



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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In re:) **APPEAL NO. BP-A100**
)
Appeal of Triple J Rentals) **COTA ITB21-COTA/FTA-033**
(Micronesia), Inc.)
) **“Lease for Six Fifteen Passenger Mini-Vans”**
)
_____)

FACTUAL BACKGROUND

In 2020, the Commonwealth Office of Transit Authority (“COTA”) issued ITB21-COTA/FTA-033 (“IFB”), an invitation to bid for the lease of six fifteen passenger mini-vans. Bids were due no later than January 25, 2021 at 9:30 a.m. for any bidders located within the CNMI. IFB at p. 1 (Director’s Report, p. 34). Bid opening was scheduled to take place at the same time unless bidders from outside the CNMI submitted a timely notice of intent to bid. *Id.*

The IFB specifications included the following minimum insurance requirements:

1. Bodily Injury Liability
2. Medical Payments or Personal Injury Protection (PIP)
3. Property Damage Liability
4. Collision
5. Comprehensive
6. Uninsured and Underinsured Motorist Coverage

IFB p. 5-6 (Director’s Report p. 38-39).

The IFB included a checklist of required documents for bid submission. IFB p. 8 (Director’s Report p. 41). The checklist provided “the following forms shall be filled out, executed, and submitted in accordance with the bid instructions. Failure to conform to these essential requirements will result in bid rejection.” The checklist referenced the following forms:

1. Bid Form
2. Non-Collusion Affidavit

3. Lobbying Certification

IFB p. 8 (Director's Report p. 41).

The checklist also specified: "The following business documentation and the parts and repair/warranty statement requirement shall be submitted in accordance with the bid instruction. Failure to conform to these requirements will result in bid rejection." The checklist then referenced the following items:

1. Bid Proposal Cost-Breakdown
2. Copies of the Specifications and Features of the Vehicle(s) Being Proposed in the Bid Submittals

IFB p. 8 (Director's Report p. 41).

The bid checklist and referenced forms did not include any specific requirements to list the types of insurance included in the bid price or any verification of the minimum insurance requirements listed in the IFB specifications. IFB p. 9-26 (Director's Report p. 42-59).

Three bidders submitted timely bids in response to the IFB: Joeten Motors, Triple J Rentals (Micronesia), Inc. ("Triple J"), and U Save Car Rental. Director's Report, p. 6. Each competing bid referenced the type of insurance included with the bid as part of their bid proposal. *See*, Joeten Motors bid documents (Director's Report p. 15); Triple J bid documents (Director's Report, p. 33), and; U Save Car Rental bid documents (Director's Report, p. 10).

Triple J's bid specified that "No Passenger Liability Insurance offered." Triple J Bid, p. 1 (Director's Report, p. 33).

On April 7, 2021, The Director of Procurement and Supply notified Triple J that their bid was found to be non-responsive for failure to provide insurance coverage as specified in the bid package. Director's Letter to Triple J, April 7, 2021 (Director's Report, p. 32). The Director's letter specified that Triple J's bid failed to provide coverage for Bodily Injury Liability, Medical Payments or Personal Injury Protection, or Uninsured and Underinsured Motorist Coverage. *Id.*

On April 9, 2021, Triple J lodged a timely protest of the Director’s determination their bid was non-responsive. Triple J Protest, April 9, 2021 (Director’s Report, p. 30). Triple J’s protest claimed their bid was in full compliance with the documentation required for submission and was therefore responsive. Triple J argued the insurance requirements specified in the IFB were to be documented at the time of contract signing and not at the proposal stage. *Id.* Along with their protest, Triple J included a certification of insurance to prove their insurance coverage was in full compliance with the specifications of the IFB. *Id.*

On April 20, 2021, Acting Director of Procurement and Supply, Francisco C. Aguon (the “Director”), issued a decision denying Triple J’s protest. In the decision the Director found the submission in the bid that stated “No Passenger Liability” insurance was offered rendered the bid non-responsive to the IFB under NMIAC § 70-30.3-205(k)(1). Protest Decision, p. 1 (April 20, 2021). The decision further found it an inappropriate to review or consider the contents of the “Certificate of Insurance” provided by Triple J, construing the submission as an attempt at revising their bid to make it responsive, something disallowed under the procurement regulations. *Id.*

Triple J filed an appeal of the Director’s decision to the Public Auditor on April 28, 2021. Triple J Appeal, p. 1-3 (April 28, 2021). The appeal is based on three primary arguments. First, that the Triple J bid meets the insurance requirements of the IFB. Second, that the Triple J’s bid was responsive to the IFB’s bid submission requirements and that the Director’s evaluation of the bid for compliance with the insurance coverage is not properly a part of the responsiveness inquiry, but instead should have been verified as part of the responsibility determination, which takes place after selection of the lowest responsive bidder and which can be supplemented with new information unlike the responsiveness inquiry. Finally, Triple J disputed the Director’s finding that submission of the Triple J certificate of insurance along with their bid protest was improper, stating the submission was not a revision or change of the bid, but instead a mere documentation of the insurance provided with the bid, only submitted after the Director questioned the insurance coverage. *Id.*

Upon receipt of the appeal, OPA solicited a report from the Director on April 29, 2021 pursuant to NMIAC § 70-30.3-505(d)(1). OPA Letter to P&S Director (April 29, 2021). OPA followed up on the progress of the report on June 1, 2021. OPA Letter to P&S Director (June 1, 2021).

The Director issued a report on the appeal on June 4, 2021. The Director's Report stated the "minimum insurance requirements" included in the IFB specifications were essential requirements of the procurement as the vans were to be used in COVID 19 response efforts to transport visitors and residents from the airport to quarantine facilities. Director's Report, p. 4. The Director's Report further noted that because Triple J's bid specifically stated that "No Passenger Liability Insurance offered" it was non-responsive to the "Bodily Injury Liability" minimum requirement of the IFB specifications. *Id.* The Director rebutted Triple J's contention that the presentation of the certificate of insurance was mere "documentation on the coverage provided" and not a supplement or alteration to the bid, pointing out that the certification had to be rejected because it contradicted the bid: the bid stated no passenger liability insurance was offered and the certificate of insurance was submitted to show that such coverage did in fact exist. *Id.* at 5. Finally, the Director's Report goes on to notify the Public Auditor and all interested parties of P&S's intention to cancel the solicitation based on their conclusion that all bids failed to satisfy the minimum insurance requirements and were thus non-responsive. *Id.* at 6.

Pursuant to NMIAC § 70-30.3-505(d)(4), interested parties have ten (working) days from the date distribution of the report to file comments on the report. Any rebuttal by the agency or other interested party shall be filed with the Public Auditor within five (working) days of receipt of the comments to which the rebuttal is directed.

Special Assistant for Public Transportation, Alfreda Camacho Maratita, filed comments on the Director's Report on June 8, 2021. COTA comments, p. 1 (June 8, 2021). COTA's comments stressed the urgent needs of COTA for the vans and highlighted concerns with the specifications on retrofitting the vehicles to comply with the CNMI Governor's COVID 19 task force social distancing requirements and the insurance requirements. *Id.* COTA recommended cancellation of the IFB under NMIAC § 70-30.3-240 (b) and (h). COTA attached a letter dated April 15, 2021 to the P&S Director where COTA had requested cancellation of the IFB on identical grounds.

The time period for comments on the Director's Report under the regulations ended on June 21, 2021. The time period for rebuttal to the COTA comments ended on June 15, 2021.

JURISDICTION

The CNMI Procurement Regulations vest OPA with jurisdiction to act as the adjudication body for appeals from decisions of the Director of Procurement and Supply. NMIAC § 70-30.3-505 (version of NMIAC § 70-30.3-505 in effect on date of filing of the present appeal). OPA has recently taken the position that the regulations designating the Public Auditor as the adjudication body exceed the regulatory authority vested in the Department of Finance. *Micronesian Environmental Services, LLC. V. Kina B. Peter, et al.*, Civ. Nos. 20-0344-CV and 21-0004-CV (consolidated) (Super. Ct. March 8, 2021) (Motion to Dismiss under NMI R. Civ. P. 12(b)(6)). Notwithstanding the position OPA has taken in that collateral matter, the Department of Finance regulations remain in effect and enjoy a presumption of validity until ruled otherwise by a court of law, and OPA is bound to carry out its duties as the designated adjudication body.

The Department of Finance has recently promulgated revised procurement regulations that remove OPA as the appellate adjudication body, however those regulations were not in effect until after the filing of the present appeal. *See*, Department of Finance Regulations published in the Commonwealth Register on April 28, 2021. 43 Com. Reg., No. 4, 045667-045765 (April 28, 2021). These new DOF Procurement Regulations were adopted on May 28, 2021. 43 Com. Reg., No. 5 046394 (May 28, 2021). Thus, the present appeal will be the final decision rendered by the Public Auditor under the former regulations.

DISCUSSION

The threshold question before OPA is whether the “minimum insurance requirements” noted in the IFB qualify as a material term of the solicitation, appropriate for a responsiveness evaluation.

Bid Responsiveness and Rejection

Triple J's bid proposal specified that "no passenger liability insurance" was included. Triple J Bid, p. 1 (Director's Report, p. 33). On its face, this conflicts with the minimum insurance requirements specifying "bodily injury liability." As stated in the Director's Report, "bodily injury liability" extends to third parties, including passengers. Triple J's bid that disclaimed any passenger liability indicated that it did not conform to the insurance requirements listed in the IFB.

To be responsive, a bid must comply in all material respects to the IFB, must accept all material terms and conditions of the solicitation, and must represent an unequivocal offer to perform the contract. NMIAC § 70-30.3-205 (j); *In re: GPPC and Hawaiian Rock*, OPA Appeal No. BP-A069, p. 9 (July 10, 2012). A bid that fails to materially conform to the solicitation is not responsive and is ineligible for award. *In re: Appeal of J & A Enterprises*, OPA Appeal No. BP-A043, p. 6 (August 5, 2004). To determine whether a term of a solicitation is material, OPA analyzes whether the term affects "price, quality, quantity, or delivery of goods or services" or the "legal obligations" of a contracting party. *In re: GPPC and Hawaiian Rock*, OPA Appeal No. BP-A069, p. 7-8 (July 10, 2012). The mere labeling of terms as "minimum requirements" within a solicitation does not make them "material" or "essential" to the solicitation for the purposes of assessing responsiveness of a bid. *In re: Appeal of All Around Security*, OPA Appeal No. BP-A021 p. 8 (April 4, 2000).

Applying these standards to the present solicitation, OPA finds the minimum insurance requirements to be material terms of the IFB. Insurance acts to protect the contracting agency from loss and liability and it most certainly affects the legal obligations of the contracting parties. OPA has previously held comparable terms of solicitations, concerning compliance with laws or insurance regulations to be material to the solicitation and that failure to address such requirements are proper grounds for rejection. *See, In re: Appeal of GPPC, Inc.*, OPA Appeal No. BP-A094, p. 4 (February 28, 2020) (finding requirement that bidders include a certificate from the Department of Commerce verifying that their insurer of choice is compliant with CNMI law to be a material term and failure to include grounds for bid rejection); *In re: GPPC and Hawaiian Rock*, OPA Appeal No. BP-A069, p. 7-8 (July 10, 2012) (finding requirement that bidders include a

certification of compliance with local and federal laws to be a material term and failure to include grounds for bid rejection).

The challenging part of the present matter is that although the “minimum insurance requirements” are material terms of the solicitation, they are not specifically listed in the bid checklist of required documents or specifically mentioned in the bid form. This creates confusion among the bidders as to whether their bid submissions must include information on the types or amounts of insurance coverage included with the bid.¹ Triple J seizes on this fact in disputing the Director’s decision to reject their bid.

Triple J offers three arguments to refute the Director’s decision: that the Triple J bid meets the insurance requirements of the IFB; that the Triple J’s bid was responsive to the IFB’s bid instructions (checklist, etc.) and that the Director’s evaluation of the bid for compliance with the insurance coverage is not properly a part of the responsiveness inquiry, but instead should have been verified as part of the responsibility determination after award, and; that the Director’s finding that submission of the Triple J certificate of insurance along with their bid protest was improper, stating the submission was not a revision or change of the bid, but instead mere documentation of the insurance provided with the bid, submitted only after the Director questioned the insurance coverage. Triple J Appeal, p. 1-3 (April 28, 2021). OPA will address each contention in turn.

The crux of Triple J’s first argument is that “passenger liability insurance” as their bid disclaimed was not specifically listed as one of the six required minimum insurance requirements. Instead, the IFB required “bodily injury liability.” Triple J Appeal, p. 1-2 (April 28, 2021); IFB p. 5 (Director’s Report p. 38). As stated above, though these terms are not identical, certainly bodily injury liability as required by the IFB includes injury to third parties, including passengers. Thus, the specific information by Triple J in the bid stating no passenger liability insurance was included was reasonably interpreted by the Director as failing to satisfy the requirement of “bodily injury

¹ Notwithstanding the lack of a direct requirement to detail the minimum insurance included as part of the bid process, each bidder provided information on the insurance included with their bid as part of their bid package. *See*, Joeten Motors bid documents (Director’s Report p. 15); Triple J bid documents (Director’s Report, p. 33), and; U Save Car Rental bid documents (Director’s Report, p. 10).

liability” insurance required by the IFB. Moreover, as the Director notes in his initial letter rejecting Triple J’s bid and again in his report: Triple J’s bid not only failed to satisfy the “bodily injury liability” insurance requirement, but also failed to list coverage for Medical Payments/Personal Injury Protection or Uninsured and Underinsured Motorist Coverage, two other “minimum insurance requirements” of the IFB. Director’s Letter to Triple J, April 7, 2021 (Director’s Report, p. 32); Director’s Report, p. 4.

Triple J’s second argument relies on a misreading of the regulations to suggest that because the bid submission instructions do not mention the “minimum insurance requirements,” compliance with those requirements cannot be considered in the bid responsiveness evaluation. Triple J quotes only the small portion of NMIAC § 70-30.3-205(j) that serves its purpose “[b]ids must be filled out, executed, and submitted in accordance with the bid instructions.” Relying on this snippet of the regulation, they suggest the responsiveness inquiry ends when the specific documents listed in the IFB bid instructions are submitted. Under this analysis, the rest of the requirements listed in the IFB, material or not, would either be disregarded or would fall into a responsibility² evaluation, done only after selection of the lowest responsive bidder. However, looking at the whole of the regulation governing responsibility of bids, there are some important parts excluded by Triple J:

To be considered for award, a bid **must comply in all material respects** with the invitation for bids. Bids must be filled out, executed, and submitted in accordance with the bid instructions. A bid may be considered **only** if

- (1) The bidder **accepts all material terms and conditions of the invitation**, and
- (2) Any future award based upon the bid would result in a binding contract with terms and conditions that **do not vary from the requirements of the invitation**.

NMIAC § 70-30.3-205 (j) (emphasis added).

² As stated above, responsiveness concerns whether a bidder has offered to provide supplies 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; responsibility refers to a bidder’s future apparent ability and capacity to perform, is predictive in nature, and is performed after the lowest responsive bidder has been selected. *See generally, In re: Appeal of GPPC, Inc.*, OPA Appeal No. BP-A061 (April 1, 2020), Responsibility inquiries tend to focus on a bidder’s financial health, record of performance, integrity, and qualified personnel. NMIAC § 70-30.3-245.

The portion of the regulation quoted by Triple J focuses on the format and mode of submission of the bid, but not on the content required in the bid. As discussed above, the “minimum insurance requirements” are material terms of the present solicitation. Responsive bids must indicate an acceptance of those terms such that a future award based on the bid would result in a binding contract with terms that do not vary from the requirements of the invitation. Instead, Triple J’s bid specified “No Passenger Liability Insurance offered” and failed to indicate acceptance of two of the other enumerated minimum insurance requirements. Triple J Bid, p. 1 (Director’s Report, p. 33). Accordingly, the Director’s decision to reject the bid is supported by the regulations.

Triple J’s third argument challenges the Director’s finding that substantively considering the insurance certification submitted by Triple J along with their protest would have constituted an improper revision or alteration to their bid. In support, Triple J stated the insurance certification was only submitted to rebut the Director’s finding that Triple J’s insurance was inconsistent with the IFB’s requirements. However, responsiveness is measured at the time of bid opening and must be ascertained by the contents of the bid; not by supplemental information. *In re: Appeal of GPPC, Inc.*, OPA Appeal No. BP-A061 p. 5 (April 1, 2010); *In re: Appeal of GPPC, Inc.*, OPA Appeal No. BP-A094, p. 6-7 (February 28, 2020) (interpreting nearly identical provision under CUC procurement regulatory scheme). Triple J’s bid was, at best ambiguous as to whether the required “bodily injury liability” coverage was included, and at worst included a direct statement that such insurance was excluded. The Director was justified in rejecting Triple J’s bid and was correct in excluding the insurance certification submitted by Triple J to clarify the insurance coverage offered in their bid.

Cancellation

Although each bidder did include a reference to the types and amounts of insurance included with their bid, it cannot go unstated that the IFB in this matter invited confusion. Clearly, the “minimum insurance requirements” are material terms to the solicitation. While the listing of the minimum categories of insurance helped bidders know what to include in their bids, the whole system would benefit if more information were included in the insurance specifications. Helpful information might include the minimum dollar amounts of each insurance type and maximum deductible

information the contracting agency desires. Insurance offerings can differ wildly on the amounts of coverage and the costs of deductibles. Both bidders and the evaluation team would benefit if the specifications were more clearly delineated, as these figures affect the cost of the insurance coverage, and thus, the price the bidders can offer.

Additionally, while bid checklists and bid forms are helpful to give bidders a handy list of required documents to submit as part of their bid packages and gives the evaluation team more uniform packages to review, they can be misleading if they include some but not all material terms of the solicitation. A minimal investment in creating well-crafted solicitations can pay large dividends to procuring agencies in terms of saving time and resources and avoiding unnecessary delays.

Though there is nothing to indicate the present solicitation is in violation of law or regulation justifying cancellation by the Public Auditor under NMIAC § 70-30.3-510, the Director has the authority to cancel the solicitation under NMIAC § 70-30.3-240, per the request of the expenditure authority on April 15, 2021. Indeed, such cancellation could have been done upon the initial request by COTA avoiding the additional costs and delays of this appeal.

DECISION

For the reasons set forth above, the appeal by Triple J, Inc. of the protest decision of the Director of Procurement and Supply is hereby denied.

Dated this 24th day of June, 2021.

BY: 

JOSEPH J. PRZYŪSKI
OPA Legal Counsel

CONCUR:

KINA B. PETER, CPA
Public Auditor

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