



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

Website: <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

In re:) **APPEAL NO. BP-A094**
)
Appeal of GPPC, Inc.) **CUC-IFB-19-031**
)
) **“San Vicente Water Tank Replacement Project”**
)
_____)

FACTUAL BACKGROUND

In June of 2019, CUC issued CUC-IFB-19-031 (“IFB”), inviting pre-registered bidders to submit bids to complete the San Vicente Water Tank Replacement Project. The project involves the removal of the current .5 million gallon reservoir and replacing with a .75 million gallon pre-stressed concrete reservoir. Bid packages were due on September 6, 2019 at 9:00 a.m. IFB p. 1.

The two page IFB required bidders to “*submit a clearance from the OIC [CNMI Department of Commerce, Office of the Insurance Commissioner] certifying their insurer of choice is in compliance with the CNMI’s Insurance Code.*” IFB, p. 2 (emphasis in original). The IFB also included a reservation by CUC of the right to “reject any or all bids and waive any imperfection in the bid proposal in the best interest of the government.” IFB, p. 2.

Three companies submitted timely bids for the project, GPPC, Inc. (“GPPC”), RNV Construction (“RNV”), and AIC Marianas, Inc. On October 18, 2019 the CUC selection committee identified GPPC as the lowest responsive bidder and issued a notice to award the contract to GPPC. The selection committee rejected RNV’s bid as non-responsive because it failed to include the required OIC clearance.

On October 21, 2019, RNV lodged a protest to the CUC Executive Director challenging CUC’s decision to reject its bid. GPPC filed a response to RNV’s bid protest on November 1, 2019. On November 11, 2019, RNV submitted a supplement to its bid protest, wherein they included a copy

of the OIC clearance form missing from their bid. The form was dated September 6, 2019, the date of the bid submission.

On November 25, 2019, CUC distributed a protest decision by the Executive Director dated November 22, 2019. In the decision, the Executive Director granted RNV's protest, finding the lacking OIC clearance form a non-material, minor informality, and annulled its award of the contract to GPPC.

On December 12, 2019, GPPC timely appealed (the "Appeal") the CUC Executive Director's decision to OPA. Pursuant to regulation, CUC distributed the Executive Director's report ("Report") on the appeal OPA and all interested parties on January 7, 2020. The Report was dated December 22, 2019.

Interested parties submitted comments following the distribution of the Report. On January 15, 2020, RNV submitted initial comments ("RNV Comments") on the appeal and the Director's Report. GPPC submitted comments ("GPPC Comments") on the Director's Report and RNV's initial comments on January 22, 2020. Lastly, on January 28, 2020, RNV submitted comments ("RNV Responsive Comments") in response to GPPC's January 22 comments.

OPA has jurisdiction to decide this appeal pursuant to NMIAC § 50-50-405(a).

DISCUSSION

The IFB in the present procurement was clear in its requirement that all bidders "*submit a clearance from the OIC certifying their insurer of choice is in compliance with the CNMI's Insurance Code.*" IFB p. 2. This requirement appears consistently in CUC's recent invitations for bids in both locally and federally-funded procurements." *See*, CUC-IFB-19-019, p. 1; CUC-IFB-18-003, p. 2; CUC-IFB-19-038, p. 2; CUC-IFB-19-029, p. 2. Equally clear was a reservation in the IFB by CUC to "waive any imperfection in the bid proposal in the best interest of the government." IFB, p. 2. RNV's bid package failed to include the required certification, though

they had obtained a certification on the bid due date. The crux of the present appeal is whether RNV's failure to include the certification rendered their bid non-responsive and, if so, whether CUC could waive the imperfection or allow RNV to supplement its bid under the CUC Procurement Regulations.

The CUC Procurement Regulations are specific as to bid security and its importance in the procurement realm. Information on "bid security requirements and form and certifications that must be submitted with the bid" must be included in the IFB. NMIAC § 50-50-301 (a)(2)(ii). Modes of acceptable bid security are bid bond, cash, certified check, cashiers check, or other form acceptable to CUC. NMIAC § 50-50-301 (b)(1). Failure to furnish bid security, when required by the IFB, shall result in rejection of the bid as non-responsive. NMIAC § 50-50-301 (b)(3). Thus bid security, in the form proscribed by the IFB is, by regulation, material to the IFB and failure to include it with the bid requires rejection as non-responsive. *See e.g. In re: GPPC and Hawaiian Rock*, OPA Appeal No. BP-AO69, p. 10 (July 10, 2012); *In re: RNV Construction*, OPA Appeal No. BP-AO39, p. 4 (Nov. 13, 2003).

The present IFB allowed bid security in the form of "cash, certified check, cashier's check, or bid bond executed by a surety company holding a certificate of authority from the United States Secretary of Treasury as an acceptable surety." ITB, p. 2. The IFB required one additional step however, specifying that all insurer "questions, concerns, and qualifications shall be handled by the Department of Commerce" and requiring all bidders to include a clearance from the OIC certifying their insurer of choice is in compliance with the CNMI's Insurance Code. *Id.* Though CUC, in its Director's Report, distinguishes general liability insurance from bonding in its discussion of materiality, it is clear in the IFB that CUC is deferring to the OIC to determine the qualifications of **all** insurers, both surety companies and general insurance providers, in its requirement that bidders include the OIC clearance. Surety insurance is included in the CNMI Insurance Code and is regulated by the OIC. 4 CMC § 7103 (p).

RNV's bid included a bid bond as its bid security. RNV bid documents, p. 31. RNV's bid bond was issued by Liberty Mutual insurance. Though RNV's bid included the appropriate bond amount and even included a certificate of authority for Liberty Mutual to act as a surety in the

CNMI, they failed to meet the specific “bid security **requirements** and form” that was required in the IFB by failing to include the required OIC certificate. NMIAC § 50-50-301 (a)(2)(ii). Accordingly, the bid must be rejected as non-responsive under NMIAC § 50-50-301 (b)(3).

OPA disagrees with CUC and RNV’s argument that the OIC certification was not a material requirement, at least with respect to the issue of bid security. Responsive bids are those that conform in all material aspects to the IFB. NMIAC § 50-50-035 (p). Analysis of materiality and bid rejection are conducted under NMIAC § 50-50-205 (g) where the regulations provide a bid “may” be rejected for failure to conform to “essential requirements” of the IFB. 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” under the solicitation or the “legal obligations” of a contracting party. *In re: GPPC and Hawaiian Rock*, OPA Appeal No. BP AO69, p. 7-8 (July 10, 2012) (finding certification that bidder was in compliance with local and federal laws was material to the solicitation).

CUC and RNV each advance arguments to distinguish the present case from *Hawaiian Rock* because the OIC certification relates to the viability of a third party (the insurer) instead of the bidder. Director’s Report, p. 2-3; RNV Comments p. 3. This distinction is neither convincing nor relevant. First, while the OIC certificate does pertain exclusively to a non-party of the procurement (*i.e.* whether the insurer or surety chosen by the bidder is in compliance with CNMI insurance law), it would certainly affect the legal rights of the contracting parties if the insurer is not viable when the bond is called upon for payment. A bid bond is security offered to ensure a bidder will not withdraw its bid and provides funds to cover excess costs of awarding to the next eligible bidder in the event of withdraw or default. *In re: GPPC and Hawaiian Rock*, OPA Appeal No. BP AO69, p. 10 (July 10, 2012). Second, and more importantly, because the CUC procurement regulations specify bids that fail to meet the bid security requirements of the IFB must be rejected (see above), the question of materiality is not relevant.

Having determined RNV’s bid was non-responsive, as submitted, for lacking the OIC certificate the analysis must shift focus to whether the CUC procurement regulations or CUC’s reservation in the ITB to waive imperfections in any bid proposal provide means to cure the defect.

The CUC Procurement Regulations are rigid on alteration or correction of bids after submission and would not allow RNV to submit its OIC certification after bid opening. “Bids shall be unconditionally accepted without alteration or correction except as authorized by regulations.” NMIAC 50-50-205 (f). Correction of bids is only permitted when an obvious clerical mistake is clearly evident examining the bid document or is otherwise supported by clear and convincing evidence as to the bid intended. NMIAC § 50-50-205 (h)(1). Even where those limited circumstances are present, “no changes in bid price or other provision of bids prejudicial to the interest of CUC or fair competition shall be allowed.” NMIAC § 50-50-205 (h). Clearly the regulations intend to limit alterations of bids to obvious clerical mistakes, not omitted documents.

The reservation included in the ITB raises fairness concerns and is not enforceable under the present circumstances. Though the “purposes and policies” section of the procurement regulations do not create independent actionable standards to support a procurement protest or appeal, they do provide a lens through which to view and interpret the underlying regulations. *In re: NAPA*, OPA Appeal No. BP-AO83, p. 5, (March 3, 2014) (finding policies section of CUC Regulations do not create independent standards to support protest or appeal); *In re: MJ Kitchenette & Catering*, OPA Appeal No BP-AO90, p. 5 (policy to ensure fair and equitable treatment of persons who deal with procurement system supported finding that specific facts extended time period to file protest).

The CUC regulations include the following purpose and policy pronouncements:

- (1) To provide for increased public confidence in the procedures followed in CUC procurement;
- (2) To ensure the fair and equitable treatment of all persons who deal with the procurement system of CUC;
- (3) To provide increased economy in CUC procurement activities and to maximize to the fullest extent practicable the purchasing value of CUC funds;
- (4) To foster effective broad-based competition within the free enterprise system;
- and
- (5) To provide safeguards for the maintenance of a procurement system of quality and integrity.

NMIAC § 50-50-001 (b). Though the CUC reservation in the ITB to “reject any of all bids and waive any imperfection in the bid proposal in the best interest of the government” serves to maximize the purchasing value of CUC funds by allowing them to overlook imperfections of an otherwise non-responsive lowest bidder, it could be used to undermine several other important policies. It undermines the fair and equitable treatment of bidders, allowing CUC to overlook imperfections in one bid in favor of another or reject an otherwise viable bid without cause. If improperly used, CUC could reject a conforming bid of one contractor and accept a non-conforming bid of another to arrive at a predetermined contractor of their choice. Such a waiver could also erode the public confidence and eliminate the safeguards to promote quality and integrity in the CUC procurement system.

OPA recommends the waiver be amended, either in form or in application, that CUC may waive “any non-material imperfection” in any bid proposal. Such a waiver could co-exist with the CUC Procurement Regulations and existing Commonwealth precedent, which has tolerated non-material omissions from bids in the past. *See e.g. GPPC and Hawaiian Rock*, OPA Appeal No. BP AO69, p. 7-8 (July 10, 2012) (finding failure to include a check-off form to indicate what type of bid guarantee was included in the bid package non-material, where an otherwise valid bond was included in the package).

As applied in the present matter, the waiver is not valid and cannot act to excuse RNV’s non-responsive bid.

RNV and CUC advance a collateral theory to overlook the lacking OIC certification. Though the theory goes by different names in the CUC Report and RNV’s commentary, the premise is the same: that because RNV and GPPC both listed Liberty Mutual as their insurer of choice, and because GPPC included the required OIC certificate, that CUC had the necessary knowledge, *i.e.* that Liberty Mutual was in compliance with CNMI laws, to accept the RNV bid as responsive. Directors Report, p. 3; RNV Responsive Comments, p. 1. It was also advanced that CUC’s past experience with Liberty Mutual as a major insurer on other projects gave CUC the needed knowledge that RNV’s insurer of choice was viable. Directors Report, p. 3; RNV Comments, p. 4. The issue of responsiveness must be determined by the contents of the bid submission, not by

reference to outside sources like other competing bids or knowledge or experience of the procurement officials. Allowing exploration outside of the individual bid submissions to determine the responsiveness of the bids would create bad precedent and a minefield of procurement litigation.

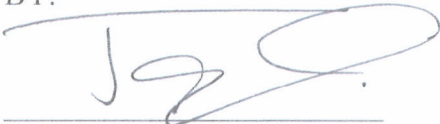
It is of no relevance whether the source of the funds for a procurement are local or federal. CUC, RNV, and GPPC have engaged in back and forth arguments regarding funding source and the relevance thereof. While it makes for tempting policy arguments that limited precious local funds will be saved by bending the procurement rules or conversely that saving money is not an issue because the funds are federal, the source of funds have no bearing on application of the procurement regulations. The procurement regulations are designed to create a fair, competitive, free enterprise system that maximizes the purchasing power of all CUC projects, regardless of their funding source.

DECISION

For the reasons set forth above, the appeal by GPPC, Inc. is hereby granted. This matter is remanded to the CUC Executive Director for appropriate action.

Dated this 28th day of February, 2020.

BY:



JOSEPH J. PRZYUSKI
OPA Legal Counsel

CONCUR:



MICHAEL PAI, CPA
Public Auditor

CC: Interested Parties and Counsel:

Edward Manibusan, Attorney General
Gary Camacho, Executive Director, CUC
Mark Hanson, Counsel for GPPC, Inc.
Michael Dotts, Counsel for RNV Construction
AIC Marianas, Inc.

attorney_general@cnmioag.org
gary.camacho@cucgov.org
mark@saipanlaw.com
mdotts@dottslaw.law
saipan@aicconstruction.com