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Commonwealth of the Northern Mariana Islands

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IN RE REQUEST FOR RECONSIDERATION
OF OPA APPEAL DECISION BP-A022 FILED BY
SEN MAULEG CORPORATION

)
) ITB00-0017
) DECISION ON REQUEST
) FOR RECONSIDERATION
) No. BP-A022.1
)

Sen Mauleg Corporation (SMC) requested the Office of the Public Auditor (OPA) on July 21, 2000 to reconsider its Appeal decision no. BP-A022 which denied SMC's appeal concerning the Department of Public Health's (DPH) procurement of outside ground maintenance services. OPA Appeal decision no. BP-A022 affirmed the Procurement & Supply (P&S) Director's ruling that: (1) DPH's award to SMC violated Section 3-102(9) of the Commonwealth's Procurement Regulations (CNMI-PR), and (2) the award should have been made to 3A's, as the lowest responsive and responsible bidder in this procurement.

OPA determined that neither SMC's appeal arguments nor the selection justification¹ raised any issue of responsiveness or responsibility with reference to 3A's. In its appeal decision, OPA also concluded that because the award to SMC violated the CNMI-PR, SMC's contract was not valid under CNMI-PR Section 1-107 and therefore none of its provisions apply. SMC's contract was held to be terminated under CNMI-PR Section 5-103(2)(a)(ii) which afforded SMC reasonable compensation.

In its reconsideration request, SMC questions anew 3A's responsiveness and responsibility by claiming that the average number of 3A's employees for the last three years is only three, and not six as stated in 3A's bid. According to SMC, its conclusion is based on the information it gathered from public records showing that 3A's had five employees (including two "endorsements") from January 1998 to January 1999, and only three employees for the year 2000. SMC asserts that this finding raises a question whether 3A's is a "responsive responsible bidder," and asks OPA to consider this information in reviewing its appeal decision.

¹ The heading of the selection justification suggests that it was prepared by the Commonwealth Health Center.

ANALYSIS

To obtain reconsideration of an appeal decision, the requesting party is required to present 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 [CNMI-PR §5-102(a)]. Our analysis of SMC's arguments reveals no basis for reconsidering our earlier decision because SMC's arguments have not persuaded us that our appeal decision contained errors of fact or law, and therefore do not warrant reversal or modification of our decision.

SMC's reconsideration arguments are based primarily on its claim that 3A's had an average of only three employees for the last three years, not six as stated in 3A's bid. According to the reconsideration request, 3A's had only five employees from January 1998 to January 1999, and only three employees for the year 2000 based on unspecified public records.

The requirement to submit the average number of employees for the last three years was contained in Section V of the ITB that was issued in December 1999. It is reasonable to assume that this requirement asked for the number of employees from January 1997 to December 1999 (the three prior years). We are not persuaded by SMC's contention that 3A's had an average of only three employees during the three-year period because the only relevant information it presented was for the year 1998 (where it claims that 3A's had only three employees and two "endorsements"). SMC did not present any similar information for the years 1997 and 1999. Even the information presented for the year 1998 was not verified because SMC did not specify from which "public record" the information came. We reiterate that in order to obtain reconsideration, arguments should contain *detailed* factual and legal grounds upon which reconsideration is sought. OPA cannot sustain a claim that is not clearly and adequately supported.

Even if we assume for discussion purposes that 3A's provided an incorrect number of employees in its bid submission, we must still uphold our appeal decision. SMC claims, without elaboration, that its new information brings into question 3A's responsiveness and responsibility. Under the sealed bid procurement method, the CNMI-PR only requires that award be made to a bidder found to be the lowest responsive and responsible among the other bidders. However, as stated in our appeal decision, the average number of employees claimed by SMC cannot be a responsiveness issue because it is not a material solicitation requirement. The published ITB neither specified nor implied a requirement for a minimum number of employees. We reiterate that an agency may not properly reject a bid for failing to comply with a requirement not set forth in the solicitation. [*Matter of Tri Tool, Inc.*, B-265649.2, January 22, 1996].

Furthermore, the average number of employees cannot be a responsibility item. In our appeal decision, we determined that a responsibility determination should focus on the contractor's ability to obtain the needed resources (manpower in this case). There has been no

determination that 3A's does not have the ability to obtain needed manpower, and SMC did not present anything in its reconsideration request to disprove this. Nothing in SMC's reconsideration request persuades us that a reversal of our appeal decision is warranted.

In any event, the disputed information in 3A's bid does not involve a material misrepresentation. Our review of the guidelines established by the U.S. General Accounting Office (GAO)² showed that misrepresentation concerning personnel generally provides a basis for rejection or termination of contract *if such misrepresentation materially influenced an agency's consideration of its proposal*. A misrepresentation is material where an agency *has relied* upon the misrepresentation and that misrepresentation likely *had a significant impact on the evaluation*. [*ManTech Environmental Technology, Inc.*, B-271002; B-271002.2; B-271002.3, June 3, 1996].

As discussed above, the "average number of employees" does not involve any responsiveness or responsibility issue. Besides, award decisions under sealed bidding are primarily based on price, and whether the lowest bidder (1) complies with material solicitation requirements, and (2) was determined to be a responsible bidder³. We do not see how the average number of employees would significantly impact the sealed bidding evaluation in this case.

If the average number of employees were indeed significant to this procurement and critical to meeting DPH's need, DPH could have specified a required minimum number of employees in the ITB. Alternatively, DPH could have used the competitive sealed proposals method⁴ for this procurement and have included the required number of employees among the evaluation criteria.

DECISION

Under the CNMI-PR, to obtain reconsideration of an appeal decision, the requesting party must present 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. As set forth above, SMC's reconsideration request failed to meet this

² GAO provides some guidelines in cases where a bidder or an offeror submits false information with its bid, although the CNMI-PR lack specific guidelines on this particular matter.

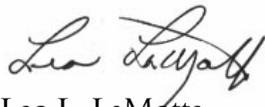
³ In this procurement, the review conducted by P&S well supported the conclusion that 3A's has the ability to perform the contract. In addition, GAO has held that allegations concerning the affirmative determination of responsibility will not be reviewed absent a showing of possible fraud or bad faith on the part of procurement officials. [*Applied Communications Research, Inc.*, B-270519, March 11, 1996]. SMC's reconsideration request has not shown fraud or bad faith on the part of any official involved in this procurement.

⁴ It should be noted that one of the differences between sealed bidding and the competitive sealed proposals method of procurement is that the latter involves a set of selection criteria on which award is based.

standard. In addition, SMC's arguments have not persuaded us that our appeal decision contained errors of fact or law, and therefore do not warrant reversal or modification of our decision. We therefore reaffirm our earlier decision, including the findings of fact and resulting conclusions set forth in that decision.

We emphasize once again that in order to obtain reconsideration, arguments should contain *detailed* factual and legal grounds upon which reconsideration is sought. OPA cannot sustain a claim that is not clearly and adequately supported.

The request for reconsideration is denied in its entirety.

A handwritten signature in cursive script, appearing to read "Leo LaMotte".

Leo L. LaMotte
Public Auditor, CNMI

August 25, 2000