



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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In re:) **APPEAL NO. BP-Ao8o**
)
Appeal of GPPC, Inc.) **IFB13-GOV-083**
)
) **"Million Gallon Reservoir Replacement"**
)

BACKGROUND

GPPC, Inc. ("GPPC") filed a timely appeal with the Public Auditor ("OPA") on August 6, 2013 objecting to the denial of its protest over its disqualification as a non-responsible bidder on the above solicitation by the Director of Procurement & Supply. GPPC claims that the Director erred in his non-responsibility finding. In its appeal, GPPC also objects to the selection of AIC Marianas, Inc. ("AIC") for award of the contract resulting from the above solicitation. AIC was the second lowest bidder and GPPC was the lowest cost bidder. AIC was found to be responsive to the solicitation as well as responsible.

GPPC, the lowest cost bidder on the above solicitation, was determined to be non-responsible on June 19, 2013 by the Director of Procurement & Supply during the contract award process. See Director's letter to GPPC dated June 19, 2013 and Director's Decision Number 13-07, dated July 12, 2013. In the June 19th letter, the Director states that he is adopting a recommendation made by the Water Task Force ("WTF"). See WTF Program Manager Letter to Director dated June 13, 2013. The WTF letter identified several contracts involving the welding of tanks where GPPC was late, received eleven Non-conformance Reports, was given a Notice of Default and had trouble getting its welders qualified. Additionally, the WTF recommendation suggested that GPPC also lacked the organization, skills, and experience to successfully perform the project. On these grounds, WTF recommended that the Director determine that GPPC was non-responsible and therefore ineligible to receive the award of the contract. The Director agreed with and adopted the WTF Program Manager's recommendation and found GPPC non-responsible for the contract award.

Because the Director's determination of responsibility was based on facts showing that GPPC had performance problems on several similar contracts involving welding, OPA finds the Director's determination to be reasonable and declines to interfere with the Director's decision. Therefore, the Appeal is DENIED.

DISCUSSION

GPPC's primary objection is to the Director's adoption of the WTF recommendation. See GPPC Appeal Letter dated August 6, 2013 at p. 3. GPPC protested the non-responsibility determination on June 27, 2013 and the protest was denied by the Director of Procurement & Supply when he issued Decision 13-07.

Standard for Review of Responsibility Determinations

OPA has long recognized the broad discretion of a procuring officer in making responsibility determinations. *In re Appeal of GPPC, Inc.* OPA Appeal No. BP-061 (April 1, 2010); *In re Appeal of Maeda Pacific Corporation*, OPA Appeal No. BP-A074 (April 11, 2013). Responsibility determinations are essentially an exercise of business judgment, where reasonable minds might reach different conclusions. *In re Appeal of Resource Management International Corporation*, OPA Appeal No. BP-A055, (July 15, 2008). Accordingly, a procuring officer's responsibility decision will not be disturbed upon review unless it lacks a reasonable basis for the determination or the contractor demonstrates bad faith by the agency. *Id.*

OPA's treatment of the Director's responsibility determination is in line with the treatment of responsibility determinations by the General Accountability Office ("GAO"). The GAO decides over 2,000 protests annually involving federal government contracts. OPA often relies on GAO decisions for guidance in its procurement review function. GAO will not question a negative determination of responsibility unless the determination lacks a reasonable basis. *KMS Solutions, LLC*, B-405323.2, B-405323.3, Oct. 6, 2011, 2011 CPD ¶ 209 at 12; *Colonial Press Int'l, Inc.*, B-403632, Oct. 18, 2010, 2010 CPD ¶ 247 at 2. The responsibility of an offeror is to be determined based on any information received by the agency up to the time contract award. *Sygnetics, Inc.*, B-404535.5, Aug. 25, 2011, 2011 CPD ¶ 164 at 4. In addition, contracting officers are "generally given wide discretion" in determining the amount of information that is required to make a responsibility determination. *See Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1334-35 (Fed. Cir. 2001). Thus, the standard of review for responsibility determinations recognizes the broad discretion of the procurement officer. OPA follows GAO's guidance in making its review of such determinations.

Bad Faith Claims by GPPC

GPPC alleges that the WTF recommendations, upon which the Director relied, were done with bias against GPPC and in bad faith. *See Appeal at 4.* As a starting point, contract officials are presumed to act in good faith and any allegation to the contrary must be supported by convincing proof. *In re Appeal of Chongs Corporation*, OPA Appeal No. BP-A073 (April 11, 2013); *See also In re Appeal of Resource Management International Corporation*, OPA Appeal No. BP-A055 (July 15, 2008) (procurement officials are required to act in good faith and may be presumed to do so).

In support of its bad faith allegations, GPPC cited to what it considered to be flaws in the WTF recommendations and a limited review of its full performance record in the CNMI, stating that the WTF overlooked 99% of its actual fourteen-year work history. Instead, GPPC claims, the WTF focused solely on tank and other welding problems associated with three recent projects. This misplaced focus, GPPC claims, was likely motivated by WTF's bias resulting from "past interactions GPPC has had with that agency in other recent procurements." *See Appeal at 3.* While GPPC goes into some further detail as to what it sees as erroneous statements within the WTF recommendations, it fails to further elaborate on any specific conduct, facts, or even innuendo supporting its claim of

bad faith. GPPC's appeal lacks sufficient proof to overcome the presumption of good faith. Accordingly, OPA finds the WTF recommendations themselves were not the product of bias or bad faith.

GPPC further claims that "[t]he unmatched alacrity with which AIC's contract was routed and awarded speaks two words loud and clear: bias and bad faith." Appeal at p. 7. The theory behind this claim is that the efficiency with which the contract was awarded and processed is evidence of a behind-the-scenes conspiracy between the WTF and the Director of Procurement & Supply to avoid review of any protest by GPPC as to the determination of its non-responsibility. Comments submitted by AIC artfully dismantle GPPC's frail factual and legal theories on this matter. AIC illustrates that the award and processing of the AIC contract showed no more than swift action on a contract, which provided GPPC timely notice, and deprived it of no remedy under procurement law. *See AIC Comments*, p. 2-3. Moreover, AIC points out, the speed with which government contracts are awarded and processed can vary greatly from one project to the next, depending on whether the project is a priority of the governor, whether it is a priority of the agency and whether "runners" are used to route a contract through on its journey for signatures. *Id.* Certainly no presumption against bad faith can be overcome by GPPC pointing out these entirely legal and efficient government actions and labeling them "bias and bad faith."

Non-Responsibility Determination by P&S Director

The CNMI Procurement Regulations require that non-responsibility determinations be signed by the Director of Procurement & Supply. NMIAC § 70-30.3-245 (d). GPPC claims that the Director's reliance on the WTF responsibility analysis implies that the Director just adopted said recommendation without fully investigating the facts in order to draw his own conclusion. Thus, GPPC claims that the Director's decision is flawed. It is not.

Nothing in the CNMI Procurement Regulations indicates that the Director cannot obtain and consider information from other sources, such as the WTF, when making a responsibility determination. The only requirement is that the Director issue the determination as was done in this case. Indeed, under the procurement regulations, the Director's duties and responsibilities include the duty to "procure or **supervise** the procurement" of all goods and services needed by the government. NMIAC § 70-30.3-101 (c). This recognizes that the Director's role is to oversee the procurement process. It does not preclude him from relying on agencies to assist in making his decisions or participating in the process.

In other appeals, OPA has recognized reliance by the Director on outside sources when making responsibility determinations. *See In re Appeal of Resource Management International Corporation*, OPA Appeal No. BP-A055, p. 4 (July 15, 2008) (Director relied upon recommendations of DPW engineer who had inspected two recent projects by contractor). While the Director must make the **final** responsibility determination, he cannot be expected to be an expert in every facet of construction, engineering, architecture, and other government works. Thus, the input by government agencies to the Director regarding responsibility determinations is entirely reasonable.

The non-responsibility determination at issue here was based on two subsets of NMIAC § 70-30.3-245(a), either one of which would be sufficient to find GPPC to be a non-responsible bidder. See Director's Notice Letter to GPPC as to non-responsible decision, dated June 19, 2013 (citing NMIAC § 70-30.3-245(a) (3) and (5)). Specifically, the Director found GPPC to lack a satisfactory performance record (section 3) and failed to demonstrate the necessary organization, experience and skills to perform (section 5). See *Id.* GPPC takes issue with each of these categories in its appeal.

Reviewing each of these subsets, OPA finds the record is sufficient to demonstrate the Director's decision that GPPC's was a non-responsible bidder to be a reasonable one, supported by law.

GPPC goes to great lengths to dispute the timing aspect of the Director's non-responsibility determination. Specifically, the Director's decision states that GPPC has an unsatisfactory performance record "at this time." To this GPPC takes issue and argues that GPPC's long performance history on projects with varying Commonwealth and Federal agencies is the only proper consideration. See Appeal, p. 2-5. Contrary to GPPC's contention, however, the CNMI Procurement Regulations **do not** require consideration of a contractor's entire history of performance. See NMIAC § 70-30.3-245(3). In *Resource Management Int'l. Corporation*, OPA left undisturbed a non-responsibility determination based on the bidder's performance in two recent construction projects, which ignored successful performance in other government construction projects. See, OPA Appeal No. BP-A055, p. 4 (July 15, 2008).

This analysis is consistent with GAO treatment. In *Gray Graphics Corporation*, the GAO reviewed an agency non-responsibility determination based on facts analogous to the present case. See B-295421, February 18, 2005. At the time the determination was made, Gray had performed late on 7 of 215 orders for the previous 3 months and had a 3 percent delinquency rate. *Id.* While Gray's overall performance was fairly positive, the agency was concerned that Gray's recent performance history demonstrated an upward trend in late deliveries and it saw little corrective action being taken by Gray. As such, the agency determined that Gray's recent record of delinquencies brought its ability to timely perform all jobs under the present contract into question. *Id.* The GAO found no reason to override the determination.

OPA reaches the same conclusion in the present matter applying the same logic as *Resource Management* and *Gray*. GPPC's performance on several recent contracts involving welding and tank construction has been shown to have been poor. The instant solicitation was for the creation of a large, welded reservoir tank. As such, GPPC's performance on similar recent and ongoing contracts is highly relevant to the non-responsibility determination.

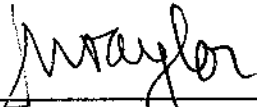
Accordingly, OPA finds the Director's decision that GPPC was a non-responsible bidder to be reasonable. The Director's decision adopted the WTF recommendation which contained a substantial quantity of information collected by the WTF relevant to GPPC's past performance in related projects and its projected ability to successfully perform on the instant project. Finding no evidence of bad faith or bias in the underlying report or conduct by the WTF, OPA has no reason to second guess the judgment of the Director.

DECISION

The Public Auditor determines that the Director of Procurement & Supply acted properly in making a determination based on input from the WTF that GPPC was not a responsible contractor and thus not eligible for award of the contract. GPPC has had a long history of successful work on various road and construction projects in the CNMI but, according to the WTF findings adopted by the Director, has had serious trouble with three recent contracts that required welding. That knowledge, plus GPPC's receipt of a Notice of Default from CUC on May 23, 2013, adds to the relevant facts that were before the Director of Procurement & Supply when the non-responsibility determination was made. Therefore, the actions of the Director in determining that GPPC was not responsible were reasonable and consistent with our prior procurement decisions and those of the GAO. Finding no evidence of bad faith, the reasonable decision of the Director is hereby affirmed. Accordingly, the appeal is DISMISSED.

Dated this 17th Day of September 2013.

BY



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CONCUR



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