



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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)	APPEAL NO. BP-A069
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In Re: GPPC and Hawaiian Rock)	DPW11-IFB-005
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_____)	

July 10, 2012

I. SUMMARY OF DECISION

Hawaiian Rock submitted a letter, which it identified as a bid protest, but it was not yet an aggrieved bidder under the CNMI regulatory scheme and thus had no standing to protest. Its letter was informational and, as such, did not create an obligation on the part of Procurement & Supply to notify other bidders nor to obtain comments from them. GPPC's bid contained a material defect in that it only partially complied with a solicitation requirement to submit a certification stating that it was in compliance with local and federal laws. The solicitation requirement was material because it involved a legal liability if it was false and there was no other way identified in the solicitation for the awarding agency to determine if a bidder was operating within the law. The awarding agency included the wrong certification form for equal employment opportunity compliance; the correct form may be requested from bidders. GPPC's failure to check-off the type of bid guarantee submitted was an immaterial defect since it included a valid bid bond and its submission of the equal employment opportunity form provided in the solicitation was not a misrepresentation of fact. GPPC's allegations of defects in the Hawaiian Rock bid are baseless.

The appeal of Hawaiian Rock is DISMISSED and the appeal of GPPC is DENIED.

II. FACTUAL SUMMARY

1. Bid opening occurred on January 3, 2012 and GPPC was the lowest cost bidder on DPW11-IFB-005 (the "IFB"). Hawaiian Rock was the second lowest bidder.

2. On January 30, 2012, Hawaiian Rock filed a letter with Procurement & Supply which it identified as a bid protest that listed a number of alleged discrepancies with the bid of GPPC. This filing was based on Hawaiian Rock's review of the GPPC bid when those bids became public following the January 3, 2012 bid opening.
3. Procurement & Supply wrote to Hawaiian Rock's counsel on February 7, 2012 and asked for additional information but did not otherwise treat Hawaiian Rock's January 30, 2012 letter as a bid protest.
4. Hawaiian Rock provided additional information about GPPC's bid to Procurement & Supply on February 29, 2012.
5. On March 8, 2012, Hawaiian Rock appealed the lack of a decision on its protest from Procurement & Supply to the Office of the Public Auditor.
6. On March 12, 2012, Procurement & Supply determined that Hawaiian Rock should be considered for award of the contract that would be issued under the IFB and so notified the Secretary of Public Works.
7. On March 14, 2012, GPPC's counsel filed comments about the Hawaiian Rock appeal with the Public Auditor claiming, among other things, that the procurement was shrouded in secrecy and requesting that government agencies and interested parties, including GPPC, be included in any future filings by any agency or party.
8. GPPC filed a timely bid protest with Procurement & Supply on March 19, 2012 that addressed defects identified during the evaluation process with its bid and pointing out defects in the Hawaiian Rock bid.
9. On March 22, 2012, Procurement & Supply filed a letter with the Public Auditor regarding the Hawaiian Rock appeal indicating that there "never was a protest filed by Hawaiian Rock ..."
10. On March 28, 2012, the Secretary of Public Works provided Procurement & Supply with a request to accept a favorable responsibility determination made by the Department of Public Works as to Hawaiian Rock.
11. Also on March 28, 2012, counsel for Hawaiian Rock filed comments with Procurement & Supply regarding the GPPC bid protest rebutting the GPPC claim that Hawaiian Rock's bid was nonresponsive.
12. On April 9, 2012, Procurement & Supply denied the GPPC bid protest explaining that GPPC's bid was defective due to a misrepresentation of material facts regarding GPPC's compliance with equal employment opportunity requirements; failing to provide a proper certification of compliance with local and federal laws; failing to properly reply to an essential question and that its allegation regarding Hawaiian Rock's bid lacked sufficient evidence.
13. On April 19, 2012, GPPC timely appealed the denial of its bid protest to the Public Auditor.

III. ISSUES, ANALYSIS and DECISION

HAWAIIAN ROCK APPEAL

1. Standing to File a Bid Protest

Hawaiian Rock did not have standing to file a bid protest until it became an 'aggrieved' bidder. Hawaiian Rock was not an aggrieved bidder until some sort of action was taken by the Department of Public Works and/or Procurement & Supply relative to the IFB and Hawaiian Rock's bid. Hawaiian Rock's letter, if it was a protest, was premature and, as such, no action was necessary from Procurement & Supply. In the alternative, if events occurred at bid opening on January 3, 2012 that caused Hawaiian Rock to become an aggrieved bidder, its protest was untimely.

CNMI procurement regulations state that only a prospective bidder, offeror or contractor who is 'aggrieved' may file a bid protest. NMIAC 70-30.3-501(a) (1). Guidance on what constitutes 'aggrieved' may be obtained from several sources. One authoritative definition states that the term "aggrieved" is a situation where someone "whose financial interest is directly affected by a decree, judgment, or statute...(is) entitled to bring an action challenging the legality of the decree, judgment, or statute." West's *Encyclopedia of American Law, Edition 2*. Copyright 2008, The Gale Group, Inc. If the term is looked at by analogy to the CNMI Administrative Procedures Act, regarding when judicial review of an agency action may occur, further guidance may be discerned. Under this law, to be 'aggrieved' means to have suffered some type of wrong based on agency action. 1 CMC §9112(b). This means that there must be both some form of agency action taken and a resulting adverse effect. Therefore, a bidder/offeror/contractor gains the ability to protest issues it may have with some aspect of a procurement only when a government agency has taken an action adverse to the interests of that bidder/offeror/contractor. It is the taking of adverse action by the government agency that empowers the bidder/offeror/contractor to protest within a set time period. NMIAC 70-30.3-501(a) (1).

On January 3, 2012, because bids were opened on that date, Hawaiian Rock had knowledge of a possible defect in GPPC's bid but it did not yet have standing to file a bid protest based on that knowledge because neither the awarding agency, the Department of Public Works, nor Procurement & Supply had taken any action detrimental to Hawaiian Rock. On that date, bids were opened but they still needed to be analyzed by the awarding agency as well as Procurement & Supply before an award could be made. At that point, no bidder was 'aggrieved' because there had yet to be any action taken by the CNMI government regarding the IFB.

Nonetheless, armed with what it thought might be a defect in the bid by the lowest cost bidder (the GPPC bid), Hawaiian Rock filed what it thought was a bid protest with Procurement & Supply. Hawaiian Rock lacked standing to file a bid protest since it was not an “aggrieved” bidder.

2. Timeliness

If Hawaiian Rock’s January 30, 2012 letter was, in fact, a bona fide bid protest, it was untimely since it was filed more than ten working days after Hawaiian Rock knew or should have known facts sufficient to support a protest. Bid protests must be filed within ten working days of when a protester knew or should have known of facts that would support a protest. NMIAC 70-30.3-501(a) (1). Hawaiian Rock knew or should have known the facts which it espouses as support for its bid protest on January 3, 2012. On that date, bids submitted in response to the IFB were opened and made public. Therefore, on that date, Hawaiian Rock is deemed to have knowledge of the GPPC bid and, as such, should have filed its protest¹ prior to the tenth work day following January 3, 2012. Filing a bid protest on January 30, 2012 is more than ten working days after bid opening and therefore, if Hawaiian Rock filed a bid protest on January 30, 2012, it was untimely.

3. Failure to Notify Other Bidders by Procurement & Supply

Procurement & Supply essentially ignored the Hawaiian Rock communication of January 30, 2012, other than asking for additional information about GPPC’s bid on February 21, 2012. The fact that Hawaiian Rock had no standing to file a protest and that, if the letter was a protest, it was untimely simply means that no protest ever existed. Without a viable bid protest, Procurement & Supply has no duty to respond to notify other agencies or bidders of any such communication.

It is not uncommon for bidders to notify the procuring agency of a possible defect in a competitor’s bid as well as protesting the terms of a solicitation. It was appropriate for Procurement & Supply to treat the January 30, 2012 letter from Hawaiian Rock as it would any communication from the public – as informational. As such, there was no duty on the part of Procurement & Supply to notify any of the IFB bidders of the communication. The Hawaiian Rock letter did inform Procurement & Supply of possible defects in GPPC’s bid and Procurement & Supply acted upon that information, investigated and reached a determination regarding the GPPC bid.

¹ This comment does not mean that the Office of the Public Auditor has concluded that the Hawaiian Rock letter of January 30, 2012 was a bona fide bid protest. The contrary is evident based upon paragraph 1 in this section.

GPPC APPEAL

GPPC timely filed its protest with Procurement & Supply as well as its appeal with the Public Auditor. In its appeal, filed by its legal counsel, GPPC raises the following allegations:

1. GPPC was not notified nor allowed to comment on the Hawaiian Rock protest.
2. GPPC did not misrepresent its answers to the IFB's Equal Employment Opportunity ("EEO") certification.
3. The decision of Procurement & Supply to disqualify GPPC was based on facts that were not material involving the EEO certification, the certification of compliance with local and federal laws and the check-off box identifying the form of the bid guarantee.
4. A proper 'responsibility determination' was not made as to Hawaiian Rock.
5. Hawaiian Rock's bid was defective in that it failed to identify subcontracts.

1. Notice of and Comment by GPPC

As explained above, Hawaiian Rock's letter of January 30, 2012 was not a bid protest since it had no standing to protest. If it was a bid protest, it was untimely. Hawaiian Rock never filed a timely, bona fide bid protest and therefore, the January 30, 2012 communication to Procurement & Supply was an informational letter. In it, Hawaiian Rock notified Procurement & Supply about alleged defects in GPPC's bid. As such, there was no requirement for Procurement & Supply to notify GPPC or to ask for comments based solely on the Hawaiian Rock letter of January 30, 2012.

2. EEO Certification

The IFB contained several pages of instructions in the Special Procedures section regarding federally-mandated equal employment opportunity programs required by Executive Order 11246. IFB @ RCP-2, Revision No. 1. The IFB also contained a certification for bidders to sign acknowledging their compliance with EEO requirements pertaining to Executive Order 11248. The awarding agency, the Department of Public Works, erred in including the wrong certification form in the IFB because the form provided did not reference Executive Order 11246. However, the textual instructions contained in the Special Provisions section appear to be consistent with contractor EEO requirements established by the Office of Federal Contract Compliance Programs for federally-funded contracts.²

² See: <http://www.dol.gov/ofccp/regs/statutes/eo11246.htm>.

The certification form contained in the IFB is the wrong form because it references Executive Order 11248 when it should have referenced Executive Order 11246. GPPC indicated that had not participated in a contract where compliance with Executive Order 11248 was required. The other bidders signed the form indicating that they had participated in an equal employment opportunity program mandated by Executive Order 11248. Executive Order 11248 is entitled, “Placing certain positions in levels IV and V of the Federal Executive Salary Schedule” and should not have been included for certification purposes in the IFB as it does not relate to the scope of work under DPW11-IFB-005. Apparently, only GPPC answered the certification correctly by stating that it “had not” been involved in prior equal employment programs mandated by this Order. Nonetheless, even with this error, all bidders were required to comply with the EEO program requirements contained as textual provisions in the Special Provisions of the IFB (RCP -2 through -6, Revision No. 1, September 23, 2011).

GPPC was evaluated as not being in compliance with its EEO responsibilities based on its submittal of a signed EEO certification taken from the IFB indicating that it had not worked on a project awarded under Executive Order 11248. The Department of Public Works and Procurement & Supply treated this “no” indication on the form submitted by GPPC as non-responsive because the agencies (and three of the bidders) apparently believed that Executive Order 11248 was the correct Executive Order. It was not.

Additionally, based on the GPPC submission of the wrong EEO form, Procurement & Supply determined that GPPC had misrepresented itself based on its completion of the form since GPPC had been awarded previous construction contracts that received federal funding and had submitted prior EEO compliance forms referencing Executive Order 11246. Procurement & Supply erred in making this determination.

GPPC signed the form that it was given and could not have misrepresented itself since the usual form, based on Executive Order 11246, was not included in the IFB. The failure to include the proper certification form was an error made by the awarding agency, the Department of Public Works, not by GPPC. Thus, by checking to various fill-in boxes on the form provided in the IFB, GPPC said that it had not previously been involved with any work or projects where the form referencing Executive Order 11248 was required. If correct, this response was not a misrepresentation by GPPC and no documents provided by Procurement & Supply, the Department of Public Works or other bidders indicate a different conclusion.

Since contracting agencies have broad discretion to take corrective action where they determine that such action is necessary to ensure a fair and impartial competition, the submittal of the incorrect EEO form may be corrected. Where the agency has a reasonable concern that there were material errors in a procurement, it is well within the agency's discretion to correct those errors. Alfa Consult S.A., B-298288, B-298164.2, Aug. 3, 2006, 2006 CPD Para. 127; Patriot Contract Servs., LLC, B-278276.11 *et al.*, Sept. 22, 1998, 98-2 CPD Para. 77.

Therefore, Procurement & Supply may ask bidders to re-submit the correct EEO compliance form (based on Executive Order 11246) noting, however, that bidders are still bound by the textual provisions of the IFB's Special Provisions to operate an EEO program pursuant to Executive Order 11246. A certification that they are operating a valid EEO program relieves the awarding agency or Procurement & Supply from investigating such programs by placing the burden on the bidder to certify compliance.

3. Compliance with Local and Federal Laws and Bid Bond Requirement

COMPLIANCE WITH LAWS

The IFB required bidders to certify, in writing, that they were in compliance with all applicable local and federal laws. Other than mentioning this requirement at the pre-bid meeting and finding it in print on the second page of the IFB's cover sheets and at IFB Section 107.01(a) and (b), the IFB did not provide a complete list of which laws should be complied with by bidders. Some federal laws were mentioned in the IFB's Special Provisions but that listing was obviously not complete. Nonetheless, it is possible, via legal counsel or diligent research, for a bidder to determine which laws apply and then, if that bidder is in compliance, sign a form or letter certifying its compliance.

The question becomes whether or not the requirement to comply with local and federal laws, and to certify as such, is material to the IFB. Typically, material terms of a solicitation affect price, quality, quantity and delivery of the goods or services. *See: Muddy Creek Oil and Gas, Inc.*, B-296836, Aug. 9, 2005, 2005 CPD ¶ 143. However, often a factor not involving the above-mentioned four terms may be material. For instance, warranty provisions that affect the legal obligations of the contracting party are material. 4Granite, Inc., B-406459, April 2, 2012.

The IFB certification requirement here was confusing. In what was probably a prior version of the IFB, a Compliance Certification Form was provided for the bidder and subcontractors to submit. *See: IFB, Compliance Certification (1) and (2)*. This form was apparently removed by one of the Addenda because GPPC and Hawaiian Rock submitted letters instead of this form. One of the bidders, IMCO

General Contractors, filled out the form and submitted it with its bid as well as including the form as filled out by IMCO's subcontractors. *See:* IMCO Bid. The IFB's certification form (the one used by IMCO) could not be located in the IFB documents provided to the Public Auditor other than the form's inclusion in IMCO's bid.

Nonetheless, the requirement was mentioned on the IFB's signature page, signed by the Secretary of Public Works, the Director of Procurement & Supply and the CNMI American Recovery & Reinvestment Act ("ARRA") official. It was also mentioned in the IFB. *See:* IFB Section 107-1 (Revision No. 1, September 23, 2011).

Even if the IFB form (as in the IMCO bid) was used, it was up to the bidders to determine which local and federal laws were to be complied with since these were not identified in the IFB. Nonetheless, a false certification of compliance, whether submitted via the IFB's certification form (and as used by IMCO) or as a letter from the bidder (as submitted by Hawaiian Rock), could subject the bidder to legally binding penalties if it were to be determined that the bidder was not in compliance with law at the time of bid opening. In other words, submission of an inaccurate or incorrect certification would be a false statement. Thus, if the certification was falsely submitted (e.g., the bidder was not in compliance with a local or federal law), the bidder and the official who signed the certification might be subject to prosecution for submitting a false claim under the Civil False Claims Act, 31 U.S.C. §§ 3729–3733, when that bidder invoiced the government for payment.

Because of the emphasis placed on the compliance certification in the IFB and due to the potential legal and financial liability a bidder could face if the certification was false, the IFB's requirement was material since it involved legal obligations. GPPC only certified to its partial compliance with laws by submitting the CNMI Division of Tax & Revenue forms indicating that GPPC was compliant with CNMI tax laws. GPPC did not certify that it was operating itself in compliance with local and federal laws, as was required by the IFB. Due to the possible imposition of legal requirements and penalties, the certification requirement was material to the IFB and GPPC's response was incomplete and therefore nonresponsive.

Thus, from the GPPC bid documents available at bid opening, it is not clear if GPPC was in compliance with a myriad of local and federal laws that apply to it, other than being compliant with CNMI tax laws. It is well settled that where a bidder introduces ambiguity in its bid regarding material terms, such as is evident here, the bid must be rejected as nonresponsive. 4Granite, supra; *See also: Washington Printing Supplies Inc., B-227048, July 10, 1987, 87-2 CPD ¶ 34.*

To be responsive, and considered for award, a bid must contain an unequivocal offer to perform, without exception, the exact thing called for in the solicitation so that, upon acceptance, the contractor will be bound to perform in accordance with all of the solicitation's material terms and conditions. NMIAC 70-30.3-205 (i) & (j); *See also: Oregon Electric Constr., Inc. dba Integrated Systems Group*, B-294279, Sept. 27, 2004, 2004 CPD ¶ 188. If, in its bid, a bidder modifies a material solicitation requirement, limits its liability to the government, or limits the rights of the government under a resulting contract, then the bid must be rejected as nonresponsive. *Id.* Here, GPPC limited its liability to the CNMI government but also, if its bid were to have been accepted, put itself at risk of incurring a civil false claim for invoices it may have submitted due to the nature of federal funding of this project.

A bidder's intention to be bound by the solicitation requirements must be determined from the bid itself at the time of bid opening. *See Franklin Instrument Co., Inc.*, B-204311, Feb. 8, 1982, 82-1 CPD ¶ 105. GPPC failed to provide the IFB's certification form or a letter that certified its compliance with local and federal laws favoring, instead, to submit two documents from the CNMI Tax & Revenue Division certifying its compliance with CNMI tax laws. The certification by CNMI tax authorities completes only part of the scope of the requested certification. There is no indication, for instance, that GPPC is in compliance with the Davis-Bacon Act, the Buy-American Act or the many other laws that apply to businesses and construction contractors funded with either local or federal funds. Thus, by not providing the requested certification, the contracting agency does not know if GPPC is or is not in violation of law. The IFB put the burden on the bidder to tell the awarding agency, via the certification of compliance, that they were operating in accordance with law and GPPC failed to do so.

Bidders bear the primary responsibility for properly preparing bid documents in such a fashion that the contracting agency can accept the bid with full confidence that an enforceable contract, conforming to all the requirements of the IFB, will result. *See: The Scotsman Group, Inc.*, B-245634, Jan. 13, 1992, 92-1 CPD ¶ 57; *See also: Outdoor Venture Group*, B-235056, June 16, 1989, 89-1 CPD ¶ 571. GPPC failed to do so here by not providing the requested certification letter or IFB compliance form.

Thus, GPPC has subjected itself to potential liability by not submitting a complete certification, even if the requirement was vague in the IFB. All that GPPC certified to was that it was compliant with CNMI tax laws. It did not certify that it was compliant with other laws, whether local or federal. Thus, the Public Auditor determines that GPPC's bid, in failing to include a certification as to its compliance with laws, contained a material defect and was properly rejected by Procurement & Supply.

BID BOND

The IFB required a bid guarantee, e.g., a bid bond. IFB Section 102.03. A bid guarantee is a form of security ensuring that a bidder will not withdraw its bid within the period specified for acceptance and, if required, will execute a written contract and furnish required performance and payment bonds. The bid guarantee secures the surety's liability to the government, thereby providing funds to cover the excess costs of awarding to the next eligible bidder in the event that the bidder awarded the contract fails to fulfill these obligations. A.W. and Assocs., Inc., B-239740, Sept. 25, 1990, 90-2 CPD Para. 254. When it is required by a solicitation, a bid guarantee is a material part of a bid and must be furnished with it. A.D. Roe Co., Inc., B-181692, Oct. 8, 1974, 74-2 CPD Para. 194.

GPPC provided the bond but failed to check-off a portion of a signed form that appears to have been a cover page for its bid. *See*: IFB pg. BD-2 (Revision No. 1, September 23, 2011). This form requested that the type of bid guarantee be identified. Since the bond was included in the GPPC bid, the failure to check the cover sheet as to what type of bid guarantee was included in the bid was immaterial. The IFB required a bid bond and GPPC provided an otherwise valid bond. The bond was material to the IFB, not the check-off form.

Thus, the Public Auditor determines that the absence of a completed bid bond check-off form is an immaterial defect that can be waived by Procurement & Supply.

4. Responsibility Determination of Hawaii Rock

Contrary to GPPC's claim, a responsibility determination was undertaken of Hawaiian Rock and transmitted to Procurement & Supply. Hawaiian Rock provided documents pertaining to the determination to the Department of Public Works on March 22, 2012 and the Department made an affirmative responsibility determination about Hawaiian Rock. The Public Auditor determines that a valid responsibility determination was conducted by the awarding agency.

5. Incompleteness of Hawaii Rock Bid

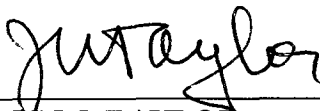
GPPC alleges that Hawaiian Rock's bid is incomplete because it lacks a listing of subcontractors. IFB Section 108.02(b) states that subcontractor information must be submitted to the awarding agency within ten days of an award of a subcontract. Since this provision contemplates a post-award submission of subcontractor information, GPPC's allegation is baseless.

OPA DECISION

The issues before OPA are decided as follows:

1. The Hawaiian Rock appeal is DISMISSED as Hawaiian Rock had no standing to protest via its letter of January 30, 2012.
2. Procurement & Supply had no duty to notify other bidders of Hawaiian Rock's communication of January 30, 2012 since that communication was not a protest.
3. GPPC's bid contained a material defect by not certifying that the company was fully in compliance with local and federal laws.
4. GPPC's failure to indicate that its bid guarantee was via a bid bond was an immaterial defect since a valid bid bond was submitted.
5. GPPC's EEO form was properly completed and did not evidence a misrepresentation of a material fact.
6. The Department of Public Works and the Division of Procurement & Supply erred in not including the correct EEO form for bidders to complete that would indicate their compliance with the proper Executive Order (Number 11246) that mandated EEO requirements. It was not up to the bidders to inquire about this; they simply had to fill out the form and submit it answering the relevant questions. Only GPPC answered the questions on the form correctly. As such, the IFB was defective but this defect may be corrected prior to award since the textual provisions of the IFB unambiguously identify the EEO program requirements for bidders and those provisions must be complied with by the intended awardee.

The appeal of Hawaii Rock is DISMISSED and the appeal of GPPC is DENIED.



JAMES W. TAYLOR
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CONCUR



MICHAEL PAI
PUBLIC AUDITOR