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Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF
HAWAIIAN ROCK PRODUCTS CORPORATION)

)
) APPEAL NO. BP-A028
) DECISION ON APPEAL
) (Protest Decision No. 01-006A)
)

SUMMARY

This decision is from an appeal filed by Hawaiian Rock Products Corporation (HRPC) from the denial of its protest by the Division of Procurement and Supply (P&S) Director concerning the paving of the Susupe Sports Complex parking lot and a residential road in Capitol Hill, Saipan.

In its appeal, HRPC asserts that (1) the P&S Director's decision improperly rejected HRPC's claim that it was low bidder, (2) the P&S Director's decision to not disqualify Western Equipment, Inc. (WEI) was contrary to the bid instructions, and (3) the award was not to a responsible bidder. HRPC requests the Public Auditor to overturn the ruling of the P&S Director and award the contract to the lowest responsible bidder.

The Public Auditor denies the appeal. Although we have determined that HRPC filed a timely protest on the low bidder issue, we find that WEI was in fact the lowest bidder under the IFB based on the criterion set forth in addendum 2, and sustain the P&S Director's finding that WEI was also a responsible bidder, in the absence of any showing that he abused his discretion.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

In November 2000, Invitation for Bid Number DPW00-IFB-062 was jointly issued by the Department of Public Works (DPW) Secretary and the P&S Director for the paving of the Susupe Sports Complex parking lot and a residential road in Capitol Hill, Saipan. Addenda 1 and 2 were subsequently issued on November 30 and December 1, 2000, respectively. Three companies submitted bids by the December 27, 2000 bid opening date: Maeda Pacific Corporation, WEI, and HRPC.

By letter dated February 14, 2001, the DPW Secretary informed the bidders of the government's intent to award the project to HRPC. On February 15, 2001, WEI protested the intended award to HRPC alleging that based on its review of the record, WEI was the lowest responsive and responsible bidder. In its P&S Protest Decision No. 01-001 dated April 4, 2001, the P&S Director

granted WEI's protest by ruling that WEI was in fact the low bidder, and directed DPW to rescind its letter of intent to award the project to HRPC and to pursue award of a contract to WEI.

On April 18, 2001, HRPC protested P&S Protest Decision No. 01-001, claiming that WEI was not the lowest and responsible bidder. In its P&S Protest Decision No. 01-001A dated June 12, 2001, the P&S Director ruled that WEI was the low bidder but not a responsible one, and therefore directed the DPW Secretary to pursue award of a contract to HRPC.

On June 26, 2001, WEI protested P&S Protest Decision No. 01-001A by alleging that it was a responsible bidder. In its P&S Protest Decision No. 01-006 dated August 3, 2001, the P&S Director granted WEI's protest, ruled that WEI is a responsible bidder for the project, and directed the DPW Secretary to award the contract to WEI.

On August 15, 2001, HRPC protested P&S Protest Decision No. 01-006, claiming that: (1) HRPC submitted the lowest bid in the procurement based on DPW's assessment; (2) P&S failed to perform an independent investigation of WEI's responsibility with regard to WEI's payment of its subcontractors on CNMI projects, and relied solely on a certification from WEI's attorney that all subcontractors had been paid; and (3) HRPC was not provided a copy of that certification, nor was it provided a copy of the bond commitment letter for the project dated June 15, 2001. On September 12, 2001 in its Protest Decision No. 01-006A, the P&S Director denied HRPC's protest.

On September 24, 2001, HRPC appealed P&S Protest Decision No. 01-006A to the Office of the Public Auditor (OPA). On September 25, 2001, OPA informed the P&S Director of the appeal and requested a complete report, which P&S filed on the same day. On October 10, 2001, WEI submitted its comments on HRPC's appeal. No rebuttal to WEI's comments was submitted to OPA by the October 17, 2001 deadline.

ANALYSIS

We now discuss the arguments of P&S, HRPC, and WEI as presented in the appeal process, including our comments on the merits of the arguments presented.

P&S Director's Protest Decision No. 01-006A

On September 12, 2001, the P&S Director denied HRPC's August 15, 2001 protest, concluding that:

1. WEI is the low bidder under the subject procurement, and this was decided in P&S Protest Decision No. 01-001A. Because HRPC failed to file a timely protest of this earlier decision, P&S denied HRPC's attempt to now raise the issue.

2. The P&S Director had performed an investigation of WEI's financial responsibility appropriate to the circumstances of this case, and WEI was a responsible bidder for the project.
3. HRPC would be provided a copy of the commitment letter for U.S. Treasury bonding which WEI obtained for the project.
4. HRPC would not be provided a copy of the certification of payment submitted by WEI's attorney for confidentiality reasons.
5. The DPW Secretary should award the contract to WEI.

HRPC's Appeal to the Public Auditor

On September 24, 2001, HRPC appealed the P&S protest decision to OPA. In its appeal, HRPC requests the Public Auditor to overturn the ruling of the P&S Director and award the contract to the lowest responsible bidder. HRPC asserts that (1) the P&S Director's decision improperly rejected HRPC's claim that it was low bidder, (2) the P&S Director's decision to not disqualify WEI was contrary to the bid instructions, and (3) the award was not to a responsible bidder.

P&S Director's Rejection of HRPC's Low Bidder Claim

HRPC argues that:

1. There was no need to either appeal or protest the P&S Director's decision on the issue of *lowest bidder* in Protest Decision No. 01-001A since (a) HRPC had already been designated the prevailing bidder after WEI was determined not to be responsible, (b) WEI filed its protest on the *responsibility* issue on the last day for filing protests, there was no time for HRPC to then prepare and file its protest on the *lowest bidder* issue, and (c) [although no issue regarding appeal was raised by the P&S Director] HRPC stated that if it had appealed to OPA a protest decision in which it had already prevailed, this would produce the incongruous result of the Public Auditor assuming jurisdiction while the P&S Director was still considering WEI's protest.
2. The P&S Director erred in his determination that HRPC was not the low bidder, again asserting that it submitted the lowest bid based on DPW's assessment.
3. The bid documents and subsequent addenda noted that certain items were likely to be deleted. Accordingly, the deletions were anticipated as per the bid documents and all parties were aware that certain items would be deleted. Hence, all parties were treated fairly and equitably.

P&S Director's Decision to Not Disqualify WEI

HRPC states that Section 14(c) of the Bid Instructions provides that the government may disqualify a bidder for “failure to pay or satisfactorily settle all bills due for labor and material on former contracts in force at the time of advertisement of bids.” HRPC argues that the P&S Director was put on notice that WEI is currently in arrears to other local contractors for DPW projects in which WEI is the general contractor. HRPC contends that despite this notice, the P&S Director still chose to not disqualify WEI as a bidder.

Award Was Not to a Responsible Bidder

HRPC contends that WEI was not a responsible bidder as defined in the CNMI-PR since WEI was not current in its obligations to pay for materials supplied in a previous DPW contract. HRPC also questions WEI's financial integrity and reliability when it certified in its application for payment under a public contract that it had paid its outstanding obligations to its vendors.

P&S Director's Report on the Appeal

In his report on the appeal dated September 26, 2001, the P&S Director has provided the following response to the allegations in the appeal:

P&S Director's Rejection of HRPC's Low Bidder Claim

The P&S Director emphasizes that WEI was clearly the low bidder since bids must be evaluated based on the specifications in the Invitation for Bids. The P&S Director also states that this issue was decided adversely to HRPC in P&S Protest Decision No. 01-001A, but was not protested by HRPC within the allowable time limits.

P&S Director's Decision to Not Disqualify WEI

With respect to this issue, the P&S Director states that the language of Section 14(c) of the Bid Instructions gives the P&S Director the discretion whether to disqualify WEI, and claims that P&S did not view this situation as one where the best interest of the CNMI government would be served by such a disqualification.

Award Was Not to a Responsible Bidder

The P&S Director asserts that WEI has settled relevant outstanding obligations, and stresses the fundamental rule that a bidder's responsibility may be determined at any point up to the time of contract award.

WEI's Comments on the P&S Report

On October 10, 2001, WEI submitted its comments on the September 26, 2001 P&S Director's report. In its comments, WEI requests the Public Auditor to uphold the P&S Director's September 12, 2001 decision. Specifically, WEI states that:

1. HRPC's protest regarding WEI's bid being the lowest was filed too late. WEI contends that HRPC was "aggrieved" by the P&S Director's decision in P&S Protest Decision No. 01-001A that WEI was the lowest bidder, and therefore should have filed a protest within ten working days from the date of that protest decision.
2. Even if HRPC's protest is deemed timely, P&S properly found WEI's bid to be the lowest.
3. WEI is a responsible bidder. WEI contends that in support of its position that it has adequate financial ability to perform the contract, it provided a March 31, 2001 financial statement, a June 26, 2001 declaration from WEI's Chief Engineer detailing the dollar value of WEI's current inventory which will be used to complete the project, a letter of commitment from a U.S. Treasury-listed surety to bond WEI for the project, and an August 1, 2001 letter from WEI's attorney attesting that WEI had paid all contractors and material suppliers on CNMI contracts.

OPA's Comments

In its appeal, Appellant HRPC asserts that the (1) P&S Director's decision improperly rejected HRPC's claim that it was low bidder, (2) P&S Director's decision to not disqualify WEI was contrary to the bid instructions, and (3) award was not to a responsible bidder.

P&S Director's Rejection of HRPC's Low Bidder Claim

HRPC challenges the P&S Director's conclusion that it had not filed a timely protest. We will first discuss this issue before deciding who the lowest bidder is under this IFB.

The P&S Director, in Protest Decision No. 01-001A, ruled that WEI was the low bidder under the IFB. However, since WEI was determined to be not responsible, the P&S Director granted HRPC's protest and directed DPW to pursue the award of a contract to HRPC. Being the prevailing bidder, HRPC was not "aggrieved" at that time. Under CNMI Procurement Regulations (CNMI-PR) Section 6-101(1)(a), any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the P&S Director. Since HRPC was not aggrieved by the decision, the issue of low bidder was not ripe for protest.¹

¹ Black's Law Dictionary, Fifth Edition, 1979, defines "aggrieved party" in part as "(O)ne whose legal right is invaded by an act complained of, or whose pecuniary interest is directly affected by a decree or judgment."

In a subsequent decision on the same project (Protest Decision No. 01-006), the P&S Director *reaffirmed* his determination that WEI submitted the lowest responsive bid. The decision granted WEI's protest and directed that the project be awarded to WEI. Only then did HRPC become an aggrieved party, and the low bidder issue became ripe for protest. HRPC filed its protest on August 15, 2001, eight working days after the P&S Director issued Protest Decision 01-006. HRPC's protest to the P&S Director was timely filed.

Who, then, is the lowest bidder under the IFB? Addendum No. 2, which incorporates HRPC's written questions regarding the IFB and the corresponding A&E firm's response to these questions, clearly sets forth how the lowest bidder will be determined. Number 14 in the A&E firm's response provides that "(T)he lowest, responsible, responsive bid for Schedules A and B, less the additive bid will be selected." Based on this criterion, the table below shows the breakdown and total amount of HRPC's and WEI's submitted bids.

Particulars	HRPC	WEI
Schedule A	\$167,813.00	\$153,781.50
Schedule B	44,139.75	53,460.50
Total	211,952.75	207,242.00
Less: Additive	10,208.70	17,442.00
Net Bid	\$201,744.05	\$189,800.00

The table above clearly shows that WEI is the lowest bidder in this procurement under the criterion set forth in addendum 2. DPW's determination of lowest bid included unnecessary deductions which were not set forth in the invitation for bids or in the subsequent addenda.

P&S Director's Decision to Not Disqualify WEI

The language of Section 14(c) of the Bid Instructions gave the P&S Director the discretion whether to disqualify a bidder for failure to pay or satisfactorily settle all bills due for labor and material on former contracts in force at the time of advertisement of bids. Nowhere in the IFB was there a requirement that the P&S Director automatically reject a bidder for failure to settle bills on its former or current contracts. We reiterate our ruling in Appeal Decision No. BP-A020, that "Although the ITB specified the grounds for disqualification, its language gave the P&S Director the discretion to disregard these factors when making an award if he determined that doing so would be in the Government's best interest." (At page 8.)

Award Was Not to a Responsible Bidder

In its appeal, Appellant HRPC failed to provide information to substantiate its allegation concerning WEI's integrity and reliability. Nonetheless, the financial responsibility and capability of WEI to perform the contract was evaluated by P&S, which concluded that WEI had settled

relevant outstanding obligations. As stated above, the P&S Director had the discretion to not disqualify WEI even if it had not paid its vendors, in the absence of evidence that the P&S Director had clearly abused his discretion. No such evidence was provided by HRPC.

DECISION

The Public Auditor denies the appeal. Although we have determined that HRPC filed a timely protest on the low bidder issue, we find that WEI was in fact the lowest bidder under the IFB based on the criterion set forth in addendum 2, and sustain the P&S Director's finding that WEI was also a responsible bidder, in the absence of any showing that he abused his discretion.

Section 6-102(9) of the revised CNMI-PR provides that HRPC, 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 10 days after the date of this decision.



Michael S. Sablan
Public Auditor

December 17, 2001