



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor
**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

IN THE APPEAL OF

MID PAC FAR EAST,

Appellant.

Docket No. OPA-PA-15-011

DECISION

I. INTRODUCTION

This is the Decision of the Public Auditor for appeal number OPA-PA-15-011 regarding MID PAC FAR EAST's ("MPFE") Appeal of the GENERAL SERVICE AGENCY's ("GSA") denial of procurement protest dated September 29, 2015, concerning Invitation for Bid No. GSA-093-015 ("the IFB"), which solicits bids for "Miscellaneous Items & School Bus Parts."

This matter came before the Public Auditor and Hearing Officer Delia Lujan Wolff for a Hearing on December 1, 2015. Present at the Hearing were R. Marsil Johnson, counsel for MPFE, MPFE representative Craig Wade, and Nicholas Toft, counsel for GSA. In reaching this Decision, the Public Auditor has considered and incorporates herein the procurement record, all documents submitted by the parties, and all arguments made during the December 1, 2015, Hearing on MPFE's Appeal. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

II. FINDINGS OF FACT

1. On July 31, 2015, GSA issued the IFB which solicits bids for "Miscellaneous Items & School Bus Parts." (Procurement Record, Tab 7, Invitation for Bid.)

1 2. On August 7, 2015, GSA issued Amendment #1 to the IFB, which changed the provision
2 regarding brochures/descriptive literature. (Procurement Record, Tab 9.)

3 3. On August 11, 2015, GSA issued Amendment #2, which changed the bid opening date
4 to August 25, 2015, changed the description for Absorbent Pads for Oil Spills, and changed the
5 description for Engine Oil. (Procurement Record, Tab 9.)

6 4. The IFB states, in relevant part:

7 a. That bidders are required to examine the drawings, specifications, schedule, and
8 all instructions, and that failure to do so will be at bidder's risk, (Procurement Record, Tab 7 at 26);

9 b. That it does not seek "ALL OR NONE" BIDS, meaning that it does not require
10 that bidders bid on all of the bid items, (Procurement Record, Tab 7 at 22);

11 c. That "[u]nit price for each unit offered shall be shown and such price shall include
12 packing unless otherwise specified. A total shall be entered in the amount column of the Schedule
13 for each item offered. In case of discrepancies between a unit price and extended price, the unit
14 price will be presumed to be correct." (Procurement Record, Tab 7 at 26);

15 d. That a 15% Bid Security of the total bid price must accompany the bid package,
16 (Procurement Record, Tab 7 at 22);

17 e. That the Government reserves the right to waive any minor irregularity in a bid
18 received, (Procurement Record, Tab 7 at 23).

19 5. MPFE, Morrico Equipment LLC, Pacific Petroleum Trading Corp., and BMI
20 Automotive, LLC, dba NAPA Auto Parts, submitted bids in response to the IFB. (Procurement
21 Record, Tab 3, 4, 5, and 6).

22 6. On August 25, 2015, GSA conducted a bid opening. (Procurement Record, Tab 8)

1 7. MPFE bid, at Item No. 79.1, Heater Hose (3/4 Inch Inner Diameter) 50 feet Roll, a unit
2 price of “\$537. X50 FT ROLL” and extended amount of \$268.50, (Agency Report, Tab 4 at 47),
3 and it provided bid security in the amount of \$42,000.00, (Procurement Record, Tab 3).

4 8. On September 28, 2015, GSA issued a Bid Status to MPFE, advising that its bid was
5 rejected due to no bid security or insufficient bid security, and remarking that the Standby Letter
6 of credit in the amount of \$42,000.00 was short by \$2,263.41 based on MPFE’s total bid amount
7 of \$295,089.37. GSA further advised that the bid was recommended for “Multiple Awards.”
8 (Procurement Record, Tab 11.)

9 10 11 12 13 14 11. On September 28, 2015, MPFE sent a letter to GSA wherein it contested GSA’s finding
11 that MPFE’s total bid amount was \$295,089.37, argued that its extended bid prices totaled
12 \$268,507.87, and protested GSA’s determination that MPFE’s bid bond was insufficient.
13 (Procurement Record, Tab 1.)

14 15 16 12. On September 29, 2015, GSA issued a stay of the procurement due to MPFE’s protest.
16 (Procurement Record, Tab 1.)

17 18 19 13. On September 29, 2015, GSA issued a Memorandum denying MPFE’s protest.
18 (Procurement Record, Tab 2.)

20 21 22 23 24 25 14. On October 2, 2015, MPFE filed an appeal to the OPA, with respect to GSA’s
20 September 29, 2015, denial of MPFE’s protest. MPFE requests that the OPA determine that the
21 \$537.00 per foot price was clearly a mistake, determine that the intended bid price was clearly
22 evident on the face of the bid document, order that the bid document be corrected to the intended
23 correct bid of \$5.37 per foot, and overturn GSA’s rejection of MPFE’s bid on the basis of
24 insufficient security. (Notice of Appeal ¶ 14.)

26 27 28 15. At the Pre-Hearing, GSA indicated that no award has been made on the IFB.

1 **III. ANALYSIS**

2 In this appeal of GSA's September 29, 2015 denial of MPFE's September 28, 2015 protest,
3 MPFE requests that the OPA (a) determine that the \$537.00 per foot price was clearly a mistake,
4 (b) determine that the intended correct bid price was clearly evident on the face of the bid document,
5 (c) order that the bid document be corrected to the intended correct bid of \$5.37 per foot, and (d)
6 overturn GSA's rejection of MPFE's bid on the basis of insufficient security. Pursuant to 5 G.C.A.
7 § 5703 and 2 G.A.R. § 12103, the Public Auditor shall review and determine GSA's denial of
8 MPFE's protest de novo.
9

10 Guam's procurement statute permits correction of erroneous bids, stating:

11 (f) Correction or Withdrawal of Bids; Cancellation of Awards. Correction
12 or withdrawal of inadvertently erroneous bids before or after award, or cancellation
13 of awards or contracts based on such bid mistakes, shall be permitted in accordance
14 with regulations promulgated by the Policy Office. After bid opening, no changes
15 in bid prices or other provisions of bids prejudicial to the interest of the Territory or
16 fair competition shall be permitted. Except as otherwise provided by regulation, all
17 decisions to permit the correction or withdrawal of bids, or to cancel awards or
contracts based on bid mistakes, shall be supported by a written determination made
by the Chief Procurement Officer, the Director of Public Works or head of a
purchasing agency.

18 5 G.C.A. § 5211(f). 2 GAR 4 § 3109(m)(4)(C), a regulation which requires correction of bids,
19 provides:

20 (m) Mistakes in Bids

21 ...
(4) Mistakes Discovered After Opening but Before Award.

22 ...
(C) Mistakes where intended correct bid is evident. If the mistake
23 and the intended correct bid is clearly evident on the face of the bid
24 document, the bid shall be corrected to the intended correct bid and may
25 not be withdrawn. Examples of mistakes that may be clearly evident on
the face of the bid document are typographical errors, errors in extending
unit prices, transportation errors, and arithmetical errors.

26 2 GAR 4 § 3109(m)(4)(C).
27

1 **A. Request to Determine Mistake**

2 MPFE requests that the OPA determine that the \$537.00 per foot price bid by MPFE for
3 Item No. 79.1 was clearly a mistake. In support of the request, MPFE argues that there are several
4 indications on the face of MPFE’s bid that the unit price for Item No. 79.1 was the subject of a
5 typographical error: (1) the “\$537.” unit price bid on Item No. 79.1 is the only line item unit price
6 entry in MPFE’s bid that provides a whole dollar figure not marked with zeroes following the
7 decimal; (2) the extended price for Item No. 79.1 in MPFE’s bid is listed as \$268.50, reflecting the
8 unit price of \$5.37 multiplied by 50 units; (3) the only other bidder on Item No. 79.1 included a
9 unit price of \$9.04 in its bid, which is closer in value to \$5.37 and not \$537; (4) including the
10 recalculated extended price, based on a unit price of \$537, results in a total bid price that is
11 \$26,581.50 greater than the correct total bid price and renders the bid bond submitted by MPFE
12 insufficient; and (5) common sense would dictate that one foot of heater hose for a bus at ¾ inch
13 diameter could not possibly cost over 100 times that of the unit price of one foot of heater hose for
14 a bus at 5/8 inch diameter, as shown at Item No. 80.1.

15 The OPA agrees that MPFE’s bid contains a mistake at Item No. 79.1, as the \$537 unit price
16 is inconsistent with an extended amount of \$268.50. Either the unit price is in error or the extended
17 amount is in error, or both. However, despite the inconsistency, it is not clear whether the mistake
18 is in the unit price or the extended amount. For example, it is not clear whether a mistake lies in
19 the placement of the decimal point for the unit price or extended amount.

20 Further, the IFB instructions explicitly state that “[i]n case of discrepancies between a unit
21 price and extended price, the unit price will be presumed to be correct.”

22 Therefore, the Public Auditor declines to find that there is a clear mistake in the “\$537.”
23 unit price, although the bid contains a clear mistake as to Item No. 79.1.

1 **B. Request to Determine Intended Correct Unit Price to Be Clearly Evident**

2 MPFE requests that the Public Auditor find that the intended correct unit price for Item No.
3 79.1 is clearly evident on the face of the bid to be \$5.37. MPFE argues that clear evidence of the
4 intended correct bid is seen from the fact that the unit price for Item No. 79.1 did not follow the
5 same format as the rest of the unit prices in MPFE’s bid, and that the extended amount bid by MPFE
6 reflects a unit price of \$5.37 and not \$537. As stated earlier, while there is clearly a mistake, it is
7 not certain whether the mistake is in the unit price or the extended amount. The bid contains no
8 clear evidence that the unit price was intended to be \$5.37 as opposed to \$537.
9

10 **C. Request to Correct Bid to State Unit Price of \$5.37**

11 MPFE requests that it be allowed to correct its bid to reflect a unit price of \$5.37 for Item
12 No. 79.1. As earlier discussed, while the bid contains a mistake, the intended correct bid amount
13 is not clearly evident. As a result, MPFE is not entitled to correct its bid pursuant to 2 GAR 4 §
14 3109(m)(4)(C).
15

16 **D. Request to Overturn GSA’s Rejection of MPFE’s Bid for Insufficient Security**

17 MPFE requests that the OPA overturn GSA’s rejection of its bid on the basis of insufficient
18 security.

19 Here, the IFB requires bidders to provide a 15% bid security, in accordance with 5 GCA §
20 5212. Section 5212 requires that the bid security be in amount equal to 15% of the total amount
21 bid. 5 GCA § 5212(b). The statute further requires that, “[w]hen the Invitation for Bids requires
22 bid security, noncompliance requires that the bid be rejected unless, pursuant to Policy Office
23 regulations, it is determined that the bid fails to comply in a non-substantial manner with the
24 security requirements.” 5 GCA § 5212(e). Guam’s procurement regulations provide that minor
25 informalities or insignificant mistakes discovered after opening but before award can be waived
26
27

1 without prejudice to other bidders. 2 GAR 4 §3109(m)(4)(B). Additionally, the IFB specifically
2 provides that the Government may waive minor irregularities in a bid.

3 At the Hearing, MPFE argued that its bid should not have been rejected completely, since,
4 even though it is not the lowest bidder on Item 79.1, it is the lowest bidder on several other items
5 bid and the Government of Guam would be disserved financially by awarding on bid items that are
6 priced higher than MPFE's. GSA responded that it first has to determine whether a bid is
7 responsive before looking at anything else, including potential savings to the Government of Guam,
8 and that the noncompliance with the bid security requirement rendered MPFE's bid nonresponsive.
9

10 A similar situation was addressed in Township of Hanover v. Int'l Fidelity Ins. Co., 122
11 N.J. Super. 544 (1973). In that case, the bid invitation required a surety bond of five percent, and
12 contained a provision authorizing the municipality to waive informalities in the bids. Id. at 546.
13 The lowest bidder submitted a bid bond in the amount of \$12,000, which was about \$2,000 less
14 than the required five percent. Id. at 547-48. The court upheld the municipality's waiver of the bid
15 security defect, on grounds of minimal extent of variation and of the parties' good faith in the
16 transaction. Id. at 550. The bid bond was in the substantial amount of \$12,000, although \$1,885
17 less than five percent of the bid of \$277,700, the court stated. Id. The court stated held that this
18 \$1,885 variance was minor and inconsequential, and that the municipality was authorized to waive
19 the variance and award the contract to the lowest bidder. Id.
20
21

22 Here, MPFE's bid security in the amount of \$42,000 is short by \$2,263.41, based on the
23 total bid amount of \$295,089.37. However, the \$295,089.37 total bid amount is based on the higher
24 price for item 79.1. If item 79.1 is eliminated, then the bid security of \$42,000 would have been
25 sufficient. The Public Auditor finds that this is a minor variation and that MPFE's bid bond of
26 \$42,000 is a substantial amount. Thus, MPFE's noncompliance with the bid security requirements
27

1 of the IFB is non-substantial, and its bid should not have been completely rejected as non-
2 responsive for failure to comply with the bid security requirements.

3 The non-substantial nature of MPFE's noncompliance is also evident from the type of bids
4 invited by GSA. As the IFB does not seek "ALL OR NONE" BIDS, it contemplates making
5 multiple awards to different bidders as to line items. In fact, the Bid Status to MPFE states that
6 GSA recommends "Multiple Awards." If MPFE is not the lowest responsible bidder as to Item No.
7 79.1, and MPFE's bid security is otherwise sufficient, then MPFE's failure to comply with section
8 5212, in providing 15% bid security based on the total amount bid, is obviously non-substantial.
9 In that situation, GSA clearly should not have rejected MPFE's bid for failure to comply with the
10 bid security requirements.
11

12 Of the four bidders that submitted bids, only two submitted bids for majority of the items.
13 If MPFE is eliminated, there will only be one bidder for majority of the items, thus eliminating
14 competition and resulting in higher costs to the government. MPFE calculated additional costs of
15 \$118,746.41 if they are eliminated, while OPA calculated \$125,478.96 in additional costs.
16 Although there is a difference in the additional cost calculated by MPFE and OPA, it still results in
17 significantly higher costs to the government.
18

19 One of the underlying purposes and policies of Guam's procurement law is to provide
20 increased economy in territorial activities and to maximize to the fullest extent practicable the
21 purchasing value of public funds of the Territory. 5 G.C.A. § 5001(b)(5). Thus, bids should not
22 be rejected for waivable minor informalities or insignificant mistakes, at the cost of realizing
23 savings for the people of Guam.
24

25 Based on the foregoing, the Public Auditor concludes that MPFE shall not be permitted to
26 correct its bid and that GSA should not have rejected MPFE's bid for insufficient security,
27

1 especially if MPFE was not the lowest responsible bidder as to Item No. 79.1 and MPFE's bid
2 security was otherwise sufficient.

3 IV. CONCLUSION

4 Based on the foregoing, the Public Auditor hereby determines the following:

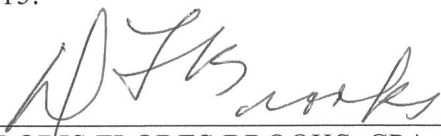
5 1. MPFE cannot correct its unit price bid at Item No. 79.1 under 5 GCA § 5211(f) or 2 GAR
6 4 § 3109(m)(4)(C).

7
8 2. GSA should not have rejected MPFE's bid for insufficient security, especially if MPFE
9 was not the lowest responsible bidder as to Item No. 79.1 and MPFE's bid security was otherwise
10 sufficient.

11 3. Accordingly, MPFE's procurement appeal is hereby GRANTED IN PART and DENIED
12 IN PART.

13
14 This is a Final Administrative Decision. The Parties are hereby informed of their right to
15 judicial review in the Superior Court of Guam of a Decision of the Public Auditor under 5 G.C.A.
16 Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law. In
17 accordance with 5 G.C.A. § 5481(a), such action shall be initiated within fourteen (14) days after
18 receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties
19 and their respective attorneys, in accordance with 5 G.C.A. § 5702, and shall be made available for
20 review on the OPA website at www.opaguam.org.

21
22 SO ORDERED this 31st day of December, 2015.

23
24 
25 DORIS FLORES BROOKS, CPA, CGFM
26 Public Auditor of Guam