



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF CARRIER GUAM, INC.
SAIPAN BRANCH

PSS IFB No. 97-0019
DECISION ON APPEAL
No. BP-A012

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This is an appeal filed by Carrier Guam, Inc., Saipan Branch (Carrier), represented by its Branch Manager, from the denial by the Commissioner of Education (Commissioner) of its protest pertaining to Invitation for Bids (IFB) No. 97-0019 of the Public School System (PSS). The Office of the Public Auditor (OPA) has jurisdiction of this appeal as provided in Section 5-102 of the PSS Procurement Regulations (PSSPR). Carrier filed its timely appeal with OPA on December 3, 1997.

OPA's Earlier Appeal Decision

PSS IFB 97-0019 resulted from a re-solicitation of bids for the delivery of 118 air conditioners (A/Cs) for Marianas High School (MHS) which was originally solicited in PSS IFB 97-005. The re-solicitation of bids was directed by OPA in its decision on an earlier appeal from a protest ruling in PSS IFB 97-005. In that earlier decision, OPA directed PSS to cancel the portion of PSS IFB 97-005 that pertained to the procurement of 118 A/Cs for MHS and re-advertise a new solicitation of bids. OPA concluded that it was more appropriate to cancel IFB 97-005 and re-solicit new bids after a qualified person had assessed and set forth an accurate statement of MHS's minimum needs for air-conditioning units. In the same decision, OPA stated that cancellation of an IFB is appropriate where an award would not satisfy the actual minimum needs of the government, or when other bidders would be prejudiced by the award.

The Current Solicitation

PSS IFB 97-0019 was a solicitation of competitive sealed bids for the procurement and installation of 118 split-type A/Cs for MHS. The IFB was advertised from the latter part of August 1997 to September 1997. The IFB also provided that the A/Cs were to be delivered and installed in Susupe, Saipan within ninety (90) days from the date of contract award (CIF MHS). PSS then began issuing the technical specifications document for IFB 97-0019 on August 29, 1997, which was prepared by an Engineer from the Department of Public Works - Technical Services Division (DPW-TSD). The specifications required the bidders to deliver and install 118 split-type A/C units with a total cooling capacity of 24,000 BTUs, sensible

cooling capacity of 18,000 BTUs, condenser air temperature of 95F, evaporator fan motor of 2.0 FLA, compressor motor of 10.9 RLA, condenser fan motor of 0.70 FLA and a power supply of 208/230V-1-60, among other requirements.

In addition to the technical specifications for PSS IFB 97-0019, PSS issued "Instruction to Bidders" which stated that the successful bidder must be the lowest responsive and responsible bidder. The "Instruction to Bidders" provided guidelines for determining a responsive and responsible bidder which were mostly a restatement of relevant PSSPR requirements. It also listed certain documents that the bidders should submit with their bids, such as financial statements, listing of customers, documentation of the company's satisfactory record, staff experience and skills, and business license, among other required documents.

The bids for PSS IFB 97-0019 were opened as scheduled at 10:00 a.m. on September 25, 1997 at the PSS Central Office, 3rd Floor Nauru Building, Susupe. Four companies submitted bids in this IFB, namely: ALPZ Merchandising (ALPZ), Torres Refrigeration, Inc. (Torres), Pacific Technical Services Saipan, Inc. (PTS), and JWS Air Conditioning & Refrigeration (JWS). The appellant, Carrier, did not submit a bid on the current solicitation although it had been the selected bidder on the canceled original solicitation under PSS IFB 97-005.

Evaluation of the Bids

Among the four bidders on IFB 97-0019, PTS submitted the lowest bid price, followed by JWS, ALPZ, and Torres. Although PTS's bid was the lowest, it was not selected for award because it was considered non-responsive and non-responsible. PTS was determined to be non-responsible because it did not submit the documents that were required to be submitted with the bid. PTS's bid was also considered non-responsive based on the technical evaluation of the brand of A/C units submitted by PTS and JWS which was done by an electrical engineer (Evaluator) selected by the Principal of MHS. In his undated memorandum to the MHS Principal, the Evaluator made a point-by-point comparison of PTS's and JWS's A/C units, which showed JWS's A/C to be the better unit.

Based on the Evaluator's conclusion, the MHS Principal recommended to the PSS P&S Officer on September 27, 1997 that the award in PSS IFB 97-0019 be made to JWS. On September 28, 1997, the PSS P&S Officer recommended to the Commissioner that award of PSS IFB 97-0019 be made to JWS because it was responsive to the technical specifications of the IFB, and was responsible based on a financial review conducted by the PSS Comptroller. The recommendation for award to JWS was concurred with by the Commissioner on September 30, 1997. On the same date, the Commissioner informed all bidders of the result of the bid evaluation. PSS awarded the contract covering all 118 A/Cs to JWS on September 30, 1997.

The Protest and Subsequent Appeal to OPA

As early as September 26, 1997, Carrier had requested PSS to provide it with a copy of the bid results. On October 10, 1997, Carrier formally requested PSS in writing to review the bid documents in PSS IFB 97-0019. PSS granted this request on October 15, 1997 by informing Carrier of the date and time when it could review the relevant PSS files. On October 17, 1997,

Carrier filed a protest in PSS IFB 97-0019 with the Commissioner, in which it alleged that the subject bidding may not have conformed to accepted contracting practices or may not have been accomplished in accordance with appropriate CNMI Procurement Regulations. Carrier raised four grounds to support its allegation and requested the Commissioner to declare the bidding null and void. On November 21, 1997, the Commissioner rendered his decision on Carrier's protest. In his decision, the Commissioner denied the protest on the ground that Carrier lacked standing to file a protest in this IFB. The Commissioner concluded that Carrier was not an interested party to this procurement because it had neither submitted a bid nor filed its protest before the bid submission date.

On December 3, 1997, Carrier filed with the Public Auditor a timely appeal of the Commissioner's denial of its protest. The appeal claims that Carrier is an interested party to this procurement, based on the argument that it was the lowest responsive bidder on the canceled original solicitation under PSS IFB 97-005. The appeal also raises three of the four protest grounds earlier presented at the protest level. On December 4, 1997, OPA informed the Commissioner of the appeal filed by Carrier, and requested him to submit a complete report on the appeal and notify affected parties in accordance with the PSSPR. On the same date, the Commissioner issued the appeal notification letters to the affected parties.

On January 16, 1998, the Commissioner submitted his agency report on the appeal to OPA. To date, OPA has not received any comments on the Commissioner's report from either the appellant or any other affected parties. Although no comments on the Commissioner's report were received, we have gathered all information necessary to render a decision on this appeal. OPA is therefore issuing its decision on this appeal pursuant to PSSPR Section 5-102 (8)(c)(i), which provides that the Public Auditor shall issue a decision after all necessary information for the resolution of the appeal has been received.

ANALYSIS

The Commissioner's denial of Carrier's protest on PSS IFB 97-0019 on the basis of lack of standing to protest is the issue of this appeal. The following discusses the arguments of Carrier and PSS as they were presented in the protest and appeal process, including OPA's comments on the merits of the arguments.

Carrier's Arguments in its Protest to the Commissioner

In its protest to the Commissioner on October 17, 1997, Carrier stated its belief that some aspects of the bid did not conform to accepted contracting practices and that some items may not have been accomplished in accordance with appropriate CNMI Procurement Regulations. To support these allegations, Carrier presented the following grounds identified as items 1 to 4 in the appeal:

Item 1: Carrier stated that JWS submitted a Lennox A/C under PSS IFB 97-0019, the current solicitation, although JWS originally submitted a Peake A/C under PSS IFB 97-005. It was Carrier's position that JWS should have submitted a bid containing the same brand of A/C that was submitted in the original solicitation.

Item 2: Carrier mentioned that the technical specifications for IFB 97-0019, the current solicitation, were prepared by an Engineer under DPW-TSD, and that the same person was the Technical Advisor to PSS throughout the bid process. Carrier questioned why the DPW-TSD Engineer was not given the opportunity to review the technical specifications (perhaps Carrier was referring to a review of the bidders' compliance with the technical specifications).

Item 3: Carrier stated that the original installation and delivery time of 60 days was extended to 90 days. Carrier asked who benefitted from this extension and who requested this extension aside from the MHS Principal.

Item 4: Carrier claimed that the Evaluator reviewed only the specifications of the A/C units submitted in JWS's and PTS's bids, adding that no technical review was done on the bids submitted by ALPZ and Torres.

Decision on the Protest by the Commissioner

In his decision dated November 21, 1997, the Commissioner denied Carrier's protest because Carrier was not an interested party to the procurement in question. The Commissioner cited PSSPR Section 5-101(a) which states, in pertinent part, that 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 Commissioner. The protest decision stated that Carrier was not an interested party to the procurement in question because it had not submitted a bid and had not filed its protest before the bid submission date. As a basis for his decision, the Commissioner cited a previous Court decision that to qualify as an interested party on the basis of being a prospective offeror, a protester must file its protest prior to the date for submitting offers. The Commissioner added that the Federal Government's General Accounting Office (GAO) has repeatedly held that a non-bidding entity is not included within the definition of interested party.

Carrier's Arguments in its Appeal to the Public Auditor

In its appeal, Carrier claims that it is an interested party by virtue of having been the lowest responsive bidder in the canceled original solicitation under PSS IFB 97-005. According to Carrier, if the re-solicitation has not been done properly in accordance with the recommendation of the Public Auditor, then Carrier should be awarded the contract. The appeal again raises three of the four protest grounds presented earlier at the protest level, as follows (we have numbered them as grounds 1 to 3 for presentation purposes):

Ground 1. The appeal states that the original bid submitted by JWS was a Peake A/C. According to Carrier, in order not to gain an unfair price advantage, the bidder should have been required to bid the same brand of A/C unit.

Ground 2. The appeal states that the technical specifications were prepared by a staff member of DPW-TSD, and made an official part of PSS IFB 97-0019. As such, Carrier questions why that staff member from DPW-TSD was not given a chance to review the bidders' compliance with the technical specifications.

Ground 3. The appeal states that the Commissioner indicated that based on the technical review of the bids, JWS was considered the lowest responsible bidder. The appellant claims, however, that the Evaluator reviewed only the specifications of A/C units under JWS's and PTS's bids, and that there was no technical review done on the bids submitted by ALPZ and Torres.

The Commissioner's Comments in his Report to the Public Auditor

In his agency report on the appeal, the Commissioner reiterated his basis for denying Carrier's protest decision as discussed in his November 21, 1997 decision. The Commissioner emphasized that because Carrier neither submitted a bid nor filed its protest before the bid submission date, it was not an interested party and could not participate in the protest process contained in the PSSPR.

OPA's Comments

We first discuss the threshold issue of whether or not Carrier has standing to protest this IFB. On this issue, PSSPR Section 5-101(1)(a) requires that "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 Commissioner." In this instance, the PSSPR is very specific that a protester must be an actual bidder or a prospective bidder, and must be an aggrieved party in protesting a solicitation or award of a contract.

Appellant is not an actual bidder because it did not submit any bid on PSS IFB 97-0019. Therefore, Carrier cannot claim that it has standing to protest on this basis. However, in determining whether a non-bidding vendor has standing to protest, our office considers whether there was an alleged failure on the part of the Government to publicly announce the solicitation, including inadequate or defective advertisements, that reasonably could have caused a vendor to be unaware of the solicitation, whereas with adequate public notice the vendor would have known of the solicitation and would have submitted a bid. In this appeal, there is no allegation that the newspaper advertisement of the IFB was inadequate or defective.

Additionally, we believe that vendors had been adequately notified of this IFB through the advertisements placed in a newspaper of general circulation pursuant to the requirements of the PSSPR. Nothing came to our attention indicating any deficiency in the IFB's newspaper announcement. Therefore, appellant cannot claim that its failure to submit a bid by the bid closing was caused by a defective or inadequate solicitation announcement. Moreover,

information obtained in this appeal suggests that Carrier did not submit a bid because it missed the bid closing date. If such was the case, it would be even more inappropriate to consider Carrier's protest because of unfairness to those bidders who met the bid closing date.

As for qualifying as a prospective bidder, we have determined that Carrier could not be a prospective bidder after the closing date for submitting bids had already passed. Once a bid proposal period ends, a firm which has not submitted a bid can no longer qualify as a prospective bidder; it must have filed a proper bid protest or become an "actual" bidder by submitting a bid (*Waste Management of North America v. Weinberger*, 862 F.2d 1393 (9th Circuit 1988)). In *MCI Telecommunications Corp. v. U.S.*, 878 F.2d 362 (Fed. Cir. 1989), the Court agreed that a solicitation must be pending when protested in order for those having not yet submitted bids to be considered prospective bidders on the proposed contract. In the *MCI Telecommunications Corp.* case, *id.*, the Court added that after the date for submission of proposals has passed, the would-be protestor can no longer realistically expect to submit a bid on the proposed contract, and therefore cannot achieve prospective bidder status with regard to the original solicitation.

Further, Carrier claims that it is an interested party because it was the lowest responsive bidder on the original solicitation under PSS IFB 97-005. Carrier seems to suggest that if the re-solicitation was declared void, it would be in line for award as the lowest responsive bidder in the original solicitation. We do not agree. Carrier is not an interested party in the procurement in question, *i.e.*, the solicitation under PSS IFB 97-0019. Although the PSSPR does not contain a definition of "interested party", the U.S. Competition in Contracting Act provides that the term "interested party" means, with respect to a contract or proposed contract, an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract. As discussed above, Carrier is neither an actual nor a prospective bidder, and therefore could not be an interested party in PSS IFB 97-0019. The fact that Carrier was the lowest responsive bidder in the original solicitation has no relevance to its lack of standing to protest in the current solicitation. The original solicitation under PSS IFB 97-005 had already been canceled; any tentative award made on this canceled IFB is no longer effective and has nothing to do with the bidding process under IFB 97-0019.

Accordingly, OPA agrees with the Commissioner's decision that Carrier lacks standing to protest because it is not an interested party in PSS IFB 97-0019. Since we have determined that Carrier does not have standing to protest this procurement, we need not comment on the merits of the specific arguments presented in this appeal.

DECISION

The Office of the Public Auditor **denies** this appeal. Based on our review, we conclude that Carrier is not an interested party in PSS IFB 97-0019, and therefore lacks standing to protest any procurement action involving this IFB. Carrier is not an interested party because it is neither an actual nor a prospective bidder.

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

in the protest, may request consideration 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

February 26, 1998