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FILE No. OPA-PA 07-005

BEFORE THE OFFICE OF THE PUBLIC AUDITOR

In the Appeal of	)	
	)	DOCKET NO. OPA-PA-07-005
JONES & GUERRERO CO., INC., dba	)	
J&G CONSTRUCTION,	)	REQUEST FOR DECISION
	)	
APPELLANT	)	
	)	
	)	
	)	
	)	

This Appeal was filed June 21, 2007, based on a Protest lodged May 4, 2007, arising from an IFB dated February 1, 2007.

Hearing was waived by both parties, as recorded in the Scheduling Order dated February 26, 2008. That Scheduling Order required a final submission, being Appellant's Response to GMHA's Supplemental Response to Appellant's Comment on Agency Report, to be filed no later than March 3, 2008. That Response was filed February 28, 2008, with an Erratum filed February 29<sup>th</sup>.

No Decision has been forthcoming and, apart from the passage of time, good cause exists to issue the Decision without further delay.

The good cause is that, in the interim since this Appeal was originally filed, a Decision of the Public Auditor, adopting the findings of a Hearing Officer other than the Hearing Officer hearing this matter, are being handed down that are at odds with Appellant's assertions herein and, to the extent this may create a precedent, impact adversely to Appellant's claim, and to the extent Appellant's Appeal is upheld, creates a conflict in the Public Auditor's decisions.

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The case in point is *The Appeal of Guam Publications* (OPA-PA-08-007), which Appeal has been protested, filed, heard and decided since the final submission of documents herein in February this year.

The core of Appellant's legal argument in this instant Appeal is that matters of bidder responsibility are required to be measured and determined by standards and processes apart from the determination of responsiveness.

Appellant asserts that the *Guam Publications* Decision failed to make this distinction, and in the course of that Decision made a carelessly broad and erroneous misstatement of law that arguably precludes any such distinction.

As Appellant's arguments and supporting memoranda herein describe, issues concerning a bidder's qualification, capability and integrity to perform or provide the service or thing solicited are matters strictly and solely going to the determination of bidder *responsibility* and must be determined by the requisite standards and processes for making the determination of responsibility, *independent of any evaluation whether the bid is responsive to the IFB*.

The *Guam Publication* Decision (at page 14) fails to even consider that distinction, and erroneously quotes one central relevant regulation in the process of doing so, in proclaiming a "general rule" in the following passage:

"The general rule is that an invitation for bids must set forth the requirements and criteria which will be used to determine the lowest **responsible and responsive** bidder and shall be evaluated based on the requirements set forth in the invitation for bids. 5 G.C.A. §5211(e) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(1)."  
(Emphasis added.)

The law and regulation cited in support of this "general rule" do NOT support such a rule.

§5211(e) is solely concerned with Bid Acceptance and Evaluation. Nowhere in that section does it mention anything about bidder *responsibility*. By contrast, 5 GCA §5230 speaks *specifically* to bidder responsibility and requires that the determination of responsibility "*shall be made in accordance with regulations promulgated by the Policy Office*". By carving out the issue of bidder responsibility as a matter to be determined by *regulation*, the statute clearly indicates that bidder responsibility is not elsewhere determined in the *code*, including §5211(e).

But even more to the point is the Decision's reference to regulation 2 GAR §3109(n)(1), which is exactly inapposite to the "general rule" postulated.

While that regulation does note the general rule that a "contract is to be awarded 'to the lowest responsible and responsive bidder'...", it then goes on to *distinguish* responsible from responsive, but, critically the *Guam Publications* Decision failed to read that far.

Unlike the “general rule” postulated in *Guam Publications* that “an invitation for bids must set forth the requirements and criteria which will be used to determine the lowest **responsible and responsive** bidder and shall be evaluated based on the requirements set forth in the invitation for bids”, §3109(n)(1) very specifically says **ONLY responsiveness is determined by the IFB**. It very pointedly DOES NOT SAY *responsibility* is determined by the IFB: It says:

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

There is absolutely *no reference to determining bidder responsibility under the terms of the IFB*, and this is not accident, because, by contrast, the next subsection following §3109(n)(1) requires that:

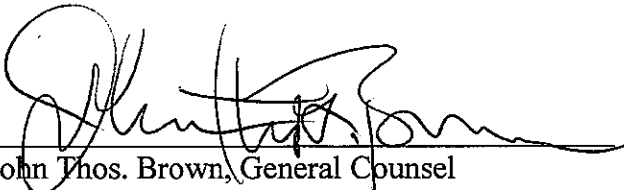
**“Responsibility of prospective contractors is covered by §3116 (Responsibility) of this Chapter.”** (2 GAR §3109(n)(2).)

Nothing in this subsection nor in the referent §3116 says that bidder *responsibility* is to be determined in the IFB, in stark contrast to the very specific requirement that *responsiveness* is to be determined by the IFB, as set out in §3109(n)(1). Indeed, nothing in §3116 even uses the term “invitation for bids”, referring instead to “an inquiry with respect to responsibility” consistent with the requirements of 5 GCA §5230(a).

Thus, to claim there is a general rule that the lowest responsible and responsive bidder is determined by the IFB is simply not supported by the citations nor other relevant law and regulation.

Appellant, therefore, respectfully asks the Public Auditor to render a Decision in this Appeal to clarify if the Public Auditor will continue to follow the arguably erroneous “general rule” proclaimed in *Guam Publications* to the effect that, as claimed by GMHA in this Appeal, matters of bidder responsibility must be determined as part of the determination of responsiveness “in the bid envelope”, which is to say, by the IFB alone.

Respectfully submitted, this 10<sup>th</sup> day of September, 2008



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