2 G.A.R. § 3115(e)(3)(A)(ii).² The section also refers the reader to 2 G.A.R. §

² Indeed, Amendment No. 8 to the IFB, Item 2, states: "Note: We encourage all Prospective Bidders that they must be One-Hundred Percent (100%) responsive in order
(footnote cont'd)"

3109(n)(2) on the topic of bid evaluation and award. The provision notes that a “responsive bidder” is defined by 5 G.C.A. § 5201(g) “as a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.”

GSA determined that Far East’s bid was non-compliant with the specifications outlined in the IFB for the New Dockside Container Handling Gantry Crane. The IFB required minimum specifications that were not met by Far East. Furthermore, Far East bid price of \$9,698,250.00 was deemed high, due to budgetary constraints, as noted in the protest response dated December 28, 2007. Therefore, the bid was rejected.

On November 16, 2007, Far East raised the concern regarding the method of solicitation for construction on an email to GSA and PAG. Far East continued to raise concerns regarding negotiations up until November 28, 2007 as noted on an email to GSA. However, the issue regarding negotiation or the method of solicitation was *not* indicated on the protest filed by Far East on December 21, 2007, and therefore is barred as untimely because of failure to raise the issue with the required 14-day period.³ 5 GCA §5425 states in part: “The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.”

CONCLUSION

GSA respectfully requests that the appeal of Far East Equipment Company, LLC be dismissed, and that the Public Auditor award all legal and equitable remedies that the agency may be entitled to as a result thereof.

for their bids to be accepted and considered for award.” Procurement Record at Tab 5. The same statement appears in Amendment No. 7, Item 3. *See also* 2 G.A.R. § 3115(e)(3)(A)(iii) which provides that a bid may be rejected because the “supply, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the Invitation for Bids....”

³ Notwithstanding the fact that Appellant is now barred from raising the construction/negotiation issue on appeal, appellant does not argue (nor could it) that negotiations with appellant were *mandatory* under the law. The government has the unqualified right to reject nonconforming bids. Even in situations where negotiations are permissible, those circumstances do not apply here. *See, e.g.,* 5 GCA 5211(g) (in bid for construction project, low responsive and responsible bidder must not exceed available funds by more than 5% in order for negotiations to be authorized; however, negotiations are not mandatory). Indeed, the general rule is that negotiations and discussions in a procurement process are not only disfavored, they are prohibited in most cases. *See* 2 GAR § 3101(4).

EXHIBIT “2”

