



# Office of the Public Auditor

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APPEAL NO. BP-A072

ITB12-GOV-087

**January 8, 2013**

## FACTUAL BACKGROUND

On August 24, 2012, GPPC timely protested the selection of USA Fanter (“Fanter”) for a contract under ITB12-GOV-087, Leak Detection & Repairs (the “ITB”). The GPPC and Fanter bids were approximately \$2,000 apart. Fanter was the lowest cost bidder.

In its protest, GPPC claimed that Fanter’s bid was nonresponsive to ITB Section 5.B. This section, entitled Project Bonding, stated as follows:

“The Bidder must submit with the bid a letter from the surety or insurance company documenting Bidders ability to acquire the necessary U.S. Treasury Listed (“T-Listed”) performance and payment bonds. Each bond shall be in an amount equal to 100% of the Bid Price.

Note. WTF understands that the bonds may not be issued by a surety prior to presentation of a duly executed contract. However, the intent of this requested letter is to have the Bidder provide WTF with a written statement from an authorized surety specifying the Bidder’s ability to acquire the necessary bonds. The letter shall be written by surety and must contain affirmative statement that it will issue the necessary performance and payment bonds to Contractor upon contract award.”

The Water Task Force (“WTF”), the awarding agency, made documentation of the surety’s ability to obtain performance and payment bonds in the full amount of a vendor’s bid an essential part of the bid package, therefore subject to a responsiveness test. Fanter’s surety, First Net Insurance (“First Net”) was unable to issue performance and payment bonds at the amount of Fanter’s bid price and, instead, would have to rely on reinsurance companies to do so. This fact was not disclosed in Fanter’s bid. Instead, First Net’s agent, Moylan’s Insurance (“Moylan”) stated that the bonds would be issued after contract award.

By not informing WTF that First Net was unable to fully bond the contract at the required value, Fanter’s bid did not demonstrate that it could issue the performance and payment bonds. To bond the project, First Net would have to cover any liability exceeding its underwriting limit with reinsurance companies in order to meet the bonding requirement. Therefore, Fanter’s bid was nonresponsive based on its failure to comply with the instructions in Section 5.B of the ITB. Fanter could not meet the bonding requirement because the required amount of the bonds exceeds the surety’s underwriting limit as stated on the Treasury list and Fanter failed to submit documentation with its bid that would have indicated its ability to comply with ITB Section 5.B. Thus, Fanter did not demonstrate its ability to issue the required bonds.

The appeal of GPPC is GRANTED.

## DISCUSSION

First Net has an underwriting limitation that is about half the amount of Fanter’s bid. Nonetheless, an August 1, 2012 letter from Moylan, the authorized agent for First Net, was submitted with the Fanter bid. That letter states, in pertinent part, “we stand ready to issue the necessary performance and payment bonds if the contract is awarded to Fanter.” See Moylan Letter, August 1, 2012, 3rd Paragraph. The ITB required surety bonding equal to 100% of the bid price for both the performance and payment bonds. Such bonds would be required prior to signing any contract with the successful bidder and WTF wanted bidders to document that the bonds would issue.

Moylan’s letter of August 1, 2012 did not indicate that First Net had an underwriting limitation nor that First Net would have to use reinsurance companies in order to issue performance and payment bonds in an amount equal to Fanter’s bid. Instead, Moylan’s letter merely states that “we stand ready to issue the ... bonds.” The use of the word ‘we’ in that sentence refers to Moylan and First Net since no other sureties are identified. Since Moylan is acting as First Net’s agent, the reference can simply be attributed to First Net. Restated,

the August 1st letter from Moylan makes a promise to the WTF, as the awarding agency, to provide the necessary bonding.

However, section 5.B. required more. The paragraph asked for documentation of a bidder's ability to bond, not simply a promise. The notes, added by WTF to the ITB paragraph and which are read with Section 5.B., confirm this by stating that the surety's letter should specify the bidder's ability to obtain bonding. Documenting a bidder's ability to bond is more than a promise to bond the project. Therefore, at bid opening, WTF had no knowledge that First Net's underwriting limitation, standing alone, would prevent it from bonding the project. Second, the awarding agency had no knowledge of First Net's on-going relationships with reinsurance companies as this information did not come to light until August 27, 2012, following the filing of GPPC's protest.

In other words, the Moylan letter of August 1, 2012 did not document that First Net had an underwriting limitation or that it would have to use reinsurance companies to issue the required bonds at the requested full amount. The letter was nonresponsive to the requirements of ITB Section 5.B. What the letter should have said was that First Net would have to use reinsurance companies in order to issue the performance and payment bonds and identified the reinsurance companies and the agreements between them. Even if First Net is automatically reinsured with Everest Reinsurance Company and Odyssey Reinsurance Company, documentation needed to be included with Fanter's bid pursuant to the ITB. An opinion of the Comptroller General points this out. The Comptroller General stated that "while the reinsurance agreement [appeared] to have been in effect at the time of bid opening, it was not documented ... [resulting in a determination that the bid was ] nonresponsive because the required bond amounts exceeded the surety's underwriting limit and no reinsurance agreement covering the excess amount had been submitted ... at bid opening." *See Contract Services Company, Inc.*, B-266774 (Comp. Gen.), B-226774.4, 88-1 CPD ¶ 441, 1988 WL 227101, May 6, 1988. If such information had been included in Moylan's August 1, 2012 letter, arguably the requirement to document the ability to bond found in Section 5.B. would have been met.

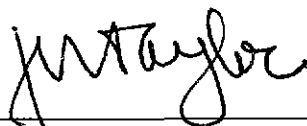
Moylan's second letter of August 27, 2012 is the first instance wherein Moylan represents that First Net will utilize Odyssey and Everest reinsurance companies. The reinsurance relationship with these companies was not documented in Fanter's bid. Therefore, Fanter's bid was nonresponsive to the Section 5.B. requirement because the required bond amounts exceeded First Net's underwriting limit and no reinsurance agreements or other documentation of the relationship between First Net and the reinsurance sureties was submitted by Fanter with its bid. Section 5.B. required such documentation, as well as an

explanation of Fanter's ability to issue the bonds, and this information was not provided with Fanter's bid.

## DECISION

GPPC's appeal is granted. Fanter could not provide bonding at the required level and so it had to use reinsurance companies to cover the excess liability above First Net's underwriting limit. This information should have been submitted as a part of Fanter's bid in order to comply with ITB Section 5.B's documentation requirement. The August 1, 2012 letter from Moylan that was a part of Fanter's bid package failed to document how the performance and payment bonds would be issued and by whom and, further, failed to specify First Net's ability to issue such bonds due to its underwriting limitation.

OPA directs Procurement & Supply to cancel its notice of award to Fanter and award the contract resulting from the ITB to the second lowest, responsive, responsible bidder.



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## CONCUR



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