



Jerrick Hernandez <jhernandez@guamopa.com>

In the Appeal of All Business Enterprises Corp OPA-PA-22-002

Monique Sanchez <MSanchez@guamlawoffice.com>

Thu, Apr 21, 2022 at 4:36 PM

To: "jhernandez@guamopa.com" <jhernandez@guamopa.com>

Cc: "arcamacho@triton.uog.edu" <arcamacho@triton.uog.edu>, "cguerrero@triton.uog.edu" <cguerrero@triton.uog.edu>, Seth Forman <Forman@guamlawoffice.com>

Good afternoon All,

Please see the attached *Appellant's Hearing Brief* regarding the above referenced matter.

Kindly confirm receipt of this email.

Thank you.

Regards,

Monique J. Sanchez

Legal Assistant to Tim Roberts, Seth Forman, David Dooley & Colin Jones

ROBERTS FOWLER & VISOSKY LLP

865 South Marine Corps Drive, Suite 201

Tamuning, Guam 96913

Tel: (671) 646-1222

Fax: (671) 646-1223

Email: msanchez@guamlawoffice.com

 **04.21.22 Appellant's Hearing Brief.pdf**
1680K

Seth Forman
Roberts Fowler & Visosky LLP
865 South Marine Corps Drive, Ste. 201
Tamuning, Guam 96913
Telephone (671) 646-1222
Facsimile (671) 646-1223
E-mail: Forman@guamlawoffice.com

Attorneys for Appellant
All Business Enterprises Corp.

OFFICE OF PUBLIC ACCOUNTABILITY

PROCUREMENT APPEAL

In the Appeal of)	APPELLANT’S HEARING BRIEF
)	
All Business Enterprises Corp.,)	
)	Docket No. OPA-PA-22-002
Appellant.)	
_____)	

I. INTRODUCTION

Appellant All Business Enterprises Corp. (“ABE”) submits the following Hearing Brief. ABE, the third place bidder in the procurement at issue, contends that both the first and second place bids were non-responsive.

II. FACTS

A. Bid opening, initial evaluation, intent to award, and award.

The bid opening for UOG IFB NO. B21-17, Purchasing of HVA Equipment, took place on December 6, 2021 at 3:15 p.m. Exhibit 1, ABE Exhibit List (Abstract Analysis). There were three bids. In the Abstract Analysis, Tony’s Workshop (“Tony’s”) had the lowest bid. JWS had the second lowest bid. ABE came in third. *Id.* The Notice of Intent to Award to Tony’s Workshop was issued the same day by 5:03 p.m. *Id.* (E-mail from UOG Procurement and Notice of Intent). The following day UOG issued its Notice of Award to Tony’s and a rejection of the ABE bid. Exhibits 2 and 3, ABE Ex. List. It seems very unlikely that UOG reviewed the bulky bids, with

many pages of fine print and diagrams, in the one hour forty-eight minutes before issuing the Notice of Intent or even in the day before making the award.

B. Bid requirements for Phenolic coating.

One major requirement of UOG IFB B21-17 was Factory Phenolic Coating. Section 2.6.2.1 in the bid specifications was captioned "**Phenolic Coating**" and stated, in part, "Provide a resin base thermosetting phenolic coating." Exhibit 4, Abe Ex. List, at p. 36 (boldface in original).¹ Section 2.7.2.1 was captioned "**Phenolic coating**" and again provided, in part, "Provide a resin base thermosetting phenolic coating." *Id.* at p. 59 (boldface in original).

C. Tony's bid did not include Phenolic coating for six units.

The description for six of the units included in Tony's bid did not include Factor Phenolic Coating. The following Unit Reports from Tony's bid show no indication of Factory Phenolic Coating:

1. Unit Report for RFK Building First Floor Main Entrance 112321; Ref: page 29 of 178, Exhibit 5-1, ABE Ex. List
2. Unit Report for 7.5 RFK Building First Floor AV Room 112321; Ref: page 43 of 178, Exhibit 5-2, ABE Ex. List
3. Unit Report for 7.5 RFK Building First Floor Office 112321; Ref: page 56 of 178, Exhibit 5-3, ABE Ex. List

¹ Unless otherwise indicated, page numbers in citations to exhibits refer to the original page number on the exhibit.

4. Unit Report for PIP (GLE) Second Floor 112321; Ref: page 69 of 178, Exhibit 5-4, ABE Ex. List
5. Unit Report for 20 Science Building Third Floor 112321; Ref: page 106 of 178, Exhibit 5-5, ABE Ex. List
6. Unit Report for Lecture Hall Auditorium 112321; Ref: page 143 of 178, Exhibit 5-6, ABE Ex. List

This was not a mere oversight. Tony's indicated on the Unit Reports for other units that it was providing the "E-Coat", i.e. the required coating. *See* Exhibit 6 to ABE Ex. List.

D. JWS's bid did not include Phenolic Coating on any units.

The Technical Report in the submission from JWS has no indication of Factory Phenolic Coating for any of the units. *See* Exhibit 7, ABE Ex. List. *See also* Exhibit 9, ABE Ex. List (chart listing Technical Reports omitting Phenolic Coating, followed by documents listed in chart with some overlap with Exhibit 7).

E. Bid requirements for copper tubes and copper fins

Another major requirement of UOG IFB B21-17 was that the units have copper tubes and copper fins. Section 2.2.1.1 in the bid specifications stated in part, "Provide coils with copper tubes of 3/8 inch diameter with copper fins that are mechanically bonded or soldered to the tubes." Exhibit 4, ABE Ex. List, at p. 28. Section 2.2.1.4.1(c.) of the bid specifications stated in part, "Coils must have copper tubes of 3/8 inch minimum diameter with copper fins that are mechanically bonded or soldered to the tubes." Exhibit 4, ABE Ex. list, at p. 30. Tony's and JWS failed in whole or in part to comply with this requirement.

In re Appeal of All Business Enterprises Corp.
Docket No. OPA-PA-22-002
Appellant's Hearing Brief

Through some combination of the bulk of materials that had to be reviewed on short deadlines, possible miscommunication between ABE and its technologically illiterate counsel, ABE officials being off-island when the Notice of Appeal was being drafted, and ABE's counsel having medical issues requiring two surgeries that limited his work from mid-January to early March, the text of the protest letter and the text of the Notice of Appeal only addressed the Phenolic Coating issue. The undersigned counsel recognizes that while such situations and excuses would be grounds for an extension request or an amended complaint with relation back in a civil action, they may not excuses under the statute setting deadlines for procurement protests and OPA appeals. However, someone at ABE did append some pages after the exhibits at the end of the initial protest before it was delivered to UOG. The first of these pages, attached hereto as "Exhibit 1", was on ABE Stationary. On this page, under the headings "P R O T E S T" and "UOG BID No. B21-17 BID MAJOR REQUIREMENT", three items were listed. These included Buy America Act and Phenolic Coating. The other item was "Spec. Section 2.2.1.1 and Section 2.2.1.4.1 (c); Copper coil; Copper Fin; per UOG Spec. See attachment." Those specifications and others, and two Question and Answer pages, followed. The entire protest, including those additional pages, was included as an exhibit in the Notice of Appeal filed on February 7, 2022. Thus the requirement for copper coils and fins was mentioned on a page captioned "Protest", and the relevant specifications were set forth in whole, in both ABE's protest and its Notice of Appeal.

ABE contends (albeit because it has no choice but to so contend) that the issue of copper coils and fins was raised in a timely manner by the service of a protest that (a) contended the Tony's and JWS bids were non-responsive and (b) included the above-referenced material about copper coils and fins in the protest documents.

F. Tony's did not comply with the requirement for copper coils and fins.

Tony's did not comply with the requirement for copper coils and fins for some or all of the units. Exhibit 8 in ABE's Exhibit list and binder begins with a chart summarizing Guide Specifications for Tony's submittal, followed by the pages from the Guide Specification in Tony's submittal that are referred to in the chart. In some instances, Tony's submittal refers to "microchannel" rather than copper or aluminum. "Microchannel" refers to aluminum. *See* Exhibit 11 to ABE Ex. List.²

As shown in the chart in ABE's Exhibit 8, Tony's HVAC Guide Specifications indicated his bid included eight units where both the tube coils and fins were aluminum, and six units with copper tube coils and aluminum fins. This is confusing because in Unit Reprints elsewhere in Tony's submittal, Tony's did specify that some units had "Copper E-Coat Fin/Copper Tube". Exhibit 6 to ABE Ex. List. Because of this conflicting information, it is difficult to determine how many of the units were non-compliant as to copper, but definitely some of them were.

² It may seem strange for ABE to use an exhibit praising microchannel. When taking exhibits from the internet concerning the use of aluminum, ABE has sought to use exhibits that set forth facts and

G. JWS did not comply with the requirement for copper fins.

The JWS submittal provided for copper coils, but not copper fins. Exhibit 9 in ABE's Exhibit list begins with a chart summarizing Technical Reports and Specifications for the JWS submittal, followed by the pages from those documents in the JWS submittal that are referred to in the chart. These documents show copper tube coils but aluminum fins.

H. ABE's bid was responsive.

Just as it would have made no sense for ABE to challenge the award to Tony's if the JWS bid was responsive, similarly it would have made no sense for ABE to protest if its own bid were not responsive as to the Phenolic Coating and the requirement for copper. Exhibit 10 to the ABE Exhibit List includes excerpts from ABE's bid submittal to show that ABE was responsive as to these issues.

I. Buy America issue

In its protest and appeal, ABE raised a "Buy America" issue concerning JWS. In its comments on the Agency Report, ABE noted the issue is probably moot because (a) if UOG prevails, the award to Tony's stands and there will be no need to reach any issue pertaining to JWS, or (b) if ABE prevails as to the award to Tony's, the ruling would apply to the similar issues raised as to JWS.

that are not biased towards ABE's position. Exhibit 11 actually comes from a website maintained by a division of Carrier, Tony's supplier, although the Carrier banner was not printed on the page.

Persons reading this brief may wish to skip over anything further concerning this apparently moot issue. If anyone is still reading this paragraph, ABE originally contended, based on its knowledge of the industry, that Dunham Bush ("DB") was manufacturing the type of units at issue in Malaysia, not the United States. UOG contended the units would be manufactured in Florida, and submitted documents including an unsigned letter from a DB salesman to that effect. In research done subsequent to UOG's filing on the matter, ABE has (a) found news reports of a DB manufacturing plant opening in Florida in 2019, and (b) been informed by an industry contact that the plant is not in operation, manufacturing has been shifted back to Malaysia, and the building is used by DB for administrative operations. It appears the DB plant may (or may not) have been operational when JWS submitted its bid. The plant may (or may not) have closed due to the pandemic that hit shortly after it opened. Given Florida Governor DeSantis's general opposition to pandemic restrictions, the plant may (or may not) be operational now, or by the time the contract is fulfilled. For reasons noted above, the Buy America issue may best be treated as moot.

III. LEGAL ARGUMENT

A. The bids from Tony's and JWS should have been rejected as nonresponsive.

1. **The bids from Tony's and JWS were nonresponsive because they did not conform in all material respects to the Invitation for Bids.**

University of Guam Procurement Regulation 3.9.12.1 provides in pertinent part:

The contract is to be awarded "to the lowest responsible and responsive bidder" whose bid meets the requirements and criteria set forth in the

In re Appeal of All Business Enterprises Corp.
Docket No. OPA-PA-22-002
Appellant's Hearing Brief

Invitation for Bids. . . . The Invitation for Bids shall set forth the requirements and criteria which shall be used to determine the lowest responsive bidder.

University of Guam Procurement Regulation 3.9.14.2 provides in pertinent part:

Responsiveness of bids is covered by Section 5201(g) (Definitions, Responsive Bidder) of the Guam Procurement Act, which defines "responsive bidder" as a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

See also In the Appeal of Pacific Data Systems, Guam Office of Public Accountability Appeal No. OPA-PA-10-005 at 11 (Decision, Jan. 12, 2011) (citing 5 GCA §5201(g)); Mack Trucks, Inc. v. United States, 6 Cl. Ct. 68, 70 (1984) ("A bid is responsive if it conforms with the requirements of the solicitation.").

UOG does not contest that the bid specifications required coating the condenser and the evaporator coils. UOG contends that the bid specifications set forth options for different types of coating. However, while Tony's Workshop specified coating for some units, it did not specify any coating at all for six others. JWS did not specify any coating for any units. UOG does not contest these facts. If an invitation for bids for a motor vehicle procurement specified that the vehicles had the option of one of multiple types of undercoating, a bid offering vehicles with no undercoating would not be responsive.

"A bid which contains a material variance is an unresponsive bid" Leo Michuda & Son Co. v. Metro. Sanitary Dist. of Greater Chicago, 422 N.E.2d 1078, 1082 (Ill. App. 3d 1981). Material requirements include those which affect the price and quality of the solicited products.

In re Appeal of All Business Enterprises Corp.
Docket No. OPA-PA-22-002
Appellant's Hearing Brief

Tel-Instrument Elecs. Corp. v. United States, 56 Fed. Cl. 174, 176 (2003), aff'd, 87 F. App'x 752 (Fed. Cir. 2004).

The requirement for coating was material. ABE has previously submitted a declaration, and is prepared to submit testimony at the hearing, that (a) the coating required in the IFB is necessary to protect units from corrosion and to prolong the life of the units, and (b) the cost of the coating is not an insignificant part of a bid.

The requirement for copper is even more material. Exhibit 12 in ABE's Exhibit List discusses the relevant advantages and disadvantages of copper and aluminum coils. As noted in footnote 2 above, ABE has sought to provide exhibits with a fair approach, not mere propaganda for ABE's position. ABE's representative can testify to these differences at the hearing. Copper is generally stronger, more reliable, easier to maintain, and provides better heat transfer. On the other hand, galvanic corrosion is a problem with copper tubing. A major difference between copper and aluminum is that copper coils require up to three times as much material as aluminum coils, causing the cost of copper coils to be considerably higher than aluminum. As a result, aluminum may be an economical choice for a single home, but perhaps not a practical choice for institutional purposes. This may explain why ABE's bid was higher than the Tony's and JWS bids. In any event, the difference between copper and aluminum is material. If UOG did not notice the substitution of aluminum for copper during its 108 minute review of the bids, it may wish to reconsider its position now regardless of the outcome of this appeal.

Because the bid from Tony's Workshop omitted coating for six units, and did not have copper coils and/or tubes for some or all units, it did not conform in all material respects to the IFB. Tony's Workshop was not a responsive bidder and could not be awarded the contract. This is even truer for JWS, which omitted coating for all units and had aluminum fins for all units.

2. A nonresponsive bid cannot be made retroactively responsive after a contract is awarded.

Responsiveness is determined when bids are opened, not at some undetermined time after a contract has been awarded. *E.g.*, 2M Research Services, LLC v. United States, 139 Fed. Cl. 471, 479 (2018); Firth Const. Co. v. United States, 36 Fed. Cl. 268, 275 (1996); Mack Trucks, *supra*, 6 Ct. Cl. at 71; Carl Bolander & Sons Co. v. City of Minneapolis, 451 N.W.2d 204, 206 (Minn. 1990). As noted above, the UOG procurement regulations state, "The contract is to be awarded 'to the lowest responsible and responsive bidder' whose bid meets the requirements and criteria set forth in the Invitation for Bids." UOG Procurement Regulations 3.9.14.1. The Guam Procurement Code provides, "The contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids" 5 GCA §5211(g). Neither the regulation nor the statute says that a bid may be awarded to a bidder whose bid might, or might not, meet the requirements or criteria set forth in the Invitation for Bids once additional information is provided at some later date after bids have been opened and a contract has been awarded. *Cf.* Pacific Data Systems, *supra* at 12 (bids may not be modified after time and date set for bid opening). A bid that is nonresponsive due to a material

variance “may not be corrected after the bids have been opened in order to make it responsive.” Leo Michuda, *supra*, 422 N.E.2d at 1082. The bid from Tony’s Workshop did not meet the requirements and criteria in the IFB. Thus, the contract should not have been awarded to that nonresponsive bidder. Again, that applies equally to JWS.

UOG has suggested that Tony’s bid could be rendered retroactively responsive with provision of the “Manufacturer’s standard catalog data.” It is purely speculative as to whether the standard catalog data would provide specific information required for this procurement, and whether the “standard catalog” would provide project-specific information or general options. It is possible that copying-and-pasting of “standard catalog data” led to the inconsistencies in Tony’s submission concerning the use of copper or aluminum.

X. UOG’s “coulda woulda shoulda” argument should be disregarded.

In its rebuttal to ABE’s comments on the Agency Report, UOG said it could have done one of four things:

- (1) Waive Tony’s mistake as a minor informality pursuant to UOG Procurement Regulation 3.9.13.1;
- (2) Treat Tony’s mistake as a minor informality and allow Tony to correct it pursuant to UOG Procurement Regulation 3.9.13.4.1 and 3.9.13.5;
- (3) Ratify the Contract pursuant to UOG Procurement Regulation 9.7.1.1 and 9.7.1.2;
- (4) Award the contract to Tony’s for the units not in question and award the other six units to the lowest responsible bidder as permitted by the IFB.

In re Appeal of All Business Enterprises Corp.
Docket No. OPA-PA-22-002
Appellant's Hearing Brief

For reasons noted above, the errors and omissions in Tony's bid were material. Omitting the required coating or substituting aluminum for copper would materially affect the performance and price of the units. Now that UOG has had time to review the submittals, it may wish to reconsider its position.

Furthermore, the fact that UOG could maybe have done any of these four things does not change the fact that it did not do any of them. It would be purely speculative for either side to pontificate on whether any of the above actions would have prevented or simplified this appeal or generated another appeal. ABE would note, however, that previously a related company that shares key management personnel with ABE did enter in settlement of an OPA appeal with UOG on terms similar to the fourth option above. *See* Stipulation and Order to Dismiss Appeal, filed Aug. 15, 2011, in In the Appeal of Phil-Gets (Guam) International Trading Corp. dba J&B Modern Tech, Case No. OPA-PA-11-013 (copy attached hereto as "Exhibit 2").

In its List of Issues, UOG states that if the OPA finds that Tony's bid was not responsive, UOG will ask the OPA to determine "whether UOG may ratify its contract with TONY'S WORKSHOP pursuant to 5 G.C.A. §5452(a) and Section 9.7, UOG Procurement Regulations." The OPA does not appear to have the power to issue advisory opinions before an agency acts. 1 GCA §1909. In any event, UOG cannot ratify the contract with Tony's under Section 9.7 of its own Procurement Regulations.

UOG Procurement Regulation Section 9.7.1.1 provides that the President of UOG “may ratify or affirm the contract or terminate it in accordance with this Section after consultation with the Attorney General.” There has been no showing that the President of UOG has consulted with the Attorney General about Tony’s contract. UOG Procurement Regulation Section 9.7.1.2.1 provides for ratification as the preferred action if a violation can be waived “without prejudice to the University or other bidders or offerors.” ABE would be prejudiced if Tony’s contract is ratified. UOG could be prejudiced if it received units without Phenolic coating or with aluminum substituted for copper. UOG Procurement Regulation 9.7.1.2.2 imposes limits on ratification if performance has not begun. UOG Procurement Regulation 9.7.2.3 sets forth requirements for findings in writing for a contract to be modified, ratified, or affirmed. UOG has not “jumped through the hoops” required for even a very belated ratification of Tony’s contract.

IV. CONCLUSION

For the foregoing reasons, ABE requests that the Office of Public Accountability (1) overrule GCC’s denial of ABE’s protest as to both Tony’s Workshop and JWB, (2) remand the matter to UOG for further action in accordance with the OPA’s ruling.

Respectfully submitted,

ROBERTS FOWLER & VISOSKY LLP

Date: April 21, 2022

By: Seth Forman
SETH FORMAN
Attorneys for Appellant All Business
Enterprises Corp.

EXHIBIT 1

ALL BUSINESS ENTERPRISES. CORP.

P.O. BOX 8410 TAMUNING, GUAM U.S.A. 96931
TELEPHONE: (671) 646-3346; FAX (671) 646-0589

P R O T E S T

UOG BID No. B21-17 BID MAJOR REQUIREMENT

1. BUY AMERICAN ACT; "BAA"; UOG confirmed on question and answer.
See attachment.
2. Spec Section 2.2.1.1 and Section 2.2.1.4.1 (c); Copper coil; Copper Fin; per
UOG Spec, See attachment.
3. Spec Section 2.6.2.1 and Section 2.7.2.1 PHENOLIC COATING;
The section denotes required factory phenolic coating by immersion
dipping the entire coil. Local spray of phenolic coating denotes NOT
required or NOT acceptable.

..... NOTHING FOLLOWS

EXHIBIT 2



UNIVERSITY of GUAM
Unibetsedåt Guahan

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

AUG 15 2011

TIME: 11:25 AM
FILE NO. OPA-PA: 11-1213

Office of the President
Legal Counsel

OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

In the Appeal of)	
)	
Phil-Gets (Guam) International Trading Corp.,)	CASE NO: OPA-PA-11-013
dba J&B Modern Tech,)	STIPULATION AND ORDER
)	TO DISMISS APPEAL
Appellant.)	
)	

COMES NOW Appellant J&B Modern Tech and Respondent University of Guam, who stipulate and agree to resolve the above-referenced appeal pertaining to UOG Bid No. P 13-11 (Roof Repairs & New Roof Coating Systems at Various Facilities on UOG's Mangilao Campus) and to dismiss this action, as follows:

1. The University will issue a Second Corrected Bid Status letter showing J&B as the lowest bidder in part; and will thereafter issue Appellant an Intent to Award letter;
2. Under Option A of UOG Bid No. P13-11, the University will award Appellant the site locations A through D and G through N (Fine Arts Bldg, Dean Circle House 9, College of Natural & Applied Sciences, Science Bldg, Dormitory 1, Dormitory 2, Dormitory 3, Health Science Bldg, Marine Laboratory, WERI Bldg, RFK Library and School of Education) using United Coatings (Roof Mate Concrete Roofing System) in the amount of \$663,627.00.
3. The University will award site locations E & F to the lowest responsible and responsive bidder under option A.
4. Appellant verifies that the University will receive three (3) warranties upon acceptance of the work: 1) a Manufacturer's Warranty from the roofing product

ORIGINAL

manufacturer, which warrants the roofing material used, 2) a Workmanship Warranty from the certified applicator (subcontractor), which warrants the application of the roofing material, and 3) a general Labor and Materials Warranty from the prime contractor, which warrants that they are ultimately responsible, as the contracted entity, to uphold and respond to all warranty issues within the warranty period.

5. Appellant agrees to dismiss this appeal without prejudice upon approval by the Public Auditor.
6. The parties agree that this is a full and final settlement of all the issues arising out of UOG Bid No. P13-11.

NOW THEREFORE, the parties agree and request the Office of Public Accountability to dismiss without prejudice the above-captioned appeal.

SO STIPULATED:

DOOLEY ROBERTS & FOWLER LLP
Attorney for Appellant

Seth Forman
Seth Forman, Esq.

Date: 8/15/11

UNIVERSITY OF GUAM
Legal Counsel

Victorina M.Y. Renacia
Victorina M.Y. Renacia

Date: 8/15/11

SO ORDERED this 15th day of Aug, 2011.

OFFICE OF PUBLIC ACCOUNTABILITY
Public Auditor of Guam

By: Doris Flores Brooks
DORIS FLORES BROOKS, CPA, CGFM

ORIGINAL