



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

World Wide Web Site: <http://opacnmi.com>

1236 Yap Drive

Capitol Hill, Saipan, MP 96950

Mailing Address:
P.O. Box 501399
Saipan, MP 96950

E-mail Address:
mail@opacnmi.com

Phone: (670) 322-6481
Fax: (670) 322-7812

April 1, 2010

Mark B. Hanson
Attorney for GPPC
PMB 738 PO Box 10000
Saipan, MP 96950

**Subject: Decision on GPPC's 2d Appeal of DPW 09-IFB-19,
Puerto Rico Dump Final Closure**

Dear Mr. Hanson:

Enclosed is the decision on the appeal you filed with our office on February 3, 2010, on behalf of GPCC, the second appeal GPPC filed regarding the above referenced IFB. GPPC appealed the Procurement & Supply Director's denial of its protest on January 22, 2010, concerning the solicitation for bids for final closure of the Puerto Rico Dump.

Please contact us if you have any questions regarding the decision.

Sincerely,

Michael Pai, CPA
Public Auditor

Enclosure

c: Herman Sablan, Director P & S
ITSI
DPW
James Stump, AAG



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)	APPEAL NO. BP-A061
)	
IN RE APPEAL OF)	DPW 09-IFB-19
GPPC, INC.)	
)	PUERTO RICO DUMP
)	FINAL CLOSURE

DECISION ON APPEAL

I. SUMMARY

This is an appeal filed by GPPC, Inc. from the denial of its second protest regarding DPW 09-IFB-19 by the Director of the Division of Procurement and Supply (P & S), Department of Finance. The Office of the Public Auditor (OPA) has jurisdiction over this appeal as provided in Section 505(a) of the Department of Finance's Procurement Regulations, NMIAC 70-30.3-505(a).

II. FACTUAL BACKGROUND

In May 2009, the Department of Public Works (DPW) issued an Invitation for Bid (DPW 09-IFB-19) on the Puerto Rico Dump Final Closure. The IFB was amended by five addendums.

The bids were opened on August 5, 2009. ITSI was the presumptive lowest bidder.

On September 25, 2009, Henry K. Pangelinan and Associates ("HKPAI"), the Construction Manger for this project, wrote to ITSI requesting additional information in order to make a decision regarding the bidder's responsibility.

ITSI responded to HKPAI's request for additional information by facsimile on October 9, 2009. The original response documents were received by HKPAI on October 15, 2009.

On October 30, 2009 (Saipan time), HKPAI had a recorded teleconference with ITSI and representatives from DPW, the Capital Improvement Project office (“CIP”), and the Office of Insular Affairs (OIA), US Department of the Interior. The transcription of that teleconference is dated December 3, 2009.

HKPAI provided its responsibility determination on ITSI to the CIP office – to which responsibility and oversight for the Puerto Rico Dump Final Closure had been transferred from DPW – on November 6, 2009.

III. PROCEDURAL BACKGROUND

On December 3, 2009, GPPC filed its second protest on this IFB.¹

The P & S Director gave notice of the protest to all interested parties on December 10, 2009.

On January 7, 2010, the Director certified the matter as complex and extended the due date for the Decision until January 22, 2010.

The Director issued his Decision on January 22, 2010, denying GPPC’s protest.

On February 3, 2010, GPPC appealed the Director’s Decision to OPA.

OPA provided notice to all interested parties that same day.

The Director issued his Report on the protest on February 18, 2010.

By letter dated February 24, 2010 and received by OPA the following day, GPPC requested clarification on the documents the Director attached to his report.

OPA responded to GPPC’s inquiry on February 25, 2010, listing the documents attached and requesting the Director provide GPPC with “all of the documents except those that he determines are privileged by law or which he deems must be confidential in order to benefit from competitive bidding or that he knows are in GPPC’s possession,

¹ GPPC initially protested on the basis that ITSI’s bid was not timely. The Director of Procurement and Supply denied that protest on September 23, 2009; OPA affirmed the Director’s denial on November 18, 2010.

like its bid, appeal, and the IFB and addendums. NMIAC § 70 - 30.3 - 501(a)(5).”

On March 1, 2010, GPPC wrote to the Director, listing what documents in the OPA letter it already had in its possession.

On March 2, 2010, the Director provided GPPC with the following documents:

- 10/9/2009 Letter from ITSI to HKPAI responding to request for additional information
- 11/6/2009 Letter from HKPAI to CIP on responsibility determination
- 12/3/2009 Transcript HKPAI teleconference with ITSI, DPW, CIP, and OIA
- 12/29/2009 Letter from DPW to P&S re-assigning matter to CIP

The Director declined to provide the January 8, 2010 communication from Assistant Attorney General James Stump (hereinafter “the Stump analysis”) because “it is considered exempt from public inspection and copying under . . . 1 CMC § 9917(a) and 1 CMC § 9918(a)(7).”

GPPC provided its comments dated March 4, 2010 (received by OPA on March 5) on the Director’s Report and reiterated its need for the Stump analysis and additional time to comment on it.

On March 8, 2010, OPA provided GPPC the Stump analysis and gave it an additional five (5) business days to comment.

Late in the afternoon of March 15, 2010, GPPC provided additional comments after having reviewed the Stump analysis.

On March 22, 2010, the Director provided a rebuttal to GPPC’s March 15 comments.

On March 30, 2010, GPPC responded to the Director’s March 22 comments.

IV. ISSUE

The issue on appeal is whether ITSI “qualified” its lump sum bid such that it could not be considered a firm offer and must be rejected as non-responsive.

V. JURISDICTION

OPA has jurisdiction over this appeal pursuant to Section 505(a) of the Department of Finance's Procurement Regulations, NMIAC § 70-30.3-505(a).

VI. POSITION OF THE PARTIES

GPPC argues that ITSI has "qualified" its lump sum bid in order to protect against future changes in conditions, i.e., that ITSI has used its bid to lay a foundation for subsequent change orders. GPPC further argues that by doing so, ITSI has removed the risk from its bid and thus has unfairly prejudiced other bidders who had to factor the risk of changed conditions and increased equipment, materials, or sub-contractor prices into their bids.

The Director, in his Report, disagrees with GPPC that ITSI is setting itself up for change orders. Rather, the Director notes that the Puerto Rico Dump Final Closure project is a complex, expensive project that is a critical component of the CNMI's compliance with an existing Consent Order. As such, the CNMI has taken extra steps to ensure that the design is appropriate and the bid is structured to yield a total fixed price proposal so that the project can be implemented expeditiously and avoid the change orders usually inherent in capital improvement projects.

The Director explains that the process was a competitive sealed bid for a firm fixed lump-sum price contract. NMIAC § 70-30.3-205. This Fixed Price bid structure is expressly identified in numerous sections of the request for bids. According to the Director, the risk of adequate supplies and materials lays with the bidder. If the identified supplies are inadequate, it is incumbent on the bidder to procure alternate supplies, regardless of cost. Similarly, if the identified sub-contractors are unable to complete performance at the estimated price, then the bidder must obtain alternate sub-contractors regardless of the expense.

In response to GPPC's argument, the Director noted that the five instances of qualified language identified by GPPC are all in the proposal text, not in the fixed, lump-sum proposal. Moreover, the Director found ITSI's use of language in the proposal text was for the purpose of providing sufficient detail in order to reflect a true understanding of the nature of the project, its intended approach, and identification of a source for the fill materials. The Director emphasized the requirement for a total fixed price is stated at least 14 times on the bid price forms supplied by the CNMI.

VII. ANALYSIS

There are two primary types of government procurement in the CNMI: competitive sealed bidding under NMIAC § 70- 30.3 - 205 and competitive sealed proposals under NMIAC § 70- 30.3 - 210.

Under NMIAC § 70- 30.3 - 205(k), a competitive sealed bid may be rejected for:

- (1) Failure to conform to essential requirements of the invitation for bids such as specifications or time of delivery;
- (2) Imposition of conditions or restrictions in the bid which modify requirements of the invitation or limit the bidder's liability to the government. For example, bids shall be rejected in which the bidder:
 - (i) Protects against future changes in conditions, such as increased costs;
 - (ii) Fails to state a price and indicates that price shall be the price in effect at the time of delivery;
 - (iii) States a price but qualifies it as subject to price in effect at time of delivery; or
 - (iv) Limits the rights of government.
- (3) Unreasonableness as to price;
- (4) A bid from a non-responsible bidder as defined in § 70-30.3-245.

In order for the contracting officer² to award a contract, the bid must be responsive and the contractor must be responsible. NMIAC § 70 - 30.3 - 205(j); NMIAC § 70- 30.3 - 245.

Bid responsiveness concerns whether a bidder has offered to provide supplies and / or services in conformity with all material terms and conditions of a solicitation for sealed bids and is determined at the time of bid opening. *Data Express, Inc.*, B-234685, 89-2 C.P.D. 28 (July 11, 1989).

Responsibility refers to a bidder's future apparent ability and capacity to perform, and is predictive in nature. The bidder may provide responsibility information to the contracting officer at any time before award. *ADC Ltd.*, B-254495, 93-2 C.P.D. 337 (Dec. 23, 1993); *Triton Marine Constr Corp.*, B-255373, 93-2 C.P.D. 255 (Oct. 20, 1993).

² DPW was the agency that promulgated the ITB and its addendums. HKPAI is contracted to DPW as the Construction Manager for this project. DPW transferred responsibility for this project to the Capital Improvement Projects office. DPW, HKPAI, and CIP will be collectively referred to as the "contracting officer."

Under NMIAC § 70- 30.3 - 245, “Responsibility of Bidders and Offerors,”

- (a) Awards shall be made only to responsible contractors. To be determined responsible, a prospective contractor 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 or 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; and
 - (7) Be otherwise qualified and eligible to receive an award under applicable laws and rules.

GPPC’s primary argument is that ITSI’s bid was not responsive because of several qualifications in its bid proposal, that non-responsive bids must be rejected at the time of bid opening, and finally that the information requested by the Construction Manager went to the issue of responsiveness, not responsibility, and was therefore, improper.

However, as at least one case has recognized, “[a]lthough easily stated, the distinction [between responsiveness and responsibility] can be difficult to apply in practice, even when the IFB declares that compliance is a matter of responsiveness.” *Essex Electro Engineers, Inc v. US*, 3 Ct. Cl. 277, 284 (1983). See, e.g., *International Business Investments*, B-206474, 82-1 C.P.D. 500 (May 27, 1982) (IFB requirement listed as an item to be considered part of bid responsiveness held a question of responsibility because it went to the ability of the bidder to perform its obligations).³

Appellant cites *Fire-Trol Holdings, LLC v. US*, 68 Fed Cl. 281 (2005) to support its contention that ITSI’s bid was nonresponsive because of the qualifications. GPPC’s comparison is inapt. In *Fire-Trol*, the United States Department of Agriculture, Forest Service (“Forest Service”) found Fire-Trol’s bid to be nonresponsive because it required

³ However, information used to determine responsibility can render a bid non-responsive if it indicates no intent to comply with IFB specifications. See, e.g., *Twehouse Excavating Co.*, B-208189, 83-1 C.P.D. 42 (Jan. 17, 1983).

the Forest Service to acquire the fire retardant from another manufacturer despite a material condition of the bid that required the bidder to furnish, store, mix, and load the fire retardant into air tankers and also because the bid required the Forest Service to reimburse the bidder for the cost of the fire retardant plus freight where the amount of the freight was not easily calculable and therefore the bidder did not furnish a firm fixed price.

In the instant case, the contracting officer found that ITSI offered a firm, fixed price bid. GPPC's contention is that ITSI's text contains several qualifications that set it up to request change orders should the conditions it relied on not come to fruition, thereby reducing its risk and allowing it to proffer a lower bid price. GPPC's contention is speculative and is negated by the transcript of the teleconference. In that teleconference, ITSI stated that its recitation of the "following price proposal is based on local materials, equipment, and subcontractor pricing" was simply a means of explaining its method to determine its pricing. Transcript at pp. 21-22. ITSI further explained that this statement is "normally required . . . in our proposals to other government agencies." *Id.* at p. 22.⁴

GPPC argues (Appeal at p. 6) that "it is not clear under what authority the CM [Construction Manager] and DPW could request and require such explanations from ITSI with regard to various issues identified within its bid package. . . ."

Under NMIAC § 70- 30.3 - 245(b),

Obtaining information. Prior to award, the P&S Director shall obtain information from the bidder or offeror necessary to make a determination of responsibility using the factors in subsection (a) above. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for determination of non-responsibility with respect to that bidder or offeror.

In order to award a contract, an agency must make a responsibility determination, regardless of whether the solicitation is an Invitation for Bid or a Request for Proposals.

⁴ Compare with *Culver Group v. NASA*, GSBICA 11964-P, 93-1 BCA ¶ 25,540 (Oct. 13, 1992)(statements such as "specifications are subject to change" in descriptive literature normally will not render a bid nonresponsive where the bidder elsewhere in the bid clearly indicates an intention to provide an item meeting the government's specifications in all respects).

NMIAC § 70- 30.3 - 245. An agency may obtain information pertaining to responsibility from pre-awards surveys, checking debarment lists, and asking the contractor to supply information. See, e.g., FAR 9-105(1).

If an agency needs additional information to facilitate its responsibility determination, it may properly obtain this information from the offeror, after the closing date for receipt of offers, without conducting negotiations with all competitive range offerors or seeking revised proposals from them. *Unisom Transformer Services, Inc.*, B-232434.2, 88-2 C.P.D. 539 (Nov. 30, 1988) . “Any other conclusion would either deprive the government of the right to make award on the basis of initial proposals or allow such an award only at the peril of dealing with nonresponsible contractors.” *Hercules, Inc.*, B-167643 (1969 B-167643, 1969 WL 3534 (Comp. Gen.)(Nov. 14, 1969).

HKPAI evaluated ITSI’s bid as the lowest presumptive bidder and sent it additional questions in order to facilitate its responsibility determination. ITSI provided written responses to HKPAI’s inquiry. Then HKPAI corroborated the written inquiries through a telephone conference that was later transcribed. With a potential contract worth close to \$12 million, it behooves the CNMI government to be cautious.

The contracting officer is the arbiter of what and how much information he or she needs to determine responsibility. *John C. Grimberg, Co. v. US*, 185 F.3d 1297 (CA FC 1999). Because responsibility decisions are largely a matter of judgment, contracting officers are generally given wide discretion to make this decision. *Trilon Educational Corp v. US.*, 578 F.2d 1356, 1358 (Ct. Cl. 1978).

GPPC suggests that the inquiries made by HKPAI on behalf of the Contracting Officer went to the issue of responsiveness not responsibility, but the inquiries were the questions one would expect regarding responsibility on a large, specialized construction project:

- HKPAI inquired as to the quantity and location of the heavy equipment and fill materials that are to be used.⁵ Transcript at pp. 5-8, 16-17.

⁵ The contractor must maintain or have access to sufficient equipment, facilities, and production capacity to accomplish the work required by the contract. NMIAC § 70- 30.3 - 245(a)(6); FAR 9.104-1(f); *IPI Graphics*, B-286830, B-286838, 01 C.P.D. 12 (Jan. 9, 2001) (contractor lacked adequate production controls and quality assurance methods).

- HKPAI inquired as to whether ITSI understood that it was responsible for getting all the necessary permits and licenses.⁶ Transcript at p. 14.
- HKPAI asked ITSI to demonstrate its management and technical capacity, which ITSI did by identifying its sub-contractors but noting that in the end, it was responsible to get the job done.⁷ Transcript at pp. 11, 18-19.
- HKPAI also elicited information from ITSI that demonstrates its expertise in closing landfills and its ability to perform in remote locations.⁸ Transcript at p. 24.
- ITSI provided information that it could do whatever it needed to do in order to streamline the process so that it could make its performance schedule.⁹ Transcript at p. 24.

The contracting officer's actions in this case were entirely reasonable, particularly given the threat of sanction for failure to comply with a federal environmental order and the magnitude of the project and contract. Responsibility determinations are generally not reviewed where there is no showing of fraud or bad faith on the part of the contracting officer. *Horizon Trading Co, Inc.*, B-231177, 88-2 C.P.D. 88 (July 26, 1988).¹⁰

⁶ See, e.g., *Intera Technologies, Inc.*, B-228467, 88-1 C.P.D. 104 (Feb. 3, 1988).

⁷ The contractor must display adequate management and technical capability to perform the contract satisfactorily. NMIAC § 70- 30.3 - 245(a)(6); FAR 9.104-1(e). See, e.g., *TAAS-Israel Industries*, B-251789.3, 94-1 C.P.D. 197 (Jan. 14, 1994)(contractor lacked the design skills and knowledge to produce an advanced missile launcher power supply).

⁸ See NMIAC § 70- 30.3 - 245(a)(5).

⁹ The contractor must demonstrate its ability to comply with the delivery or performance schedule. NMIAC § 70- 30.3 - 245(a)(2); FAR 9.104-1(b). See, e.g., *System Development Corp.*, B-212624, 83-2 C.P.D. 644 (Dec. 5, 1983).

¹⁰ See also, *Robert E. Derecktor, etc., v. Goldsmith*, 516 F. Supp. 1085 (D RI 1981) (agency officials have wide discretion in making responsibility determinations; those decisions will not be overturned absent a lack of rational basis or proof of a clear and

VIII. DECISION

Based on the foregoing, OPA finds:

ITSI's bid was responsive.

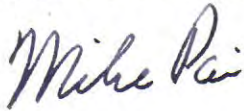
The contracting officer properly solicited additional information with which to make a responsibility determination.

The contracting officer's responsibility decision has a rational basis and there is no showing of fraud or bad faith or prejudicial violation of an applicable statute or regulation.

The Office of the Public Auditor, therefore, affirms the Decision of the Director of Procurement and Supply to deny GPPC's second protest on this matter.

GPPC, 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. NMIAC §70-30.3-505(i)(1). 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. NMIAC §70-30.3-505(i)(2).

Dated this 1st day of April, 2010.



Michael Pai
Public Auditor

prejudicial violation of an applicable statute or regulation).