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Re: OPA-PA-18-001 Decision

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Jerrick Hernandez

Auditor

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BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

IN THE APPEAL OF JMI-EDISON, Appellant, GUAM MEMORIAL HOSPITAL AUTHORITY, Purchasing Agency.	DOCKET NO. OPA-PA-18-001 **DECISION**

I. INTRODUCTION

This is the Decision of the Deputy Public Auditor for Procurement Appeal, OPA-PA-18-001. Appellant, JMI-Edison ("JMI") filed its appeal on January 16, 2018. JMI's appeal is made from a Decision on Protest of Method, Solicitation or Award. JMI appeals the Guam Memorial Hospital Authority's ("GMHA") December 28, 2017 denial of JMI's Protest.

The Appeal was heard on May 22 and 23, 2018 before Deputy Public Auditor Yuka Hechanova and Hearing Officer Peter C. Perez, Esq. Joshua D. Walsh, Esq. appeared on behalf of JMI along with Appellant representative, John Ilao, JMI Vice-President. Rachel Taimanao-Ayuyu, Esq., appeared on behalf of Purchasing Agency, GMHA, along with agency representative Dolores F. Pangelinan, Hospital Supply Management Administrator. Georgette Bello Concepcion, Esq. appeared on behalf of Interested Party, Oka Pacific, Inc., along with Interested Party representative Simon Sanchez.

In its Notice of Procurement Appeal, JMI asserts that GMHA's rejection of JMI's bid on the ground that JMI's bid did not meet bid specifications was wrong. JMI requests that, as the lowest priced responsive offeror, JMI should be made the awardee under GMHA IFB 013-2017.

The Deputy Public Auditor holds that: (1) JMI's Procurement Protest is sustained; (2) GMHA's determination that JMI's Bid was non-responsive was in error; (3) JMI was the lowest responsible and responsive bidder on GMHA IFB 013-2017; (4) JMI shall be awarded GMHA IFB 013-2017; and (5) the parties shall bear their respective costs and attorney's fees.

II. FINDINGS OF FACT

The Deputy Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, and has considered the testimony and arguments made during the hearings that were held on May 22 and 23, 2018. Based on the aforementioned record in this matter, the Deputy Public Auditor makes the following findings of fact:

A. The IFB

1. On July 19, 2017, GMHA issued IFB 013-2017 ("IFB") for the purchase, installation, and training of new CT scanners. (Agency Procurement Record ("PR") Tab H, 739).
2. The IFB provided, "Each Bid must be submitted on the prescribed Bid Form contained within Appendix A and shall be accompanied by all of the required forms and documents required in these Specifications." (IFB Section 1-3; PR, Tab H, 744).
3. The IFB provided, "...the award will be made to the lowest responsive and responsible bidder." (IFB Section 1-22, PR, Tab H, 749).

4. The IFB provided, "Failure to submit a bid that conforms to the requirements of the Bid Plans and Specifications in every respect may subject the bidder to being deemed non-responsive and therefore having their bid rejected." (*Id.*).

5. The IFB provided, "Descriptive literature is required to establish, for the purpose of evaluation and award, details of the product(s) the bidder proposes to furnish including design, materials, components, performance characteristics, methods of manufacture, construction, assembly or other characteristics which are considered appropriate." (IFB Section 1-42, PR, Tab H, 753).

6. The IFB Scope of Services provided:

> The Guam Memorial Hospital Authority ("GMHA") is soliciting bids from qualified Contractors to purchase one (1) 64 slice state of the art Computed Tomography (CT) system (to evaluate the entire body such as lungs, heart, brain, extremities) and one (1) 64 slice fully cardiac configured state of the art system (that is, to evaluate the coronaries and other structures non-invasively), both with all resources, services, labor, materials, and supplies necessary to deliver, install, commission, train personnel and set in place the new equipment in the hospital Radiology Department; and provide on-going local or remote technical and application support and service for the equipment. It is imperative that the selected Bidder has local support on site for emergency maintenance calls.
>
> (IFB Section 2-1, PR, Tab H, 786).

7. The IFB Technical Specifications provided:

> The systems should be new, FDA-compliant, state-of-the-art console CT systems with full digital technology to include all upgradable software, hardware, reporting system, connection peripherals. Vendor must consult with MIS/IT to assure compatibility with GMHA networking/connectivity configuration and unit is preferred to be upgradable as new updates, software and new services become available…
>
> One CT scanner should be cardiac, vascular (CTA, dissections, etc.) capable. The other CT scanner should be capable of routine arterial and venous studies for pediatric, adult, and geriatric patients such as brain, body, orthopedic, and vascular.

Among the technical specifications for both scanners, the IFB required that the system should have:

- 64 slice acquisition should be possible with one 360-degree rotation;
- Minimum slice thickness should be 0.625mm; and
- Slice acquisition of 64 slices.

(IFB Section 2-3, PR, Tab H, 792-793).

B. Procedural Background

8. Four bidders submitted bid packets in response to the IFB. The bidders included JMI and Oka Pacific, Inc. (PR, Tab J).
9. The GMHA Evaluation Committee was comprised of Dr. Tuan Nguyen, Dr. Kozue Shimabukuro, Zaldy Tugade, Nicole Dhanraj, and Jeffery Hughes. (PR, Tab J, 851).
10. On October 6, 2017, GMHA opened the bid packets. (PR, Tab J, 845-849)
11. On November 27, 2017, the Evaluation Committee submitted its determinations to the GMHA Hospital Materials Management Administrator. According to the Evaluation Committee, "JMI submitted the lowest bid offer however, their bid did not meet the bid specifications and their bid is being rejected. GMHA asked for a 64 slice acquisition and their bid was for only a 32 slice acquisition." (PR, Tab J, 851).
12. On December 18, 2017, GMHA issued a Bid Status to JMI rejecting JMI's bid stating:

    Nonconformance with specifications. Bid rejected due to bid proposal did not meet bid specifications. Bid Specification requested 64 slice acquisition, bid submission identifies 32 slice acquisition.

    (PR, Tab K, 857 to 858; AE 2).
13. On December 18, 2017, GMHA issued a Notice of Intent of Possible Award for Bid GMHA IFB: 013-2017 to Oka Pacific. (PR, Tab K, 855).

14. On December 22, 2017, JMI filed a Procurement Protest with GMHA. (PR, Tab L). In its Protest, JMI requested that GMHA render a decision that rescinds the December 18, 2017 determination that JMI's bid should be rejected; and awards GMHA IFB No. 013-2017 to JMI as the lowest responsive and responsible bidder. (PR, Tab L, 868 to 870).
15. On December 28, 2017, GMHA denied JMI's Protest as being without merit. (PR, Tab M, 889 to 891).
16. On January 16, 2018, JMI filed a Notice of Appeal with the Office of Public Accountability. (PR, Tab N, 893).
17. Hearings on the Appeal were held on May 22 and 23, 2018.

C. The JMI Bid

18. In a letter dated September 27, 2017, JMI Sales Manager, Jean O. Grape, wrote GMHA stating, "JMI-Edison is pleased to submit this offer for the above referenced project. This proposal will comply with GMHA Procurement and Installation of New CT Scanners under GMHA IFB #: 013-2017 requirement." (Appellant Exhibit ("AE") 3).
19. On October 6, 2017, JMI submitted its Bid. (Agency Report "AR" Tab G; AE 4).
20. JMI submitted a bid proposal in the amount of $1,224,040.00. (JMI Bid, Appendix A, Bid Proposal Form, AR, Tab G; AE 5).
21. In JMI's Bid, Appendix B, Price Bid Form, JMI included its unit prices for (1) a CT 64 cardiac capable system, and (2) a CT 64 non cardiac capable system, with a total bid amount of $1,224,040.00. (JMI Bid, Appendix B, Price Bid Form, AR, Tab G; AE 6).
22. In JMI's Bid, Appendix C, Bid Bond, JMI submitted a bid bond in the amount of 15% of the total bid amount. (AE 7).

23. The JMI Bid's Imaging Performance Images and Specifications provided, "There are 64 Detector Rows, 54,272 Detector Elements and 64 Slices/Rotation. *Appendix Tab 5.1 Data Sheet.* (JMI Bid, AR, Tab G, 1.2; AE 8).

24. The JMI Bid identified the CT model as the GE Revolution EVO, with a Clarity Highlight Detector 64 slice system, and included catalog number B78B0CE for the 64 Channel Detector Upgrade. (AR, Tab G, 1.3; AE 17).

25. The JMI Bid Equipment Delivery, GE CT Scanner Technical Training, Course Competencies referred to working safely in the 64 slice CTs environment. (AR, Tab G, 4; AE 18).

26. The JMI Bid CT Data Sheet System Configuration, System Hardware, and Optional Cardiac Package identified 64 slice acquired CTs. (AR, Tab G, Appendix 5-1; AE 20, 21, 22).

27. The JMI Bid included information showing CT images slice thickness of 0.625mm. (AR, Tab G, 1.2; AE 9, 10, 11, 12, 13, 14, 15, 16, 22).

III. ANALYSIS

Pursuant to 5 G.C.A. § 5703, the Public Auditor reviews GMHA's denial of JMI's Protest *de novo*. Pursuant to 2 G.A.R. , Div. 4 Chap. 12 §12116, in the event of disqualification or recusal of the Public Auditor, the Public Auditor shall designate a member of her staff to preside over the matter under the appeal. The Deputy Public Auditor addresses JMI's appellate issues as follows.

A. GMHA'S REJECTION OF JMI'S BID WAS IN ERROR.

5 G.C.A. § 5211(e) provides:

> Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Chapter. Bids shall be evaluated based on the requirements set for in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship,

> delivery and suitability for a particular purpose... The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids.

Generally, in competitive sealed bidding, the contract shall be awarded to the lowest responsible and responsive bidder whose bid meets the requirements set forth in the IFB. 5 G.C.A. § 5211(g), 2 G.A.R., Div. 4, Chap. 3, § 3109(n)(1).

The term "responsible bidder" means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability, which will assure good faith performance. 5 G.C.A. § 5201(f), 2 G.A.R., Div. 4, Chap. 3, § 3109(n)(2), 2 G.A.R., Div. 4, Chap. 3, § 3116.

The term "responsive bidder" means a person who submitted a bid which conforms in all material respects to the IFB. 5 G.C.A. § 5201(g), 2 G.A.R., Div. 4, Chap. 3, § 3109(n)(2).

JMI was the lowest bidder with a total bid price of $1,244,040.00. The next lowest bid price offered was $1,350,000.00. JMI's total bid price was $105,960.00 lower than the next lowest offer.

JMI was the lowest responsible bidder. JMI Vice President John Ilao confirmed in his oral testimony that:

- JMI had previously provided 64 acquired slice CT machines to GMHA and to the Guam Naval Hospital.
- Neither GMHA nor Guam Naval Hospital ever had any issues or complaints about JMI's compliance with those procurements.
- JMI has never been a target of a responsiveness or performance complaint from GMHA in all of the years JMI has been providing medical goods, services, and devices to GMHA. JMI agreed to comply in all material respects with the IFB.

JMI was the lowest responsive bidder. JMI's bid conforms in all material respects to the IFB. JMI offered 64 acquired slice CTs for both the cardiac and non-cardiac systems. The image thickness produced is 0.625mm.

Based on the above, GMHA's rejection of JMI's bid as nonresponsive was in error.

B. IFB DID NOT PROHIBIT UPGRADED CTs.

GMHA's Dr. Nicole Dhanraj developed the IFB Specifications and was on the Evaluation Committee. In her oral testimony, she explained that GMHA sought CTs that produced 64 acquired slices, and images with a thickness of 0.625mm. It was the Evaluation Committee's consensus that JMI offered 32 acquired slice CTs, not true 64 acquired slice CTs. She explained that the IFB Specifications did not allow upgrades. However, Dr. Dhanraj was unable to refer to any section of the IFB that prohibited upgrades.

JMI Vice President John Ilao testified that JMI's proposed CTs are 64 acquired slice capable for both the cardiac and non-cardiac systems. He confirmed that the basic model of the machines are 32 acquired slice capable, and clarified that they will be upgraded to the 64 acquired slices when 9shipped from its manufacturer in order to meet GMHA's IFB specifications.

Mike Teramoto, a GE Healthcare Region Modality Leader, confirmed in his oral testimony that the JMI proposed CTs were new and would be 64 acquired slice capable.

Based on the above, GMHA's assertion that the IFB prohibited upgraded CTs was unsupported by the language of the IFB.

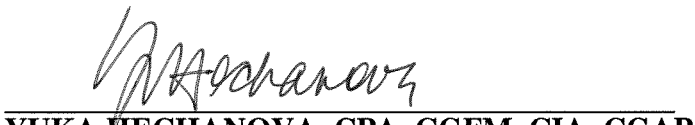
IV. CONCLUSION

The Deputy Public Auditor holds that:

1. JMI's Procurement Protest is sustained.
2. GMHA's determination that JMI's Bid was non-responsive was in error.
3. JMI was the lowest responsible and responsive bidder on GMHA IFB 013-2017.
4. JMI shall be awarded GMHA IFB 013-2017.
5. The parties shall bear their respective costs and attorney's fees.

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.opaguam.org.

DATED this 29th day of June, 2018.



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