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IN RE APPEAL OF
SOLID BUILDERS

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APPEAL NO. BP-A040
DECISION ON APPEAL
CUC-IFB-02-025

I. SUMMARY

This is an appeal filed by Solid Builders, represented by Perry B. Inos, from the denial of Solid Builders' protest by the Executive Director of the Commonwealth Utilities Corporation (CUC) regarding CUC-IFB-02-025¹. The Office of the Public Auditor (OPA) has jurisdiction of this appeal as provided in Section 5-102 of Commonwealth Utilities Corporation's Procurement Regulations (CUC-PR)(Commonwealth Register Vol. 12, No. 6 (1990), adopted in Vol. 13, No. 8 (1991)).

II. APPLICABLE REGULATIONS

The CUC-PR "are promulgated under the authority of 4 CMC 8122 and 8123, which gives (sic) CUC the duties and powers to be in control of and be responsible for procurement and supply for utility services in the Commonwealth; and 4 CMC 8157, which empowers the Board to issue regulations." CUC-PR § 1-102. The CNMI Procurement Regulations (CNMI-PR)(Commonwealth Register Vol. 22, No. 8 (2000) adopted in Vol. 23, No. 05 (2001)) provide that CNMI-PR do not "apply to a public corporation or autonomous agency for the Commonwealth which has been authorized to conduct its own procurement by enabling statute or other law." CNMI-PR 1-105. CUC-PR do not mirror CNMI-PR. CUC has not been authorized by the Department of Finance to administer procurement functions pursuant to CNMI-PR §§ 1-105 and 2-201.

On October 8, 2003, the Acting Attorney General issued Attorney General Legal Opinion No. 03-

¹ CUC-IFB-02-025 has been referred to by both Solid Builders and CUC as CUC-IFB-03-025 in various correspondence and filings throughout the appeal process. The correct number of the IFB, however, is CUC-IFB-02-025.

13 (Opinion 03-13) regarding the constitutional authority and duties mandated in Article X, Section 8 of the CNMI Constitution. Opinion 03-13 concluded, inter alia, that “both the Constitution and intent of the framers clearly establish that the Department of Finance is the sole agency granted broad authority to control and regulate expenditures and any statutes or regulations that are in conflict with this authority would be invalid.” Opinion 03-13 at 8.

At this time, however, as the validity of CUC-PR, as questioned in Opinion 03-13, has not been ruled on by a court of competent jurisdiction, nor have CUC-PR or relevant CNMI statutes been revised, OPA will apply CUC-PR in interpreting this appeal.

III. PROCEDURAL AND FACTUAL BACKGROUND

The Invitation for Bid, CUC- IFB-02-025, (the IFB) was a solicitation for “sealed bids for the construction of AS MATUIS SUBDIVISION SEWER SYSTEM.” The bids for the IFB were opened on October 18, 2002, at 2:05 in the afternoon. The lowest of the nine bids received was submitted by Solid Builders, with a bid bond supplied by Equitable Insurance Co., Inc., in the amount of \$240,000.

On June 4, 2003, the Bid Review Committee (BRC) informed the Executive Director that Solid Builders failed to submit a bond that complied with CUC-PR § 4-101(2)(a). By letter dated June 26, 2003, CUC requested that the Attorney General, pursuant to CUC-PR § 4-101(2)(a), determine the acceptability of the bid bond submitted by Solid Builders. By letter dated June 27, 2003, addressed to Ben T. Fejeran of Solid Builders, the Executive Director notified Solid Builders that “CUC must obtain approval of the bid bond you submitted from both the Office of Insular Affairs and the CNMI Attorney General’s Office in order to find your bid fully responsive to the solicitation.” By letter dated July 1, 2003, addressed to the Executive Director, the Office of Insular Affairs (OIA) requested a “copy of the determination of the Attorney General with regard to bid security, as well as that office’s view of bond requirements.” The letter further stated that OIA “has found in the past that its interest was protected by local regulations.” By memorandum dated July 5, 2003, the Office of the Attorney General acknowledged receipt of the request for review of the bid bond.

On September 4, 2003, Clyde Lemons, Acting Attorney General, advised CUC that the bid bond submitted by Solid Builders in the IFB “does not provide acceptable security.”

By letter dated September 12, 2003, addressed to Ben T. Fejeran of Solid Builders (the Rejection), the Executive Director of CUC notified Solid Builders that “CUC must reject the bid as non-responsive.” The Rejection stated that CUC “was required by its

regulations to obtain a determination from the Office of the Attorney General (AG) as to whether the non-Treasury listed bid bond you submitted was acceptable or not.” The Rejection cited CUC-PR § 4-101(2)(a) as the basis for the requirement. The Rejection went on to state that CUC had “just received a response from the AG stating that after a thorough inquiry into the issue and the specific circumstances of the surety [Solid Builders] selected, [the AG] is unable to accept [the] bid security provided.” The Rejection went further and stated that in the future CUC “will be restricting bid security on larger projects to U.S. Treasury Listed bonding companies” and that doing so “will set a clear standard which will both inform the bidder of [CUC’s] requirements and adequately protect the Corporation and our funding sources.”

Solid Builders subsequently filed its Protest to the Rejection, by letter dated September 24, 2003, addressed to the Executive Director (the Protest). The Protest stated that the “basis for CUC’s rejection was arbitrary, capricious, and an abuse of discretion.” The Protest further stated that the “conclusion that the bid bond was not acceptable was not supported by evidence.” In addition, Solid Builders claimed that “CUC’s actions and representations in the bid evaluation mislead[sic] Solid Builders that the requirement of a U.S. Treasury Listed surety was waived.” Lastly, the Protest asserted that “the requirement of a bid bond is moot at this stage of the review process since more than sixty days have elapsed since the closing of the bid submission and that Solid Builders is still willing able (sic) to perform the project.”

The Protest was supplemented by letter dated September 25, 2003, addressed to the Executive Director (the Protest Supplement). The Protest Supplement requested that the Executive Director consider the additional information set forth therein. Solid Builders claimed that: 1) “CUC made it clear that the bid bond requirement was one that it was prepared to waive”; 2) “CUC represented that in the event that the bid bond did not qualify as a U.S. Treasury listed security, it had the discretion to consider alternative security and to waive any bid requirement” (emphasis in text); and, 3) “[a] plain reading of the chain of events, furthermore, reflects that the bid bond requirement was in fact waived.” Solid Builders requested “reinstatement and to be awarded the contract to perform the As Matuis Subdivision Sewer System/As Matuis Waste Water Collection System Project under CUC-IFB-02-025.”

CUC, through a letter dated September 25, 2003, gave notice of the Protest filed by Solid Builders and requested that all comments on the protest be submitted to the Executive Director by 4:30 p.m. October 7, 2003. Maeda Pacific Corp., through its counsel, Danilo T. Aguilar, submitted comments to the Protest (Maeda’s Comment) by letter dated October 7, 2003. Maeda’s Comment stated that it “believes that under no circumstances should any requirement stated in the Invitation for Bid be waived or modified.” Maeda

also claimed it was “in full agreement with CUC’s interpretation of CUC Procurement Regulation section 4-101(2)(a) and that this requirement is a fundamental requirement of the bidding process.”

The Decision on the Protest (Decision) was issued on November 10, 2003. In the

Decision, CUC concluded that “[t]he bid bond requirement is an essential requirement of the sealed bid procurement under the CUC Regulations.” Decision at 4. CUC further concluded that “[t]he bid bond requirement must be met at the time of bid submission for the bid to be considered responsive.” *Id.* In addition, the Decision stated that “[t]he regulations clearly require a bidder who elects to provide a bond rather than cash or a certified cashier’s check to either submit a U.S. Treasury Listed surety bond or a bond from another surety acceptable to the AGO.” *Id.* (Emphasis in text). CUC reasoned that “[t]he regulation is not unclear” and that “[t]he rejection of the surety by the AGO allows CUC no choice but to reject the bid.” *Id.* at 5.

Regarding the waiver issue raised by Solid Builders, CUC concluded that “CUC’s actions did not constitute conduct [that] would be consistent with waiver” and “neither CUC nor any individual acting for CUC, in the course of the procurement is empowered to waive a regulatory requirement.” *Id.* CUC reasoned that its “[r]egulations do not allow for waiver but, in fact, state that the regulations apply to every expenditure of CUC funds regardless of source and that no CUC contract covered by the regulations shall be valid unless it complies” with the CUC-PR. *Id.* CUC then concluded that “[a]uthority to waive a regulation is simply not contemplated and not found in the CUC Regulation.” *Id.* The Decision held that “CUC correctly rejected Solid Builders’ bid as non-responsive” and denied Solid Builders’ Protest. *Id.*

On November 24, 2003, within 10 working days of the issuance of the Decision, Solid Builders filed its Notice of Appeal (Appeal) with OPA.

On November 25, 2003, pursuant to CUC-PR, OPA notified CUC Executive Director by phone and by letter that Solid Builders had filed its appeal with OPA. In the same letter, OPA requested that CUC provide notice of the appeal and copies of the protest and appeal documents to the required parties. OPA further requested that CUC to submit a complete report on the appeal, including a statement fully responding to the allegations in the Notice of Appeal, to OPA and affected parties.

On December 16, 2003, OPA notified Perry Inos, counsel for Solid Builders, by letter, with copy to CUC, that there appeared to be typographical errors on page 9 of the Notice

of Appeal and clarification, through Amended Notice of Appeal would be necessary to discern the issues presented by Solid Builders. On December 19, 2003, Solid Builders filed a Notice of Errata, correcting page 9 of the Notice of Appeal. On December 30, 2003, Solid Builders filed its Second Notice of Errata to which was attached a new page 9 to replace page 9 of the Notice of Appeal.

On January 5, 2004, OPA received a package of documents and a cover letter, dated January 2, 2004, from CUC that appeared to be related to the IFB. The package, however, did not include a response to the allegations set forth in the appeal, the Protest, the Decision on the Protest, the contact list of interested parties to the appeal, the IFB and any amendments, or any committee documents or correspondence related to the protest. On January 19, 2004, OPA sent a letter to CUC, with a copy to Perry Inos, counsel for Solid Builders, that the package had been received on January 5, 2004, but that it was deficient for the foregoing reasons. The letter further stated that CUC's response to the allegations set forth in the appeal and the documents listed therein were necessary for review of this matter by OPA. The letter requested that such items be forwarded to OPA. By letter with attachments dated February 11, 2004, OPA received a second package from CUC, which included CUC's Response to the Notice of Appeal, dated February 10, 2004, (CUC's Response) attached Affidavits, and other documents related to the protest and appeal.

OPA received a letter via facsimile from Perry Inos, dated February 19, 2004, requesting an extension of time, to March 8, 2004, to file Solid Builders reply to CUC's response, based on counsel's involvement in a matter before the courts. OPA granted an extension to all parties, allowing until 4:30 p.m. on March 8, 2004, for the filing of any responses to CUC's report. Subsequently, OPA received a Stipulation signed by the Executive Director and Perry B. Inos, counsel for Solid Builders, agreeing "to allow Solid Builders additional time to submit its Reply from March 8, 2004, at 4 p.m. to March 10, 2004, at 4:00 p.m." On March 10, 2004, Solid Builders filed Appellant's Reply to CUC's Response to Notice of Appeal (Reply), with attached Declaration of Benigno T. Fejeran. On March 17, 2004, CUC filed CUC's Rebuttal Statement(Rebuttal).

Pursuant to CUC-PR §5-102(7), OPA requested additional information and documentation from CUC in three letters to the Executive Director, two dated April 12, 2004, and the third dated April 14, 2004. On April 16, 2004, OPA received a response from CUC's Legal Counsel regarding the additional information requested in those three letters.

IV. ISSUES RAISED BY APPELLANT

The Notice of Appeal sets forth two issues raised by Solid Builders, which will be addressed herein in the following order:

1. Whether the Director wrongly disqualified Solid Builders from consideration based upon the purportedly unsatisfactory bid bond.
2. Whether the summary rejection of Solid Builders' proposal on the basis of some perceived deficiency in its financial position lacked reasonable basis, was made in bad faith and without due process, and was erroneous.

V. ANALYSIS

A. The Invitation Required Bid Security

The Bid Package clearly stated that “[a]ll bids must be accompanied by a bidder’s bond in the amount of not less than 15% of the total bid amount.” The Bid Package stated that “[b]id security may be Bid Bond, Certified Check or Cashier’s check made payable to the Commonwealth Utilities Corporation.” Instruction 7 of the Instruction to Bidders portion of the packages provided to all bidders specifically addressed Bid Guarantees. Instruction 7 stated that: “Bids shall be accompanied by a bid guarantee of not less than fifteen percent (15%) of the amount of the bid, which may be a Bid Bond (form enclosed) certified check or cashier’s check, made payable to the Commonwealth Utilities Corporation.” Instruction 7 further required that: “Guarantee Bonds shall be executed by a surety company holding a certificate of authority from the United States Secretary of Treasury (See List A) or from a company acceptable to the Commonwealth Government and the U.S. Department of Commerce.” Instruction 7 also included: “The following list as extracted from U.S. Treasury Department Circular 570 comprises those insurers authorized by the United States Treasury to act as Surety for any bid, and/or performance and payment bonds.” The list included the names of fourteen companies.

Instruction 15 of the Instruction to Bidders portion of the bid package provided to all bidders addressed Award and Execution of Contract. Instruction 15 reads:

Award of Contract, if it be made, shall be made with reasonable promptness by written notice to the lowest *responsive, responsible bidder* whose bid, conforming to the Invitation to Bid, will be determined to be the most advantageous to the Government by its price and other factors considered.
(Emphasis added)

B. CUC-PR § 4-101(2) Requires Rejection as Nonresponsive

Solid Builders asserts that “there is no statutory requirement in the Commonwealth mandating a bid bond.” Although OPA agrees that there is no CNMI statute pertaining to this matter, “a validly promulgated administrative rule or regulation has the force and effect of law, much like a statute.” *J.C. & Associates v. District of Columbia Board of Appeals and Review*, 778 A.2d 296, 303 (internal citations omitted); *See generally* 2 Am.Jur 2d Administrative Law §238. In addition, the CNMI Administrative Procedure Act, 1 CMC § 9101, *et seq.*, specifically provides that a “[r]egulation’ means a rule which prescribes or has the force of law.” 1 CMC §9101(k). OPA, therefore, must agree with CUC’s assertion that the “bid bond requirement is a regulation, which has the force of law.”

The CUC-PR that addresses bid security is CUC-PR § 4-101(2), which reads:

1. Bid Security
 - (a) Requirement. Bid security shall be required for all competitive sealed bidding construction contracts where the price is estimated by the Director to exceed \$25,000.00 or when the Director determines it is in the interest of CUC. Bid security shall be on a bid bond, in cash, by certified check, cashiers check or other form acceptable to CUC. A surety company **shall** hold the certificate of authority from the U.S. Secretary of the Treasury as an acceptable surety **or** other surety acceptable to the Attorney General.
 - (b) Amount. Bid security shall be an amount (sic) to at least fifteen percent (15%) of the amount of the bid or other amount as specified in the Invitations for Bids depending upon the source of the funding.
 - (c) Rejection of bid. Failure to furnish bid security, when required by the invitation, **shall** result in rejection of the bid as nonresponsive.

CUC-PR § 4-101(2)(emphasis added).

Clearly CUC-PR § 4-101(2) requires bid security, but leaves some discretion to the bidder

in choosing the form the bid security takes. The form of the security is limited, however, if the bidder chooses, as in the instant case, to submit a bid bond from a surety that does not hold a certificate of authority from the U.S. Secretary of Treasury as an acceptable surety. The limitation is that such surety must be acceptable to the Attorney General.

In the instant case, Solid Builders did not choose to submit a certified or cashiers' check, which would have been acceptable security under both the IFB and CUC-PR § 4-101(2). Further, Solid Builders did not choose to submit a bid bond from a surety holding a certificate of authority from the U. S. Secretary of Treasury, which also would have been acceptable security under both the IFB and CUC-PR § 4-101(2). Solid Builders instead chose to submit a bid bond from a non-listed company. Therefore, Solid Builders chose to run the risk that the surety, and thus its bid bond, may not be acceptable and that its bid may be deemed nonresponsive. The burden to submit acceptable bid security is on the bidder. Submission of a defective or unacceptable bid bond is as fatal to a bid as the total failure to submit a bid bond or guarantee. John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 579 (3rd Ed. 1998).

In the instant case, the Attorney General's Office did not find the bid bond acceptable. Solid Builders, therefore, failed to furnish acceptable bid security, as required by the Bid Package and the CUC-PR. CUC-PR § 4-101(2)(a), which clearly provides notice of the consequence of failure to furnish bid security, required that Solid Builders' bid be rejected as nonresponsive. The language used in the CUC-PR is mandatory and not permissive; therefore, the Executive Director was correct in rejecting the bid as nonresponsive after receiving the notice from the Attorney General's Office that the bid bond was not acceptable.

Solid Builders argues that CUC waived any bid bond requirement. CUC, however, argues that it did not and could not waive such requirement. One of the most firmly established principles in administrative law is that an agency must obey its own rules; therefore, CUC was required to follow CUC-PR § 4-101(2)(c) and reject Solid Builders' bid as nonresponsive. 1 Admin. L. & Prac. § 4.22 (2d ed.).

CUC's rejection of Solid Builders' bid, pursuant to CUC-PR §4-101(2), was proper.

C. Rejection Not Based on Deficiency in Financial Condition

By letter dated September 12, 2003, the Executive Director notified Solid Builders that CUC must reject Solid Builders' bid as non-responsive, based on the Attorney General's

finding that the bid bond submitted by “Solid Builders in association with Project CUC-IFB-02-025 does not provide acceptable security .” Therefore, there is no evidence that any alleged deficiency in Solid Builders’ financial condition, although perhaps reviewed by CUC, formed the basis for the September 12, 2003, Rejection, which as set forth above, appears to be validly based on the unacceptable nature of the bid bond submitted. In addition, no evidence was presented by Solid Builders that the Rejection was based on any alleged deficiency in Solid Builders’ financial condition and not the deficiency in the bid bond. Therefore, as the rejection of Solid Builders’ bid as nonresponsive pursuant to CUC-PR §4-101(2) was proper, this issue need not be addressed.

D. Other Matters

It is noteworthy that Solid Builders attempted to cure its nonresponsiveness by submitting another bid bond with its Reply in this appeal. However, there is no provision in the CUC-PR to permit submission of a bid bond after bid opening and to do so would damage the integrity of the procurement process by providing the low bidder the option of winning the competition by furnishing an acceptable bond or by dropping out by not furnishing it. *See generally* Cibinic & Nash 548.

Further, the acceptance period has unquestionably expired. No extension of the acceptance period was obtained from any of the bidders prior to its expiration. Therefore, even if Solid Builders had provided sufficient and acceptable bid security, it still would not be proper for CUC to award the contract to Solid Builders. The CUC-PR contain no specific provision governing the extension of bids or specific guidance as to whether bids may be extended after the acceptance period has expired.

DECISION

Based on the foregoing, OPA finds:

- 1 Bid security is mandatory under CUC-PR §4-101(2) for construction procurement;
- 2 Rejection of a bid for failure to provide bid security is mandatory under CUC-PR §4-101(2)(c);
- 3 Solid Builders did not provide acceptable bid security;

4 CUC properly rejected Solid Builders bid under CUC-PR §4-101(2)(c);

5 Solid Builders is ineligible for award under the IFB.

The Office of the Public Auditor, therefore, affirms the Decision of the Executive Director not to award the contract to Solid Builders based on the deficiency in the bid security provided and denies Solid Builders' appeal.

Section 5-102(9) of the CUC-PR provides that Solid Builders, any interested party who submitted comments during consideration of the protest, the Director, or any agency involved in the protest, may request reconsideration of a decision by the Public Auditor. The request must contain a detailed statement of the factual and legal grounds for which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. Such a request must be received by the Public Auditor not later than (ten) 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.



Michael S. Sablan, CPA
Public Auditor

April 23, 2004