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Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF
RNV CONSTRUCTION

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APPEAL NO. BP-A039

DECISION ON APPEAL

I. SUMMARY

This is an appeal filed by RNV Construction (RNV), represented by its General Manager, from the denial of its protest by the Executive Director of the Commonwealth Utilities Corporation (CUC) regarding CUC-IFB-02-026¹. The Office of the Public Auditor (OPA) has jurisdiction of this appeal as provided in Section 5-102 of Commonwealth Utilities Corporation's Procurement Regulations (Commonwealth Register Vol. 12, No. 6 (1990) and Vol. 13, No. 8 (1991)) (CUC-PR).

II. PROCEDURAL AND FACTUAL BACKGROUND

CUC-IFB-02-026 (IFB) was a solicitation for sealed bids for the construction of a Beach Road Sewer System Upgrade (Part A: Southern System), that included the installation of approximately 10,500 linear feet of underground sewer mains and the upgrade of pump stations along Beach Road in the San Antonio area on Saipan.

The IFB was issued in September, 2002, with the bid opening scheduled for 2:00 p.m. on October 15, 2002. Subsequently, three addendums were issued. Addendum number one (Addendum No. 1) to the IFB rescheduled the bid opening for 2:00 p.m. on October 29, 2003. On that date, eight bids were received and opened.

Six months later, CUC sent a letter to RNV, dated April 29, 2003, with a reference line that read: "Notice of Intent to Award Reference number, CUC IFB-02-026 (Construction of Beach Road Sewer System)" (Notice of Intent). In the Notice of Intent, CUC stated that it found RNV to be the lowest responsive bidder for the project. CUC further requested "confirmation from [RNV] that the bid price submitted is still valid, and will remain so, during the period necessary for routing of the contract." CUC asked that RNV "confirm immediately so that contract routing may begin."

¹ Although the IFB is numbered CUC-IFB-02-026, it is referred to as CUC-IFB-02-0026 in certain documents provided by the parties.

In May, three letters were sent from RNV to CUC regarding RNV's attempts to confirm prices with its vendors. None of the RNV letters confirmed that its original bid would be extended. In addition, a letter was sent on behalf of another bidder, GPPC, Inc., through its attorney, dated May 16, 2003, to CUC, alleging that it was apparent that "several of the bidders had failed to comply with the IFB and with the CUC Procurement Regulations with regard to the bid bond requirements thereof." The letter went on to say that it served as "notice to CUC that GPPC, Inc. intends to protest any award to a bidder on the Project that was nonresponsive to the IFB, that is a nonresponsible bidder, or that otherwise failed to comply with the CUC Procurement Regulations."

CUC subsequently sent a letter to RNV, dated June 12, 2003, with a reference: "Rescission of 'Intent to Award' Letter" (Recision). That letter rescinded the Notice of Intent and stated, in part, that:

... CUC has determined that the initial bid security submitted by your firm did not meet the requirements of the CUC Procurement Regulations; specifically CUC PRR (sic) 4-[1]01 (2)(a)². This requirement concerning bid security was specifically stated in the solicitation. Only a bid bond, cash or certified check or cashier's check was acceptable as security. Your firm provided only a company check.

RNV responded to the Recision by letter, dated June 16, 2003, to the Executive Director (Response to Recision). In addition to stating that RNV had already "provided [CUC] with all the necessary documentation regarding [CUC's] inquiry on the bid bond's legality and technicality." It further set forth RNV's "new proposed bid price in the amount of DOLLARS: TWO MILLION FIVE HUNDRED SEVENTEEN THOUSAND THREE HUNDRED EIGHTY NINE & 80/100 (\$2,517,389.80)." This resulted in "[a] price adjustment of \$128,390.80" above the original bid amount of \$2,388,999.00.

RNV subsequently filed its Protest of Withdrawal of Intent to Award (Protest) under the IFB by letter dated June 27, 2003, to the Executive Director. The Protest asserted that RNV's provision of a company check was a minor defect that CUC could readily waive; that there were ample funds in the bank to cover the check; that RNV relied on the intent to award to its detriment; that RNV purchased both payment and performance bonds which should render any defect in the bid moot; and, that the decision to cancel the award was arbitrary and capricious.

The Executive Director issued the Decision on the Protest (Decision), dated July 28, 2003. The Decision held that CUC-PR requires that CUC "reject any bids for which a bid security was not furnished." It further held that RNV's submission of a company check for which there was insufficient funds in the First Hawaiian Bank when CUC attempted to verify funds, was "tantamount to a 'failure to furnish a bid security.'" The Decision determined that the mootness

² The Recision incorrectly cited CUC-PR 4-101(2)(a) as CUC PRR 4-401(2)(a).

argument presented by RNV was “misplaced” as no contract had been awarded and, therefore, RNV was not required to procure performance and payment bonds. The Decision denied RNV’s Protest.

By letter dated August 8, 2003, RNV filed an appeal with OPA. RNV claims that it is “appealing for a reconsideration of an award as CUC’s denial is unjust and uncalled for.” It further claims that “CUC’s contention for the bid security as the main reason for their rejection is already immaterial.” RNV asks OPA “for a reconsideration of an award as [it] honestly feel[s] that [it] is the lowest responsive bidder.”

III. ANALYSIS

A. A Notice of Intent to Award is not a Contract

The language of the April 29, 2003, Intent to Award is clear. Although CUC advised RNV that it was found to be the lowest responsible bidder, CUC clearly stated that it was not awarding RNV a contract by this correspondence. The Intent to Award stated, in part:

Please note that **this letter is not a contract** and therefore, should not be relied on in incurring any expenses. CUC will not be responsible for expenses incurred prior to the full execution of the contract. In addition, work should not begin until written notice to proceed is received from CUC. **Notice of an award shall only be made by the presentation of a contract with all the required approvals and signatures.** Furthermore, no acceptance of an offer shall occur nor shall any be formed until the contract has been fully approved and signed.

(Emphasis added).

The Intent to Award was partially quoting from CUC-PR §3-102 (9)(b), which controls award of contract under competitive sealed bidding, which reads:

Notice of an award **shall only be made by the presentation of a contract with all of the required signatures** to the bidder. No other notice of an award shall be made orally or by letter. No acceptance of an offer shall occur nor shall any contract be formed until a CUC contract is written and has been approved by all the officials required by law and regulations. CUC contracts shall contain a clause which states that the signature of the private contractor shall be last in time to be affixed to a contract and that no contract can be formed prior to the approval of all required government officials.

(Emphasis added).

The CUC-PR are clear. An award is not made to a bidder absent the presentation of a contract

that has been fully executed. The Intent to Award was clearly not a contract and, therefore, RNV was not awarded the bid through the Intent to Award, nor did it give rise to a right to RNV to receive the contract. Furthermore, award of a contract to RNV would have been improper for the reasons set forth below.

B. Failure to Furnish Bid Security -- CUC-PR 4-101

The IFB provided that cash, certified check, and cashier's checks were acceptable forms of bid security. Addendum number two (Addendum No. 2) to the IFB, dated October 22, 2002, provided that the "Bid Bond may be cash, certified check, cashier's check or bid bond executed by a surety company holding a certificate of authority from the U.S. Secretary of Treasury." Provision of security by RNV in the form of cash, certified check, cashier's check or properly executed bid bond would have been clearly acceptable and would not have resulted in RNV's bid being rejected as non-responsive under CUC-PR §4-101(2)(c). RNV, however, chose to submit a company check as its bid security in lieu of one of the listed acceptable forms of security. Although alternative forms of security were allowed under the original IFB and CUC-PR, such alternate form of security must be acceptable to the government. CUC determined that a company check for which funds were not verified by the bank as sufficient, was not acceptable security.

The purpose of a bid guarantee is to provide assurances in the form of a firm commitment, that the bidder will, if successful, perform the contract. *Professional Building Concepts, Inc. v. The City of Central Falls, et al.*, 974 F.2d 1, 3 (1st Cir. 1992). RNV submitted a company check drawn on First Hawaiian Bank for its bid guarantee, in lieu of one of the listed forms of security. Prior to determining that the bid security was not acceptable, CUC stated that it contacted First Hawaiian Bank to verify that funds were available to cover the check. CUC stated that it was informed that RNV did not have sufficient funds in its account to cover the check. A company check for which there are insufficient funds is not a firm commitment. The Executive Director in the Decision held that submission of a company check for which there were insufficient funds was "tantamount to a 'failure to furnish a bid security'" under CUC-PR §4-101(2)(c).

It appears that RNV attempted in December to prove that there were funds available to cover the check and cure any deficiency in its bid security. The failure to comply with the bid guarantee requirement, however, is not an informality that was waived by CUC. Although a Notice of Intent was sent to RNV, a contract was never awarded, as discussed in Section A above, and RNV's bid was rejected as non-responsive on June 12, 2003, based on its failure to furnish security under CUC-PR §4-101(2). The burden to submit acceptable security is on the bidder. The IFB through Addendum No. 2 clearly requires certain forms of bid security and CUC-PR clearly provides notice that failure to provide satisfactory bid security "shall result in rejection of the bid as nonresponsive." It was proper, therefore, for CUC to reject RNV's bid pursuant to CUC-PR §4-101(2). In addition, even if RNV had provided sufficient and acceptable bid security, it still would not have been proper for CUC to award the contract to RNV for the additional reasons set forth below.

C. RNV Can Not be Awarded the Contract

The duration of the bid acceptance period is essentially a matter of intent. The bids submitted by the bidders in response to the IFB, including the one submitted by RNV, contain language on the Proposal form which provides for a sixty (60) day acceptance period, as follows:

If written notice of the acceptance of this bid is mailed, telegraphed or delivered to the undersigned within sixty (60) days after the opening thereof, the undersigned agrees to execute the form of an Agreement included as one of the Contract Document (sic), and to furnish a Performance and Payment Bond in an amount equal to one hundred percent (100%) of the Contract Amount, within ten (10) days after receipt of such notice.

The sixty day period had expired months before the Intent to Award was issued to RNV. CUC was obviously aware that RNV could not be held to its original bid price and, therefore, requested in its Intent to Award a confirmation that RNV would extend its bid, by stating:

At this time, CUC needs confirmation from your firm that the bid price submitted is still valid, and will remain so, during the period necessary for routing of the contract. Please confirm immediately so that contract routing may begin.

RNV does not dispute that the acceptance period had expired as is evidenced by its asserting the expiration of the sixty days in its Appeal to support the argument that the deficiency in its bid security was moot.³

There is no evidence or indication that CUC requested or received extension of the acceptance period from or by any of the bidders, including RNV, prior to the expiration of the acceptance period, or at any time prior to its request in the Intent to Award, which was directed solely to RNV. As such, it is presumed that the acceptance period expired sixty-one days after bid opening as to all bidders without extension of any of the original bids.

In its June 16, 2003, Response to Recision, RNV did not extend its bid price or provide confirmation that its original bid price was valid, but proposed a new price, as follows:

We are pleased to submit our new proposed bid price in the amount of DOLLARS: TWO MILLION FIVE HUNDRED SEVENTEEN THOUSAND THREE HUNDRED EIGHTY NINE & 80/100 (\$2,517,389.80). A price adjustment of \$128,390.80 was added to the original contract amount of \$2,388,999.00.

RNV's increase in bid price equates to a refusal to extend its bid as originally submitted, thereby making RNV ineligible for award under the IFB.

The CUC-PR contain no specific provision governing the extension of bids or specific guidance

³ "May we add too that the bid opening was October 29, 2002 while the Intent to Award was given April 29, 2003, making the bid security to hold for 60 days already moot." Appeal at 1.

as to whether bids may be extended after the acceptance period has expired, as in the instant case. However, as CUC did not receive extension of any of the original bids from any of the bidders prior to the expiration of the acceptance period, the bid acceptance period expired as to all bidders. In addition, as RNV specifically refused to extend its bid as originally submitted, RNV cannot be awarded the contract.

DECISION

Based on the foregoing, OPA finds:

1. Bid security is mandatory under CUC-PR §4-101(2) for construction procurement;
2. Rejection of a bid for failure to provide bid security is mandatory under CUC-PR §4-101(2)(c);
3. Pursuant to CUC-PR §3-102 (9)(b) an award in an invitation to bid is made only by presentation of a contract;
4. A Notice of Intent to Award is not a contract;
5. RNV was never awarded a contract under the IFB;
6. The time for acceptance expired under the IFB sixty days after bid opening;
7. CUC did not receive an extension from any of the bidders prior to expiration of the acceptance period and the acceptance period under the IFB expired;
8. RNV did not extend its time for acceptance of its original bid and specifically refused to do so; and,
9. RNV is ineligible for award under the IFB.

The Office of the Public Auditor, therefore, affirms the Decision of the Executive Director not to award the contract to RNV and denies RNV's appeal.

Section 5-102(9) of the CUC-PR provides that RNV, 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 (ten) 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.



Michael S. Sablan, CPA
Public Auditor

November 13, 2003