



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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APPEAL OF MAEDA PACIFIC CORPORATION

Appeal BP-A074

May 10, 2013

Maeda Pacific Corporation ("Maeda") timely protested the selection for award resulting from DPW/FHWA-12-IFB-008, Traffic Signal Upgrade, to Radio.com. The Maeda protest was based on the following claims:

- 1 Radio.com was not a responsible bidder.
- 2 Radio.com's bid was unreasonable and should have been rejected.
- 3 Radio.com's bid should have been rejected for failure to fill out certain bid forms properly.

On January 18, 2013, the Director of Procurement & Supply denied Maeda's protest.

On January 30, 2013, Maeda timely filed its appeal with the Office of the Public Auditor. In its appeal, Maeda raised the same three issues it raised in its protest and asked that the Public Auditor sustain the appeal. After careful review and evaluation, the Public Auditor denies the appeal.

JURISDICTION OF OPA TO DECIDE THE APPEAL

The status of this matter is that a timely, written appeal was submitted to the Public Auditor after first filing a written protest with the Division of Procurement and Supply. The Director of Procurement and Supply denied the protest thus giving the Public Auditor jurisdiction over the appeal. NMIAC § 70-30.3-505.

ANALYSIS

OPA notes that the protester cites outdated regulatory sections in its protest and appeal. For instance, Maeda cites "Section 1-207(17) of part B of Article 1 of the (Procurement) Regulations." There is no such section because the CNMI's procurement regulations were revised in 2005. Nonetheless, there are applicable regulatory sections found at subchapter 70-30.3 of the Northern Mariana Islands Administrative Code (the "NMIAC") and these regulations will be cited in this appeal instead of the regulations cited by Maeda.

RESPONSIBILITY

Maeda claims that Radio.com is not a responsible contractor and thus ineligible for award. In order for a bidder to be considered responsible as a prospective contractor, it must:

1. Have adequate financial resources to perform the contract or the ability to obtain them.
2. Be able to comply with the required delivery and performance schedule.
3. Have a satisfactory performance record.
4. Have a satisfactory record of integrity and business ethics.
5. Have the necessary organization, experience and skills, (or the ability to obtain them), required to successfully perform the contract.
6. Have the necessary production, construction, and technical equipment, facilities or the ability to obtain them.
7. Be otherwise qualified and eligible to receive an award under applicable laws and rules.

NMIAC 70-30.3-245(a)

If the selected bidder meets these tests, it may be deemed to be a responsible contractor and thus becomes otherwise eligible for award. The Director of Procurement & Supply

made the determination that Radio.com was a responsible contractor. That determination met federal law requirements as well as the CNMI regulatory provisions cited above. See John C. Grimberg v. US, 185F3d 1297 (CA FC 1999). Because responsibility decisions are largely a matter of judgment, guided by the applicable regulatory scheme, such decisions are generally given wide discretion. See, Trilon Educational Corp. v. U.S., 578 F.2d 1356, 1358 (Ct. Cl. 1978).

Thus, a decision will not be examined by OPA absent a showing of fraud, bad faith, conflict-of-interest or actual bias. This has been the long-standing rule of the Comptroller General and it is a rule followed in the Commonwealth. Resources Management International Corporation, Appeal No. BP-A066, July 7, 2011. See also: Haworth, Inc., B-215638, 84 – 2 CPD 461 (October 24, 1984); Paul G. Koukoulas, B-229650, 88 – 1 CPD 278 (March 16, 1988).

Maeda has failed to provide evidence of fraud, bad faith, conflict-of-interest or bias that would be sufficient to challenge the responsibility decision at issue here. Maeda indicated that Radio.com does not have adequate financial resources necessary to perform the contract, claiming that Radio's bid price is close to the amount of the equipment cost which would be incurred by nearly any vendor. Maeda has failed to show that Radio.com does not have the funds necessary to pay for materials in order to perform the contract. Maeda has not shown that its claim regarding a guarantee of a loan to Radio.com by a bank is insufficient. Basically, Maeda does not know what information Radio.com provided to the Director of Procurement & Supply regarding its financial condition or in obtaining a loan. As such, it would have been the Director of Procurement & Supply who evaluated the financial information and made a decision based upon this type of confidential information that was not available to Maeda. The Director's decision in this matter is given great deference and requires more information than Maeda provided in its protest/appeal in order to be overturned.

Maeda also claims that Radio.com has no satisfactory performance record, admitting that it is in the business of general construction. Maeda does not provide any evidence of Radio.com's lack of experience in performing the work called for under the contract. The point being that Radio.com is a licensed general construction contractor, as indicated in

its bid. The IFB is a typical construction solicitation and contract used in the CNMI. Because of the discretion afforded to procurement officials in this regard, and the lack of evidence on the part of Maeda to document its claim, the decision of the procuring official regarding Radio.com's performance record is upheld.

Similarly, Maeda claims that Radio.com has no experience or skills necessary to perform the contract. As stated previously, the discretion of the procuring agency is broad and, absent a showing of facts indicating bad faith, fraud, bias or conflict of interest, the Public Auditor will not disturb a procuring agency's decision unless such evidence is presented in a protest or appeal.

Lastly, Maeda claims that Radio.com has no technical equipment or facilities. This statement is pure conjecture and also unsupported by any evidence. Also, no requirement for disclosure of equipment or facilities existed in the IFB; therefore this claim is invalid.

Maeda's claim that Radio.com is not a responsible contractor is denied.

UNREASONABLENESS

Next, Maeda claims that Radio.com's bid is unreasonable as to price and therefore should have been rejected on this basis. Maeda objects that Radio.com's total price is too low but does not provide a valid basis or facts necessary to question the price evaluation of Radio.com's bid. The contracting agency has the primary responsibility for determining its legitimate needs and for determining whether an offered item will satisfy those needs, since it is the agency that is most familiar with the conditions under which the supplies or services will be used and that must bear the burden of difficulties incurred by reason of a defective evaluation. *AINS, Inc.*, B-405902.3, May 31, 2012, 2012 CPD ¶ 180 at 7; *Berkshire Computer Prods.*, B-246305, Feb. 28, 1992, 92-1 CPD ¶ 242 at 2. This includes reasonableness as to bid price.

In reviewing protests challenging the price realism of a competitor's bid, OPA will focus on whether the contracting agency acted reasonably and in a manner consistent with the

terms of the solicitation. This approach is consistent with federal protest decisions. See *Nova Techs.*, B-405982.2, May 16, 2012, 2012 CPD ¶ 172 at 9. A protester's mere disagreement with the evaluation does not show that the agency lacked a reasonable basis for its decision. In reviewing protests challenging an agency's evaluation, OPA will also not reevaluate proposals. See *GC Servs. Ltd. P'ship*, B-298102, B-298102.3, June 14, 2006, 2006 CPD ¶ 96 at 6; *RVJ Int'l, Inc.*, B-292161, B-292161.2, July 2, 2003, 2003 CPD ¶ 124 at 5. Our review of an agency's evaluation is simply limited to ensuring that the evaluation was reasonable and consistent with the terms of the solicitation. *ASPEC Engineering*, B-406423, May 22, 2012, 2012 CPD ¶ 176 at 2-3.; *Barents Group, L.L.C.*, B-276082, B-276082.2, May 9, 1997, 97-1 CPD ¶ 164 at 6. OPA finds no merit to Maeda's objections to the evaluation of Radio.com's price. Maeda has not shown that the agency's evaluations, or its selection decision, were unreasonable or inconsistent with the IFB; the protester's disagreement with the agency's judgment does not establish that the agency acted unreasonably. See *Citywide Managing Servs. of Port Washington, Inc.*, B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 10-11.

Thus, OPA upholds the price evaluation of Radio.com's bid as not being unreasonable.

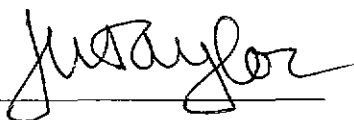
BID SCHEDULES

Maeda complains in this last issue that Radio.com failed to properly fill out a bid form and thus, its bid should have been rejected for this oversight. Radio.com did not write, with letters, the amount of several portions of its bid price. In other words, Radio.com did not state "Ten Thousand Dollars" in one location where its bid price was listed numerically as "\$10,000.00" and thus the price itself is clear and without ambiguity. Radio.com failed to list several line items in this way but, in each case, the amount of the bid price was listed numerically. These defects are immaterial and are sufficient for the procuring official to determine an unambiguous bid price from the numbers listed; adding letters designating a value would be superfluous.

A defect or variation is immaterial if the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the services being acquired. Thus, a contracting agency may waive as a minor informality if the bid meets the

solicitation's overall requirements, is *de minimis* as to a change in total cost, and would not affect the competitive standing of the bidders. W.B. Constr. and Sons, Inc., supra; E. H. Morrill Co., B-214556, May 3, 1984, 84-1 CPD ¶ 508 at 3. The failure to write in the amount of a line item price is not material since the amount actually bid is listed on the subject form numerically. Thus, there is no ambiguity as to Radio.com's bid price, which can be discerned from the numbers listed numerically on the form.

For the reasons indicated, the appeal of Maeda is denied.



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CONCUR



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