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OPA-PA-20-004 GMHA's Hearing Brief and Amended Witness List

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Hafa Adai,

Please find the GMHA's Hearing Brief and Amended Witness List attached. Ms. Nucum and I spoke over the telephone this past weekend and she advised that Mr. Julisis Nucum is off-island and may not have reliable internet to attend the hearing via Zoom videoconference scheduled for September 14, 2020. Therefore, the GMHA has amended its witness list to include Mr. Cesar Cordero, JRN's Operations Manager. I hope that JRN can make Mr. Cordero available during the GMHA's case-in-chief. If necessary, I can issue a formal Notice to Appear.

Ms. Nucum and I have agreed to provide each other with professional courtesies with regards to the order of presentation of witnesses and continued hearing dates, as may be required and approved by the OPA at its convenience. However, I am concerned with the logistics of a Zoom hearing that involves numerous exhibits. I will admit that I am not that savvy with videoconferencing (other than knowing how to call in and attend a hearing/meeting) and am not sure how I would present a witness with an exhibit for identification and discussion, for example. I also need to work out the logistics of attending the hearing with witnesses from the GMHA. I appreciate any guidance the OPA can provide as to how it intend to conduct the hearing.

Thank you in advance,

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2 attachments

202-09-08 Amended Witness List.pdf
50K



2020-09-08 GMHA's Hearing Brief.pdf
269K

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7
8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
9 **GOVERNMENT OF GUAM**

10 IN THE APPEAL OF:

11 JRN Air Conditioning & Refrigeration, Inc.

12 Appellant.

CASE NO: OPA-PA 20-004

GMHA'S HEARING BRIEF

13 **COMES NOW** Purchasing Agency Guam Memorial Hospital Authority ("GMHA"), by and
14 through undersigned counsel of record, and submits its Hearing Brief pursuant to the Office of Public
15 Accountability's Scheduling Order issued on July 13, 2020.

16 **MEMORANDUM OF POINTS & AUTHORITIES**

17 **UPON FINDING THAT SUCH DETERMINATION WAS REASONABLE, THE OPA MAY AFFIRM THE**
18 **GMHA'S DETERMINATION THAT JRN'S BID AND SUBSEQUENTLY SUBMITTED DOCUMENTS**
19 **WERE NONRESPONSIBLE.**

20 In reviewing a bid protest, an agency's action may be set aside if it is found there is no rational
21 basis to support the agency's determination. Guam law applies the substantial evidence or reasonableness
22 standard. *See Basil Food Indus. Servs. Corp. v. Guam*, 2019 Guam 29 ¶ 8 (holding "[f]actual issues
23 decided by the Public Auditor" are "clearly erroneous" and "subject to reversal" if unsupported by
24 substantial evidence. "Substantial evidence is more than a mere scintilla, but less than a preponderance.
25 It means such relevant evidence as "a reasonable mind might accept as adequate to support a conclusion."
26 (citations omitted)).

27
28 At issue is whether the GMHA was reasonable in its determination that Appellant JRN Air

1 Conditioning & Refrigeration, Inc.’s (“JRN”) bid and subsequently submitted documents were non-
2 responsible i.e., did not provide sufficient information to demonstrate JRN’s statement of qualification
3 and performance data specific to boiler installation.

4 Title 5 GCA §5201(f) defines a Responsible Bidder as “a person who has the capability in all
5 respects to perform fully the contract requirements, and the integrity and reliability which will assure
6 good faith performance.” Title 26 GAR Div 2 §16317(2)(b)(1) and 2 GAR Div 4 §3116(b)(2) *Standards*
7 *of Responsibility*, states in relevant part, “[f]actors to be considered in determining whether the standard
8 of responsibility has been met include whether a prospective contractor has: (A) available the appropriate
9 ... personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to
10 meet all contractual requirements; (B) a satisfactory record of performance...” Title 2 GAR Div 4
11 §3116(b)(4) *Duty Concerning Responsibility* states, “Before awarding a contract, the Procurement
12 Officer must be satisfied that the prospective contractor is responsible.”
13

14 To establish the reasonableness of its determination, the GMHA will prove the following through
15 evidence at hearing:
16

- 17 1. IFB 002-2020 included a Special Reminder to Prospective Bidders which ends with two sentences
18 in bold which state, “Failure to comply with any of the requirements above may be cause for
19 disqualification and rejection of the bid. This reminder must be signed and returned in the bid
20 envelope together with the bid.”
- 21 2. JRN’s representative signed, dated, and submitted as part of its bid the Special Reminder
22 acknowledging that JRN had “read and understand its intent and implications.”
- 23 3. JRN’s bid did not include a Statement of Qualifications and Performance Data relevant to the
24 IFB’s scope of work: the removal and replacement of one (1) boiler unit and piping system.
25 Instead, JRN submitted two statements of qualifications specific to air conditioning sales and
26 repair services that included lists of licenses, memberships, past and current projects, and supplier
27
28

1 information.

- 2 4. The GMHA provided JRN with two opportunities, through letters dated December 5, 2019 and
3 January 24, 2020, to provide its Statement of Qualifications and Performance Data relevant to the
4 IFB's scope of work: the removal and replacement of one (1) boiler unit and piping system.
- 5 5. In its December 5, 2019 letter, the GMHA referenced the Special Reminders to Prospective
6 Bidders and wrote:
- 7 1) Line Item # 1 – Statement of Qualifications and performance data
8 - Qualification and performance data was received for Air Conditioning Sales & Repair
9 Services. We are unable to locate any statements, experience or projects related to boiler
10 installation.
- 11 2) Special Reminder to Prospective Bidders line item #13 - Copy of Current Certificate of
12 Authorization to contract for Engineering Services issued by the Guam Board of
13 Registration for Professional Engineers, Architects and Land Surveyors: Documentation
14 not included or addressed in bid proposal.
- 15 6. JRN responded with two letters dated December 10, 2019 and received on December 11, 2019.
16 One letter contained information about JRN's boiler equipment supplier and a final sentence
17 which said, "our Mechanical Engineer in our employ has experience in the installation of
18 Boilers after having been previously employed in Mechanical, Electrical and Plumbing
19 Companies (Please see submitted Resume) and will be working under a Professional Engineer
20 registered here in Guam." The second letter attached "credentials of a Professional Engineer
21 which was retained by our company [JRN] to provide various tasks in engineering fields."
- 22 7. In its January 24, 2020 letter, GMHA wrote to JRN, "your letter states that a Mechanical Engineer
23 employed at JRN has experience in installation of boilers and that such experience can be found
24 in his resume. However, the GMHA was unable to identify any such statements, experience, or
25 projects related to boiler installation. Please provide qualification and performance data specific
26 to boiler installation."
- 27 8. Also on January 24, 2020, the GMHA sent a letter to AMmanabat Corporation
28

1 (“AMmanabat”), the second lowest bidder, and requested documentation to satisfy Special
2 Reminder to Prospective Bidders line item #13 - Copy of Current Certificate of Authorization
3 to contract for Engineering Services issued by the Guam Board of Registration for Professional
4 Engineers, Architects and Land Surveyors (“PEALS”).

5 9. On January 27, 2020, AMmanabat reminded the GMHA that its IFB included plans and
6 specifications provided by an Architectural and Engineering (A&E) firm and calling into
7 question the need for bidders to engage another professional engineer.
8

9 10. On January 28, 2020, the GMHA decided that because the IFB included plans designed by an
10 A&E firm, bidders should not be required to contract with another professional engineer.

11 11. On January 29, 2020, JRN submitted an “Affidavit Disclosing Retainage of Professional
12 Services” made by Mr. Mauro Narvarte to satisfy the now moot requirement for Current
13 Certificate of Authorization to contract for Engineering Services issued by the Guam Board of
14 Registration for PEALS. JRN also submitted an “Affidavit of Professional Experience” made
15 by JRN’s mechanical engineer, Mr. Teddy G.R. Garcia who attested to maintenance and other
16 experience with boiler systems in the years 2004 and 2005, that was not previously stated in
17 his five-page resume submitted by JRN as part of its bid.
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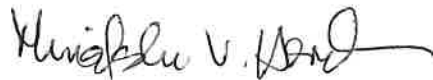
19 12. On April 13, 2020, the GMHA issued its written determination of non-responsibility pursuant to
20 5 GCA §5230 detailing the factors considered when determining responsibility pursuant to 26
21 GAR Div 2 §16317(2)(b) and 2 GAR Div 4 §3116(b), including a prospective contractor’s ability
22 to meet all contractual requirements. The GMHA stated that JRN’s bid and subsequent
23 documentation were non-responsible because they “did not provide sufficient information to
24 demonstrate your [JRN’s] statement of qualification and performance data specific to boiler
25 installation.”
26

1 Appellant's counsel argues for the first time that certain sections of Mr. Garcia's resume should
2 have been considered by the GMHA as relevant experience. See Appellant's Hearing Brief filed
3 September 8, 2020, p. 2, ll. 11-17. Appellant's counsel further proffers the following conclusory
4 statement: "Mr. Garcia, also being a licensed mechanical engineer in the Philippines, categorically means
5 that he possesses the general knowledge relevant to the scope of work." *Id.*, ll. 17-19.

6 Such contentions are belated and should have been set forth by JRN in response to the GMHA's
7 January 24, 2020 letter which sought to locate Mr. Garcia's experience in boiler installation in his resume.
8 Pursuant to 2 GAR Div 4 §3116(b)(2)(B), "The prospective contractor shall supply information
9 requested by the Procurement Officer concerning the responsibility of such contractor. If such
10 contractor fails to supply the requested information, the Procurement Officer shall base the
11 determination of responsibility upon any available information or may find the prospective contractor
12 nonresponsible if such failure is unreasonable." 2 GAR Div 4 §3116(b)(2)(B); *see also* 26 GAR, Div.
13 2, §16317(1). The GMHA correctly and reasonably based its determination on the information and
14 documents provided to it by JRN
15

16
17 Respectfully submitted this 8th day of September 2020.

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19 LAW OFFICES OF MINAKSHI V. HEMLANI, P.C.
20 Counsel for Purchasing Agency GMHA

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22 Minakshi V. Hemlani, Esq.
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