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IN RE APPEAL OF JWS AIR CONDITIONING)
& REFRIGERATION, LTD.)

PSS IFB 97-005
DECISION ON APPEAL
NO. BP-A009

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This is an appeal by JWS Air Conditioning & Refrigeration, Ltd. (JWS), represented by its Acting Branch Manager, from the Commissioner of Education's denial of its protest on the Public School System (PSS) Invitation for Bids (IFB) No. 97-005 pertaining to the procurement of 118 air conditioners for Marianas High School (MHS). The Office of the Public Auditor (OPA) has jurisdiction of this appeal as provided in Section 5-102 of the Public School System Procurement Regulations (PSSPR). JWS filed its timely appeal with OPA on May 28, 1997.

PSS IFB 97-005 was a solicitation of bids from vendors for the delivery of: (1) 118 air conditioners (A/C) for MHS, (2) 30 A/Cs for Rota schools, and (3) one riding mower for Rota Public School System. Additionally, the IFB specified that the units must have a one year warranty on parts and labor, and the bidders must be located on Saipan and have parts in stock for the bid units. The bidders were also required to indicate the cost per unit in their bids. The IFB specified an "additive" in which the bidders were required to submit bids on the cost of installation and electrical wiring with individualized switch boxes for each unit. For the items covered in this solicitation, PSS reserved the right to conduct a single or multiple award.

The specifications for the IFB required the bidder(s) for MHS to deliver 118 units of split type A/C units with a 24,000 BTU nominal cooling capacity, 9 energy efficient ratio, 230V-1-60 power supply, 12.7 operating current amps, 2751 power consumption watts, 6.9 moisture removal pints/hour, 570 fancoil airflow CFM, dimensions of 45.3 x 14.2 x 8.7, 620 square feet of area cooled, with R-22 refrigerant, 16.4 feet tubing length and with wireless remote control. The IFB required the delivery of the A/C units 30 to 45 days after notification of award.

The IFB was advertised during January and February 1997, and the opening of the bids was conducted as scheduled at 2:00 p.m. on March 4, 1997 at the office of the PSS Procurement and Supply Officer. Five Saipan vendors submitted proposals to PSS for the 118 A/Cs intended for MHS. The bidders were: Joeten's Ace Hardware, J & A Enterprises, Carrier Guam, Inc. (Carrier), Advance Marketing Saipan Corporation and JWS Air Conditioning & Refrigeration, Ltd.

After its evaluation of the bids, PSS sent its “intent to award” letter to the successful bidder and its notification letters to unsuccessful bidders on April 4, 1997. After receipt of its notification letter from PSS, JWS filed its protest on the rejection of its bid by the Commissioner of Education (Commissioner). On May 13, 1997, the Commissioner released his decision denying JWS’s protest. On May 28, 1997, JWS filed an appeal with the Public Auditor on the denial of its protest by the Commissioner. By letter dated May 29, 1997, OPA informed the Commissioner of JWS’s appeal, and requested him to submit a complete report on the appeal and to instruct interested parties to communicate directly with OPA. The Commissioner submitted his report to OPA on July 2, 1997, with copies given to JWS and other interested parties.

OPA has not received any comment on the Commissioner’s report from either the appellant or any other affected parties. OPA is, therefore, issuing its decision on this appeal pursuant to PSS Procurement Regulations which provide that the Public Auditor shall issue a decision after all information necessary for the resolution of the appeal has been received. Although no comments on the Commissioner’s report were received, we have gathered all information necessary to issue a decision on this appeal. After issuing its “intent to award” letter, PSS to date has not executed a contract with Carrier.

ANALYSIS

The denial of JWS’s protest by the Commissioner is the issue of this appeal. The following analysis discusses the arguments by PSS and JWS as they were presented in the protest process, including OPA’s comments on the merits of the arguments.

Selection of the Winning Bidder

On March 4, 1997 at about 2:00 p.m., the bids submitted on IFB 97-005 were opened at the PSS Procurement Office in the presence of all the bidders’ representatives except for Joeten Ace Hardware. Each bid was subjected to public inspection where each bidder inspected its competitors’ bids. Bids were summarized and evaluated on March 14, 1997 by a team composed of the PSS Procurement and Supply Officer and two personnel from the PSS Maintenance Department. The team agreed that cooling capacity, energy efficient ratio, power supply, operating current ampere, power consumption watts, moisture removal pints per hour, fancoil airflow CFM and wireless remote control were the important requirements of the IFB. The team decided it would not be strict as to the dimension and area cooled by the air conditioning units. The team also determined that the refrigerant type and tube length were not critical elements.

Under the PSSPR, award under competitive bidding procedures should be made to the lowest responsive and responsible bidder whose bid fully meets the bid requirements. PSS’s bid evaluation showed that no bidders complied with all requirements of IFB 97-005. However,

since Carrier met most of the requirements except for the dimension, the Procurement and Supply Officer recommended the award to Carrier. Carrier's price was the third lowest bid and was higher than the appellant's bid.

JWS's Arguments in its Protest to the Commissioner

JWS presented five arguments in its protest of the Commissioner's intent to award IFB 97-005 to Carrier, as follows:

- JWS met or exceeded the product specifications required in the bid solicitation.
- JWS met the requirements for a one year warranty on parts and labor, presence of a Saipan office, and availability of parts in stock.
- JWS's price was lower.
- PSS had pre-determined that Carrier was the only suitable unit for the project because it did not consider specifications from other brands, such as Toshiba, Mitsubishi and Peake.
- Carrier was the only company on Saipan that could possibly deliver a large number of air conditioning units within the required period of delivery. JWS further alleged that PSS required a 30-day delivery time so that small businesses would be left out of the bidding.

Decision on the Protest by the Commissioner

In denying JWS's protest, the Commissioner concluded that JWS was not the lowest responsive bidder on IFB 97-005 because it failed to include significant documentation in its bid. Additionally, the Commissioner determined that Carrier met more of the specification requirements of IFB 97-005 when compared with any other bidder that participated in the bid solicitation. In the protest decision, the Commissioner sustained one argument - the contention that JWS's price was lower than Carrier's. The other four arguments in the protest, however, were either totally denied or partly sustained by the Commissioner, as follows:

- The protester's contention that JWS met or exceeded the specification requirements of IFB 97-005 was denied where PSS found that certain information necessary for determining responsiveness was not provided in JWS's official bid on March 4, 1997. PSS stated that pursuant to its competitive sealed bidding process, JWS's bid was reviewed to determine whether it was responsive based solely upon the information contained in the bid documents at the bid opening date. PSS's review showed that JWS did not submit any documentation prior to bid opening regarding certain product specifications required in the bid. If the documents submitted by JWS after bid opening were to be considered, the Commissioner agreed with the protest argument that JWS met or exceeded the specification requirements.

- The protester’s argument that JWS met the specifications on warranty, office location and parts supply was partly sustained by the Commissioner. PSS considered JWS responsive on the warranty and presence of a Saipan office. However, PSS considered JWS non-responsive on the requirement of parts availability because it did not indicate that it had parts in stock for the air conditioning units covered in its bid.
- On JWS’s argument that the specifications were written for Carrier and not a 24,000 BTU unit in general, PSS stated that these specifications were the lawfully established minimum requirements in order to meet the needs of Marianas High School.
- As for the alleged restrictive 30-day delivery requirement, PSS stated that the bid specifications required that all items listed in the bid must be delivered no later than 30 to 45 days from the date of award notification. Accordingly, PSS allowed 45 days as the maximum delivery time, contrary to JWS’s allegation of 30 days. Although JWS had subsequently indicated its delivery time in its protest, PSS still considered JWS as non-responsive because its bid submission did not state the proposed delivery time.

JWS’s Arguments in its Appeal to the Public Auditor

In its appeal, JWS specifically requested the Public Auditor to rule that JWS was the successful bidder on IFB 97-005 or if the bidding procedures were found improper, that PSS be required to cancel its intent to award under the subject IFB. JWS presented four grounds (numbered 1 to 4) in its appeal to the Public Auditor. The arguments presented in ground no. 3, however, were a restatement of one of the issues raised in ground no. 1. Accordingly, the relevant arguments in the appeal are those presented in grounds 1, 2, and 4. The appeal grounds are summarized below in the order they were presented by JWS (for proper presentation, we have renumbered ground no. 4 to ground no. 3):

Ground No.1

The appellant presented three issues under the first ground: (a) the validity of bid documents used by PSS in determining the lowest responsive bidder, (b) the propriety of the bid specifications, and (c) whether Carrier was a responsible bidder.

- (a) Validity of Bid Documents Used by PSS in its Evaluation. JWS argues that PSS gave Carrier unfair advantage by allowing supplementation of its bid to include manufacturer’s specifications after the bid closing date. JWS claims that Carrier was permitted to submit its brochure, an additional bid documentation, two hours after the submission of bids was closed at 2:00 p.m. on March 4, 1997. According to JWS, PSS treated the other bidders unfairly because they were not extended the same opportunity to submit additional bid documentation after the bid closing date. JWS asserts that the submission of additional documentation after the bid closing date represents a flagrant breach of good faith contrary to the PSSPR. According to JWS, it had requested and was allowed to send its

manufacturer's specifications to PSS after the bid closing date; however, that submission was not among the bid documents when JWS reviewed the PSS procurement file.

JWS further alleges that the reason all bidders did not submit relevant information in their bids is because no such documentation was requested in the bid specification. JWS states in its appeal that the bidding procedures used in this solicitation differed from the past bidding practices of PSS. The appeal claims that PSS's practice in past solicitations was to request bid documentation (such as manufacturer's specifications) from the bidders after the bid closing date. Additionally, the appellant argues that Carrier did not submit such documentation in previous bid solicitations.

- (b) Propriety of the Bid Specifications. In its appeal, JWS disputes PSS's statement that the bid specifications were the lawfully established minimum needs of MHS. JWS doubts whether the bid specifications were determined by a competent and impartial engineer. JWS believes that the specifications in this IFB were not written for a 24,000 BTU air conditioner in general; instead, the specifications were allegedly lifted from a Carrier distributor's brochure.
- (c) Whether Carrier was a Responsible Bidder. The appellant argues that Carrier was not a responsible bidder based on its past performance on two government contracts. It appears that the appellant was referring to Carrier's delay in the installations (perhaps of A/C units) for Rota High School Gymnasium and Garapan Elementary School. However, no other details were provided in the appeal.

Ground No. 2

In the second ground for the appeal, the appellant states that the Commissioner's conclusion was unjustified when he determined that JWS's bid was not responsive to the bid specification requiring adequacy of parts supply. The protest decision had earlier determined that JWS did not submit a parts list in its bid; thus, it was considered non-responsive. However, the appeal argues that a parts list was not submitted because the invitation for bids did not require the submission of a parts list. Additionally, JWS also contends that its bid should be understood as meeting the bid requirement because its bid was in response to the bid specifications without a stated departure (e.g., a notation that only condensers were available).

Ground No. 3

The last ground for the appeal states that because JWS's bid had not indicated a departure from the required delivery time, it was improper for PSS to conclude that it was not responsive to the bid specification. Additionally, JWS asserts that the bid specifications should have focused on the required dates for installation instead of the delivery dates for the A/Cs. The appellant explained that PSS might receive a multitude of A/Cs that could not be installed in a timely manner.

The Commissioner's Report on JWS's Appeal

The Commissioner responded to OPA's request for a written report on JWS's appeal within the time stated in the PSSPR. In his report, the Commissioner specifically requests that OPA uphold his decision on JWS's protest. The Commissioner concludes in his report that JWS most likely would have been granted the contract had sufficient information been submitted in its bid. However, PSS states that it had to make the award to Carrier (the next lowest bidder) because Carrier's bid purportedly responded directly to every bid criterion. Regarding the alleged errors on this IFB, the Commissioner contends that these were either not errors or were not detrimental to JWS's eligibility for award of the contract.

In his report, the Commissioner states that many of the issues raised by JWS in its appeal were not brought to his attention in the original protest. The Commissioner claims that in order for an issue to be brought up on appeal, it must first be raised at the original hearing level as provided in the PSSPR. Accordingly, the Commissioner expresses the view that OPA is not granted the jurisdiction to consider those issues not previously raised at the protest level. Despite this objection, however, the Commissioner provided his comments on each of JWS's grounds for the appeal, as follows:

Ground No. 1

Regarding the first ground presented in the appeal, the Commissioner provided the following official response on the issues raised by the appellant:

- (a) Validity of Bid Documents Used by PSS in its Evaluation. The Commissioner states that only those documents submitted by the bidders before the bid opening date were considered in the evaluation of the bids. He admits that PSS apparently received information from certain bidders after the bids were opened; however, those documents were not considered in determining the successful bidder. According to the Commissioner, PSS acted properly in declining to consider the information submitted by JWS and Carrier after the bid opening date since the PSSPR clearly provides that information submitted after opening the bids should not be considered.

On the evaluation of the bids, the Commissioner reiterates that JWS's bid was clearly deficient and that JWS attempted to submit information to prove compliance with the bid specifications after the bid opening date. Carrier's bid, on the other hand, purportedly did not need to be supplemented after the bid opening date because it contained all the information necessary for proper compliance assessment. As for the Carrier brochure that allegedly supplemented Carrier's bid after the bid opening date, the Commissioner states that the inclusion of the brochure in the bid file was a harmless error because the brochure provided no relevant information that was not already included in Carrier's bid. Besides this, the Commissioner points out that the only documents assessed by PSS were the bids submitted before the bid opening date. While PSS acknowledges that the Carrier brochure was somehow included in the bid file, the Commissioner states that it was not clear how

and when the brochure was included in the bid file. He adds that based on a facsimile date, the brochure was sent to PSS on March 11, 1997, and not March 4, 1997 as JWS alleges.

- (b) Propriety of the Bid Specifications. The report acknowledges that the bid specifications were taken from a Carrier unit; however, the Commissioner asserts that the specifications on this IFB were the lawfully established minimum needs for Marianas High School. He claims that PSS has every right to ask for a "brand name or equal" bidding requirement. Such bid process purportedly requires bids to be functionally equivalent to the brand name but not necessarily the same in all details. The Commissioner adds that even in a hypothetical case where the specifications could have been based on JWS's A/Cs, JWS's bid would still have been non-responsive because it submitted almost no information relevant to the bid requirements.
- (c) Whether Carrier was a Responsible Bidder. The Commissioner's report does not comment on this issue.

Ground No. 2

Regarding JWS's alleged non-responsiveness on the requirement that parts supply should be adequate, the Commissioner states that the bid specifications clearly require the bidder to maintain an office on Saipan and have parts in stock for the proposed A/C units. The Commissioner reiterates that PSS's review of JWS's bid showed that the appellant did not submit any information related to keeping parts in stock.

Ground No.3

The Commissioner did not respond to the issues raised by JWS regarding the delivery time required in the bid specifications.

OPA's Comments

We first discuss the issue of whether OPA has jurisdiction to hear the arguments presented in this appeal. PSS contends that OPA has no jurisdiction to hear certain issues in the appeal as they were not earlier raised in the protest filed with PSS. Section 5-102(1) of the PSSPR provides that a written appeal to OPA from a decision by the Commissioner may be taken provided the party taking the appeal has first submitted a written protest to the Commissioner. However, the PSSPR does not specifically require that each ground must be protested to the Commissioner to justify the relief requested by the appellant. In its appeal to OPA, JWS requested that it be declared the winning bidder on IFB 97-005 -- the same relief requested in its earlier protest with the Commissioner. The fact is that JWS is appealing the Commissioner's decision denying it the award under the subject IFB -- a decision which had been protested to but denied by PSS.

In a previous request for reconsideration of an appeal decision [AJ Commercial Services, Division of Corrections (DOC) Food Service Program, March 31, 1995], OPA concluded that “the CNMI Procurement Regulations do not restrict the Public Auditor from taking all relevant matters into consideration when reviewing an appeal...The Public Auditor is also allowed to obtain all necessary information from all interested parties. By being able to review all facts and not just the documents related to the appellant, the Public Auditor can render a decision that serves the best interest of the CNMI Government and all interested parties.” The request for reconsideration was related to a previous decision involving the responsiveness of bidders on a food service program for DOC inmates. The requester, a bidder who was not an appellant, objected to OPA’s review of the responsiveness of its bid, arguing that the procurement procedures set out a formalized process that a bid must go through before OPA could review it. In deciding the reconsideration request, OPA affirmed its previous decision.

Accordingly, we conclude that OPA *has jurisdiction* to consider all the grounds on appeal. Regarding the issues presented in this appeal, we believe that the propriety of the bid specifications is the foremost issue since our decision on this question has relevance to the other issues. Accordingly, we first discuss the propriety of the bid specifications, followed by the other arguments in this appeal.

Propriety of the Bid Specifications

The best interest of the government and the doctrine of fair competition among bidders dictate that (1) bid specifications should consist of material requirements necessary to meet the minimum needs of the government, (2) the solicitation should be free of unnecessary restrictive requirements, and (3) in case of errors or mistakes in the solicitation, such errors or mistakes should be corrected in a manner that is not prejudicial to fair competition. Our review showed that this solicitation was flawed in that (1) the bid specifications contained immaterial items which were not necessary to meet the government’s minimum need and there was no evidence that those specifications that were considered material do reflect PSS’s minimum need, (2) the specifications included certain features which in our view may have effectively restricted competition, and (3) some errors in this solicitation were not corrected in a manner that would ensure fair competition among the bidders. The details of these findings are stated below.

- (1) Generally, bid solicitations should incorporate clear and accurate descriptions of the technical requirements upon which all bidders could submit an offer. The technical requirements should not ask for features that are unnecessary and are found only in specific brands, and therefore restrict competition. However, our review showed that the bid specifications for the A/C units covered under the subject IFB contain very specific design and performance specifications which in our view were overly stringent, as well as unnecessary requirements that might have unduly restricted the competition, as follows:

Specifications	Minimum Requirements
Operating Current Amps	12.7
Power Consumption Watts	2751
Moisture Removal Pints Per Hour	6.9
Fancoil Airflow, Cubic Feet Per Minute	570
Dimension (inches)	45.3 x 14.2 x 8.7
Area Cooled Per Square Feet	620
Tube Length (feet)	16.4

The records for this IFB do not provide a justification for requiring the exact minimum features shown above. In fact, three of the requirements listed above were considered immaterial and not used as the basis for selection by PSS during the evaluation of the bids. These unnecessary requirements -- dimension, area cooled, and tube length -- were identified by two PSS Maintenance employees during their technical review of the bids. The two employees were asked to assist in the evaluation because of their technical knowledge of A/Cs. They stated that PSS should not be strict concerning the dimension and the "area cooled" requirement. It was determined during the bid evaluation phase that all 24,000 BTU A/Cs have the same area cooled. Regarding the dimension requirement, the two employees told us in an interview that there is no set dimension that is critically needed by MHS, and explained that the classrooms at MHS can accommodate any commercially available dimension.

The PSS-Procurement and Supply (P&S) Officer stated that the tube length requirement was also not critical. In an interview, the two Maintenance employees explained that MHS does not need exactly 16.4 feet of tube to connect the indoor unit with the outdoor unit under the specified split-type unit. We have no reason to disagree with these findings. Our site inspection at MHS showed that some of the outdoor units were so near the back of the indoor units that the actual tube length requirement may just be about 6 feet -- not a minimum of 16.4 feet as required in the solicitation.

Additionally, during our review of this appeal, we were told by the same Maintenance employees that aside from the three immaterial requirements mentioned above, the moisture removal pints per hour was also not a critical requirement because all A/C units with the same BTU capacity, when placed under the same room conditions, should have almost the same moisture removal pints per hour.

Although a technical evaluation of the bids was done with the assistance of knowledgeable PSS employees, it was apparent that the bid specifications had been developed without the assistance of a person who can specify the technical requirements needed for the A/C units. In fact, the PSS-P&S Officer admitted that the minimum requirements shown in the table above were lifted from a Carrier brochure which was obtained from Carrier Guam, Inc. on December 23, 1996. The information on the Carrier brochure listed a number of quantified performance features and physical characteristics that generally differ for each unit with different cooling capacity, which is stated in terms of BTUs (British Thermal Units). As to why a 24,000 BTU capacity was specified, the PSS-P&S Officer told us that she based

the determination from the recommendation of the MHS Vice-Principal through a telephone conversation. According to the PSS-P&S Officer, the Vice-Principal specified that each classroom would need a 24,000 BTU unit which the PSS-P&S Officer understood to mean one new 24,000 BTU unit for each classroom.

In an interview, the PSS-P&S Officer stated that she lacked the expertise to determine the technical specifications of the A/C units to be procured. However, to comply with the Commissioner's instructions to proceed with the preparation of the specifications, she copied the exact features from a Carrier brochure for a 25,000 BTU unit which was the closest unit meeting the 24,000 BTU cooling capacity specified by MHS. Although the features specified in the IFB pertain to a 25,000 BTU unit, the PSS-P&S Officer still specified a minimum of 24,000 BTUs in the IFB. This resulted in an erroneous specification for the minimum Energy Efficiency Ratio (EER), the ratio of the number of BTUs over the power consumption watts. The minimum EER of 9.0 as stated in the IFB pertains to a 25,000 BTU unit and since EER is the ratio of the BTU over the consumption watts, the minimum EER should have decreased when the minimum cooling capacity was specified at 24,000 BTUs instead of 25,000 BTUs. These facts support the appellant's argument that the specifications were not developed by a technically competent person.

Under the rules for competitive sealed bidding, contracting agencies are required to state their needs in sufficient detail to permit full and open competition and to allow bidders to properly respond. It is generally accepted, however, that agencies may include restrictive specifications, but only to the extent that they are necessary to meet the agency's minimum needs. We reviewed the records and interviewed employees of PSS's Maintenance Office to determine whether the features specified in the IFB were necessary to meet MHS's minimum A/C needs. Our review of documents on this IFB showed no record that supports the agency's need for the specific features stated in the solicitation.

Regarding the required BTUs, we were initially concerned that the 24,000 BTU units, which have a specified area cooled of 620 square feet, would not be sufficient to cool a typical MHS classroom of 900 square feet. In an interview, the MHS Administration clarified that *two* new units with a combined capacity of 48,000 BTUs will be installed in each classroom instead of just one as was previously understood by both the PSS-P&S office and the PSS Maintenance office. We were puzzled at this lack of proper communication among the offices involved in this IFB.

The records on this IFB showed no evidence that the specified BTU level was based on a determined actual cooling requirement which took into consideration the relevant conditions in the different classrooms. It appears from our discussion with the MHS Administration that the specifications did not consider the equipment installed in some of the classrooms, such as computers, which would require additional BTUs. An Engineer from the Technical Services Division of DPW recommends that another A/C unit be added to those classrooms with a significant number of computers. This reflects lack of proper planning in the development of the minimum requirements for this IFB.

- (2) Because PSS imposed very rigid specifications, we believe that PSS did not take effective steps towards ensuring that all interested vendors were permitted to compete. In a previous IFB for the same split-type A/C units, PSS had not included those minimum features required under the solicitation for MHS A/C. Although we recognize the lack of a requirement that agencies should structure each procurement to be consistent with past practices, we are puzzled why specific product features were included in this IFB while a prior PSS procurement of similar school A/Cs stated only the required BTUs, voltage, and type of unit (split or window type). The A/C units procured under the previous IFB had an even higher BTU capacity (more than twice that required in this IFB) but the corresponding bid specifications did not contain the specific features required in this IFB. This demonstrates that PSS is able to put out a bid solicitation without necessarily imposing certain minimum features.

We agree with the appellant that the specification requirements were written for a 25,000 BTU Carrier brand unit and not for a 24,000 BTU unit in general. The manner in which this solicitation was handled, as discussed above, convinces us that the solicitation imposed unnecessary requirements which in our view may have effectively restricted full and open competition. In addition, it is possible that other prospective bidders were discouraged from submitting bids because their available units could not meet the definitive minimum requirements copied from the Carrier brochure. Not even the five bidders on this IFB met all the minimum requirements set forth in the solicitation. Since all the bidders were considered non-responsive by PSS, the award was given to the bidder that met most of the specifications on this IFB. Because the specifications were taken from a brochure for a Carrier brand unit, we believe that Carrier would naturally meet most of the requirements -- a situation which in our view unfairly benefitted Carrier.

A DPW engineer told us that for the type of A/C units involved in this IFB, the critical items that should have been specified to the bidders are the required BTU capacity, the required minimum and maximum voltage, the type of the unit (such as window or split type), and wireless remote, if needed. The engineer explained that the A/C units from different manufacturers for the same number of BTUs would have almost the same performance features.

- (3) We believe that an award made on the ground that a bidder met most of the bid specifications is contrary to the requirements of the PSSPR. Section 3-102(9)(a) of the PSSPR requires that award under competitive sealed bidding must be made to the lowest responsive responsible bidder whose bid fully meets the bid requirements. Based on this requirement, the specifications should contain only those necessary to meet the agency's minimum needs, to help ensure responsiveness of the bids. In this solicitation, PSS included immaterial specifications which unnecessarily created a situation where all the bids were non-responsive. This resulted because PSS did not establish the essential requirements prior to the bidding period.

It was only after the bids had been opened, specifically during the evaluation of the bids, that PSS became aware of the immaterial specifications and realized the need to identify

the essential specifications for this IFB. The PSS-P&S Officer then tried to rectify the situation by not considering these immaterial specifications in the evaluation of the bids. After discovering material errors or mistakes in a solicitation, the contracting agency commonly issues an amendment to an IFB. In cases where the material errors or mistakes are identified after the opening of the bids, the IFB is canceled, followed by a new bid solicitation with corrected specifications. In this instance, the errors were identified after the bids had been opened. We consider these errors material because we believe that they were prejudicial to fair and open competition, and they could also be prejudicial to PSS since the uncorrected specifications may not have reflected the minimum needs of PSS. Under these circumstances, we would have expected PSS to cancel the IFB and re-solicit bids based on corrected specifications. Instead, PSS made the award to the bidder meeting most of the requirements -- even though some of these requirements were erroneous. It is improper to make an award to a bidder based on a flawed solicitation, and is certainly unfair to the other bidders who may have been disadvantaged by the erroneous and overly restrictive specifications.

In conclusion, our findings of fact on the propriety of the bid specifications showed flaws in this solicitation which were material, because in our view the errors or mistakes on this IFB were prejudicial to fair and open competition and could also be prejudicial to PSS. Accordingly, we have determined that the proper remedy in this instance is a cancellation of the IFB and re-advertisement of a new bid solicitation based only on such material specifications as are deemed necessary by a technically competent person(s) to meet the minimum needs of PSS.

Other Arguments in the Appeal

Since we have already determined that the proper remedy is a cancellation of this IFB, we need not consider the other arguments in the appeal. However, we will comment on these other arguments to help guide PSS in its proper administration of IFBs. Following are our comments on the other arguments presented in this appeal:

Validity of Bid Documents Used by PSS in its Evaluation. The appellant claims that no bidder submitted relevant information in its bid because no such documentation was requested. We agree with the appellant because the solicitation did not contain a descriptive literature requirement. Descriptive literature means any information which shows the characteristics of a product, which includes brochures, illustrations, and drawings. The PSSPR does not contain requirements dealing with submission of descriptive literature. In other jurisdictions, however, such as the U.S. Government with its Federal Acquisition Regulations (FAR), bidders are not required to submit descriptive literature unless the contracting agency needs it to determine whether the products offered meet the specifications and to establish exactly what the bidders propose to furnish. If descriptive literature is needed by the contracting agency to determine responsiveness of the bids, we believe that the IFB should clearly state what descriptive literature is to be furnished by the bidders, to ensure fair competition.

To be responsive, a bidder offering an item under a “meet or exceed” requirement should provide sufficient descriptive information to permit the contracting agency to assess whether the product offered possesses each salient characteristic of the item specified in the solicitation. However, we believe that the contracting agency has an obligation to inform bidders of the characteristics that are essential to the government’s needs, including instructions as to the required statements and documents that should be submitted as part of their submissions. PSS could not properly reject a bid on the basis that no information was provided in such bid, where the solicitation did not contain sufficient bid instructions to prospective bidders.

Our review of PSS’s bid evaluation showed that three of the five bidders were determined to be non-responsive because there was no information in their submissions about their conformance with the specific features stated in the IFB. However, we believe that this resulted because the solicitation did not contain instructions necessary to guide the offerors in presenting their bids. We were told by the PSS-P&S Officer that Carrier, unlike the other bidders, was considered responsive because its submission contained all the relevant characteristics of its unit in relation to the features specified in the IFB, and Carrier met almost all of the specified features. The solicitation, however, did not provide any instructions to the bidders as to what information should be provided in their bids, nor was there an identification of the essential requirements to be met for consideration of award. It should be understood that without a clear instruction in the IFB, it was unreasonable to expect that prospective bidders would present information in their submissions in the manner envisioned by the contracting agency.

The appellant claims that PSS gave Carrier undue advantage to supplement its bid with manufacturer’s specifications after the bid closing date. Records for the IFB do not support this allegation. We found that Carrier sent its brochure on March 11, 1997 as shown in a facsimile stamp, and not at 4:00 p.m. on March 4, 1997 as alleged by JWS. In any event, our review of the bid evaluation showed that Carrier’s brochure was not a determining factor in PSS’s determination of the successful bidder.

As for determining responsiveness, we agree with PSS that responsiveness must be ascertained from the bid documents themselves and not from explanations or clarifications provided by the bidder after the bids have been opened. Since only information available at the bid opening may be considered in determining responsiveness, it is not proper to consider a bidder’s submission after the bids have been opened, nor would it be proper to seek additional data affecting a material requirement -- generally those affecting price, quantity, quality, and delivery of the items covered in the bid.

To be responsive, a bid, as submitted, must represent an unequivocal offer to perform, without exception, in accordance with the requirements set forth in the IFB so that the bidder will be bound to fulfill all the material terms and conditions. A submission which on its face takes no exception to the IFB’s requirements is responsive if it is an unqualified promise to meet all the terms and conditions set forth in the solicitation.

Whether Carrier was a Responsible Bidder. Regarding JWS's allegation that Carrier was not a responsible bidder based on two prior government contracts, PSS explained that any delays on these two contracts were not the fault of Carrier. On the Rota High School Gymnasium, PSS explained that the contractor in this project was Carrier's distributor in Rota and not Carrier itself. As for Garapan Elementary School, PSS stated that the delay in the installation of the A/Cs occurred because the school's electrical system had to be worked on first before the A/Cs were installed. PSS added that Carrier could not be blamed for the delay because the existing electrical wiring at that time was not sufficient to allow full installation of the A/Cs.

Although we have no reason to disagree with PSS on these matters, we are concerned that there was no evidence of determination of Carrier's responsibility with reference to those factors stated in PSSPR Section 3-301. In an interview, the PSS-P&S Officer stated that the bid evaluation did not include a formal determination of responsibility in those areas specified by the PSSPR, such as financial capability, management and manpower capability, and past performance. However, since a proper remedy in this appeal is a cancellation of the subject IFB, PSS should ensure that a proper determination of responsibility under PSSPR Section 3-301 will be made on its re-solicitation of bids.

Adequacy of Parts Supply and Compliance with Delivery Time. We have combined our comments on JWS's arguments under grounds 2 and 3 because of the similarity of the issues involved.

The Commissioner asserts that JWS was non-responsive because its bid did not contain any information related to keeping parts in stock and its bid submission did not state the proposed delivery time. Similar to an earlier comment, the solicitation did not provide instructions about the submission of necessary information. It was unreasonable to expect prospective bidders to submit necessary information in their bids when the solicitation failed to include clear instructions about what information was required in the submission.

Additionally, the requirements for adequate parts in stock and delivery within a specified number of days were not a matter of responsiveness, as these relate more closely to the bidder's capacity to supply the necessary parts for the repair and maintenance of the A/C units and its capability of delivering the A/Cs within the required time. The bidder's ability to comply with the solicitation requirements, such as warranty, is a matter of *responsibility*, while *responsiveness* pertains to a bid submission's conformity with the solicitation requirements. In determining responsibility, related information is obtained from a bidder submitting the lowest responsive bid prior to award -- not necessarily before the bid opening. Therefore, information pertaining to a bidder's responsibility, such as a parts list, need not be submitted before the bid closing date as this information can be submitted after bid opening and after determining the lowest responsive bid.

Again, since a proper remedy on this appeal is a cancellation of the subject IFB, PSS should ensure that in its re-solicitation of bids, the ability of the determined lowest responsive bidder to comply with the bid requirements is evaluated based on the requirements of PSSPR Section 3-301.

Other Possible Requirements Not Included in the Solicitation

In the course of our review, we were told that there are other possible requirements which may need to be included as part of the new bid specifications. In an interview, an Engineer at the Technical Services Division of DPW told us that the split-type A/C units that are commercially available on Saipan do not provide fresh air. Another Engineer at the Building Safety Office (BSO) of DPW stated that commercially available A/Cs do not normally provide fresh air; such additional feature is an optional item and will be provided only if the buyer asks for it. According to the BSO Engineer, fresh air can be provided into an enclosed room either by (1) adding an accessory called “outside air plenum” to the existing A/C, or (2) installing exhaust fans. The BSO Engineer stated that the fresh air, also called outside air, requirement is provided in the Uniform Building Code (UBC) that was adopted by the CNMI. We were shown a provision in the UBC that requires a mechanically operated ventilating system to be capable of supplying a minimum of 5 cubic feet per minute of outside air per occupant. According to the BSO Engineer this requirement applies to educational institutions.

Since this requirement is totally new to PSS, we recommend that its Legal Counsel determine the applicability of the UBC to this solicitation, particularly with regard to the fresh air requirement. If PSS needs to comply with the UBC, the re-solicitation of bids should include the applicable UBC requirements in the bid specifications.

DECISION

The Office of the Public Auditor grants the appeal in part. We hereby direct PSS to cancel the portion of IFB 97-005 that pertains to the procurement of 118 A/Cs for MHS, and re-advertise a new solicitation of bids, perhaps with a shortened bidding period. The deficiencies on IFB 97-005, as discussed in the preceding section, warrant a cancellation of the current solicitation. Cancellation of an IFB is appropriate where an award under such IFB would not satisfy the actual minimum needs of the government, or when other bidders would be prejudiced by the award. We conclude that there was no evidence either that the specifications represented the actual needs of MHS, or that the applicability of certain requirements under the UBC to this solicitation was considered. Additionally, based on our findings of facts, we are convinced that the errors or mistakes in this solicitation prejudiced other bidders.

Although the administration of MHS may have been willing to proceed with the award, it was more appropriate under the existing circumstances to cancel the IFB and re-solicit new bids after a qualified person has assessed and set forth an accurate statement of MHS’s minimum needs for air conditioning units. The determination of the minimum needs should take into account all relevant conditions in each classroom, such as: the number of students and teachers in the classroom, the electrical equipment inside the classroom, the size and design of the classroom, among other factors. According to a BSO Engineer, calculation of the needed BTU capacity and other A/C features depends on the existing conditions of the classrooms, with each condition affecting the needed level of BTUs and other features required. The same engineer said that an accurate calculation can be done using set professional standards. Accordingly, PSS

should engage a qualified person, perhaps a DPW Engineer, to assist in determining the minimum air conditioning needs of MHS.

Additionally, the re-solicitation and evaluation of bids should be done in strict compliance with the PSSPR, and the comments we made in this decision should be taken into consideration to ensure that the competitive sealed bidding process is conducted properly. Since MHS stated the urgent need for the A/C units, PSS may expedite the re-bidding and contract award process as long as it is not prejudicial to fair and open competition and is in compliance with the PSSPR. One way to expedite the bidding process is to shorten the bidding time from the usual 30 calendar days to perhaps 2 weeks if PSS determines it to be reasonable and necessary. PSSPR Section 3-102(3) provides that a bidding time of at least 30 calendar days shall be provided unless the Chief determines a shorter period is reasonable and necessary. [Emphasis added.] Additionally, our inquiry at the CNMI Division of Procurement and Supply, whose Procurement Regulations also provide the same bidding time as stated above, showed that Executive Branch solicitations normally provide for 2 weeks advertisement when the items being procured are urgently needed.

Section 5-102(9) of the PSSPR provides that the appellant, any interested party who submitted comments during consideration of the protest, the Commissioner, 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 upon 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.

ORIGINAL SIGNED

Leo L. LaMotte
Public Auditor, CNMI

August 22, 1997