

Also on July 20, 2010, Hong Electric wrote PSS and advised it of the ambiguity between the 90 day completion period called for in the question and answer section of Addendum 3 and the “performance period of 150 days or best offer” also contained in Addendum 3.

On July 21, 2010, the Procurement Officer sent Hong Electric a letter informing it that its bid was rejected due to its failure to sign an Equal Employment Opportunity Form contained in the bid package.

Hong Electric timely protested its bid rejection as non-responsive, claiming that its proffered 125 day completion period met the bid’s requirements and contested its rejection for failure to sign the Equal Employment Opportunity (EEO) Form included in the bid package as a non-material non-conformity capable of being corrected after the bid was accepted.

On August 10, 2010, the Commissioner denied Hong Electric’s protest. She agreed with Hong Electric that the failure to sign the EEO form was immaterial. The Commissioner denied the protest, though, for Hong Electric’s failure to provide a 90-day performance period. The Commissioner acknowledged the 150 day or best offer language in Addendum No. 3, but concluded the language contained in the question and answer section on pages 5 and 8 of Addendum No. 3 “unequivocally state[s] that the completion time is 90 days.” Commissioner’s Protest Decision at page 1. The Commissioner further explained that Hong Electric’s argument that the Statement of Work section extended the completion time to “150 days or best offer” was numbered 7.0 and the response in the question and answer section specifically said “Disregard Item No. 7.0 and use a completion time of 90 calendar days.” Commissioner’s Protest Decision at page 2.

Hong Electric timely appealed to OPA on August 20, 2010.

PSS provided its report on the appeal on September 1, 2010.

On September 20, 2010, OPA requested a complete copy of Addendum No. 3 with the pages in the order in which they were provided to the contractors.

On September 27, 2010, PSS provided OPA with a copy of Addendum No. 3.

The CNMI Government, including the Office of the Public Auditor was shut down from October 1 through October 11 because there was no budget. Those were not working days for OPA. OPA and the CNMI Government officially re-opened on October 12, 2010.

III. Issue

Did PSS err in rejecting Hong Electric's bid as non-responsive because of its inclusion of a 125 day completion period?

IV. Jurisdiction

The Public Auditor has jurisdiction over this appeal pursuant to NMIAC Section 60-40-405 of the PSS PR&R.

V. Analysis

There were some inconsistencies in the completion period called for by PSS in the original PSS IFB 10-056 and its addendums.

The original solicitation provided a performance period of 120 days.

Addendum No. 3 is not consecutively numbered; there are eight pages of questions and answers, followed by six pages of the Statement of Work, a three-page Bid Schedule, and four pages of schematic diagrams. At the end of the eight-page question and answer section, there is a line that reads "END OF ADDENDUM." It certainly seems that the Statement of Work, the Bid Schedule, and the schematic drawings were appended to the question and answer section because they were referenced therein and that the question and answer section was the primary purpose for provision of Addendum No. 3.

The question and answer portion of Addendum 3¹ twice rejected requests to have the completion period extended. These requests were summarily and categorically denied:

On page 5 of Addendum No. 3, Hong Electric asked in questions submitted on June 7, 2010:

3. 60 calendar days performance is not feasible, because the procurement of materials (like lighting fixtures etc.) comes from off

¹ OPA requested a copy of Addendum No. 3 on September 20, 2010 because of confusion created by PSS' submission. The notice for Addendum No. 3 stated that it had 21 pages and asked potential bidders to pick up a copy at the PSS Offices on the third floor of the Retirement Building. But on page 8 of Addendum No. 3, at the end of the question and answer section, "END OF ADDENDUM" was printed. OPA was confused as to the number of pages of Addendum No. 3 and its content and therefore requested a copy of the addendum in its entirety and in the order in which it was provided to the potential bidders.

island and takes at least 60 days to arrive in Saipan. We would like to request for a performance period extension from 60 to 120 calendar days, as also stated in the Statement of Work, Item No. 7.0 Performance Period.

[PSS] RESPONSE: Disregard Item No. 7.0 and use a completion time of 90 calendar days.

On page 8 of Addendum No. 3, Western Pacific Electric asked in questions submitted on June 9, 2010:

1. We are requesting if you can extend the completion to at least 150 calendar days, the Panelboards are not available in the island and need to be assembled in the factory specially the MDP. Lead time in the factory is 6 to 8 weeks plus shipping. It will take approximately 12 weeks for the materials to be here in the island.

[PSS] RESPONSE: 90 calendar days.

Immediately following the question and answer section of Addendum No. 3, there is a six-page Statement of Work. On the last page of the Statement of Work, there is a line that reads “performance period of 150 days or best offer.” The term “best offer” is either meaningless or confusing when it is part of an IFB. In an IFB, if a bidder meets the specifications contained therein and is a responsive and responsible lowest bidder, it should be awarded the contract. The phrase “best offer” implies balancing evaluative criteria as contained in a Request for Purchase, not an IFB. Thus, this phrase might have warranted a question from the contractors on its own, but it was clearly usurped by the very clear directives in the question and answer section.

Not only was the request for extension summarily and categorically denied twice, but in one of the instances it was in response to a question by Hong Electric. Hong disregarded an explicit directive to disregard Item No. 7.0 and instead submitted a bid based on the performance period in Item No. 7.0. While there were ambiguities in the solicitation and its addendums, they do not rise to the level to justify a re-bid of the solicitation. The performance period in Item No. 7.0 is irrelevant because bidders were instructed to disregard it.

In support of its position it should have been permitted to modify its completion period, Hong cites (Appeal at page 6) to an OPA decision, *In re Allied Construction Corporation*, BP-AO53, PSS RFP 07-025 at page 14:

The PSS-PR do, however, provide that discussions “may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for an award” to insure the responsiveness to the solicitation requirements. *See* [Section] 60-40-225(f). This does not mean that an initial proposal that contains deficiencies that may be made technically acceptable prior to the award must be rejected, as is the case in sealed bidding wherein modification of bids is limited and negotiations are prohibited. . . .

OPA stands by that assessment. Hong is citing to an OPA Decision on a Request for Purchase which allows for some discussion and negotiation. The current solicitation is an Invitation for Bid (a sealed bid), where, as the OPA Decision Hong cites, modification of bids is limited and negotiations prohibited.

VI. Decision

The Public Auditor finds that PSS properly rejected appellant’s bid as non-responsive.

Dated this 26th day of October, 2010.

A handwritten signature in black ink that reads "Mike Pai". The signature is written in a cursive, flowing style.

Michael Pai, CPA
Public Auditor