



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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In re:) **APPEAL NO. BP-A099**
)
Appeal of Hong Ye Rental &) **DPW/COTA 19-ITB-017**
Construction, LTD.) **(Contract No. 701412-OC)**
)
) **"Construction of COTA Facility"**
)

FACTUAL BACKGROUND

In 2019, the CNMI Department of Public Works ("DPW") issued Invitation for Bids DPW/COTA 19-ITB-017 ("IFB") for the construction of the Commonwealth Office of Transit Authority Administrative and Maintenance Facility. Bids were due no later than October 15, 2019. IFB at p. 2 (Director's Report, p. 166). Bid opening was scheduled for October 15, 2019 at 10:00 a.m. *Id.*

The IFB specified the project was federally funded by the Federal Transit Administration ("FTA") under the United States Department of Transportation and that bidders are required to comply with the FTA federal contract clauses, as applicable. IFB at p. 1 (Director's Report, p. 165).

The IFB included language from COTA that warned a "[f]ailure to return the following fully executed forms may be ground (sic) for disqualification" and a separate checklist prepared by DPW listed required documents and specified "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." IFB at p. 2 (Director's Report, p. 166). The federal compliance forms included in the bid package and mentioned in both the checklists were the Buy America Certification, Lobbying Certification, and Debarment and Suspension Certification. (Director's Report, p. 168 and 169).

Three firms submitted bids for the project; Hong Ye Rental and Construction, LTD (“Hong Ye”), RNV Construction (“RNV”), and HBR International, Inc. Bid Opening Summary Sheet p 1-3 (Director’s Report, p. 204-206). Hong Ye’s bid was lowest at \$2,861,548.00. *Id.*

Although Hong Ye’s bid was lowest, Hong Ye included both a certification of compliance and a certification of non-compliance with the Buy American Act. Bid Opening Summary Sheet (Director’s Report, p. 206); Hong Ye Bid (Director’s Report, p. 110-111).

On January 24, 2020, the CNMI Office of the Attorney General sent a letter to DPW addressing whether a failure to return certain federal certification forms provided in the bid package is grounds for bid rejection. OAG Letter to DPW, January 24, 2020 (Director’s Report, p. 163-164). The letter opined that the two checklists contain different language but do not need to be read as “in conflict” and that DPW could waive the certification defect in Hong Ye’s bid. *Id.*

On January 28, 2020, DPW sent a letter to Hong Ye advising that DPW had determined Hong Ye to be the “apparent lowest and responsive bidder.” Letter from DPW to Hong Ye, January 28, 2020 (Director’s Report, p. 176). The same letter requested additional documentation from Hong Ye for the purpose of conducting a responsibility determination. *Id.*

On February, 25, 2020 the COTA Special Assistant for Public Transportation, Alfreda P. Camacho, sent a letter to the Secretary of DPW updating them on their re-evaluated position that bidders or offerors who have submitted certificates of both compliance and noncompliance cannot recertify or cure their Buy America forms. Letter from COTA to DPW, February 25, 2020 (Director’s Report, p. 224-225). The COTA letter included a letter from the FTA to a bidder on a different project informing them that they cannot correct or resubmit their certifications because “the regulations specifically state that inadvertent or clerical error does not include the situation where the bidder or offeror submits certificates of both compliance and noncompliance.” FTA letter, p. 1 (Director’s Report, p. 226, *citing* 49 C.F.R. § 661.13(b)(1)).

On March 3, 2020, the Secretary of Public Works send a memorandum to the Director of Procurement and Supply informing the Director that COTA determined the Hong Ye proposal,

though lowest on the project, failed to meet the requirements of the FTA under the Buy America Act regulations. Memorandum from DPW to Procurement and Supply, March 3, 2020 (Director's Report, p. 223). The memo referenced the Attorney General opinion that suggested Hong Ye's conflicting certification under the Buy America Act could be cured, and stated that further review indicated such a defect could not be cured pursuant to the FTA regulations. The memo concluded by advising the Director to provide a written determination to Hong Ye so that DPW could evaluate the next lowest bidder. *Id.*

In a letter from the Director to Hong Ye dated April 17, 2020, the Director states that, although Hong Ye was the lowest bidder, they are "not a responsible contractor" because of failure to provide required documents. Letter from the Procurement and Supply Director to Hong Ye (Director's Report, p. 198). A fax report indicates a failed attempt to distribute the letter to the fax number listed by Hong Ye in their bid. *See* Fax Report (Director's Report, p. 199); Hong Ye bid, p. 2 (Director's Report, p. 88). Hong Ye did not receive the April 17, 2020 letter. Declaration of Hong Ye President Michael Sheu (Director's Report, p. 181).

On May 5, 2020, DPW Secretary sent a letter to RNV informing them they were next in line for award of the contract, subject to a responsibility determination. The letter sought information from RNV for the purpose of conducting the responsibility determination. DPW letter to RNV, May 5, 2020 (Director's Report, p. 117).

In a letter dated May 8, 2020, RNV provided the information requested for a responsibility evaluation. Letter from RNV to DPW, May 8, 2020 (Director's Report, p. 123).

On August 15, 2020, the DPW Secretary sent a letter to RNV construction informing them of their intent to award the COTA project to their company as the lowest responsive and responsible bidder. DPW Letter to RNV Construction, August 15, 2020, (Director's Report, p. 120).

Hong Ye received no notice regarding the procurement after the January 28, 2020 letter until August 19, 2020 when Hong Ye President Sheu received an email invitation for the groundbreaking of the COTA project. Declaration of Hong Ye President Michael Sheu,

(Director's Report, p. 181). Sheu immediately contacted DPW seeking information. *Id.* On August 20, 2020, DPW contacted Sheu advising him to pick up a letter from DPW. The letter, dated August 13, 2020, was from the DPW Secretary and notified Hong Ye that the contract was awarded to RNV as the lowest responsive bidder and that Hong Ye's bid bond would be returned. DPW Letter to Hong Ye, dated August 13, 2020, (Director's Report, p. 218).

Hong Ye Corporation, through counsel, made an Open Government Act ("OGA") request to DPW on August 25, 2020, requesting copies of the contract with RNV for the project and documentation supporting DPW's decision to award the contract to RNV. Hong Ye OGA Request Letter to DPW, (Director's Report, p. 207). The following day, Hong Ye lodged a protest with the Director of Procurement and Supply. Protest by Hong Ye, August 26, 2020 (Director's Report, p. 208-212). The protest argued the award of the contract to RNV violated the CNMI procurement regulations because Hong Ye was not promptly notified of the award to RNV and because Hong Ye was the lowest responsive bidder. *Id.* at 209-210. Hong Ye also notified the Director of their OGA request to DPW and of their intent to supplement their protest based on information received from records in response to their OGA request. *Id.*

On September 8, 2020, the Director notified other interested parties of the protest and allowed interested parties time to submit views on the matter. Memorandum from Procurement and Supply Director to Hong Ye, September 8, 2020 (Director's Report, p. 171).

On October 2, 2020, having not received any response, Hong Ye sent a letter to DPW following up on their OGA request. Appeal, p. 4. That same date, Hong Ye sent a letter to the Director notifying him of delay in receiving a response to their OGA request, requesting records from the Department of Finance, and requesting an extension of time to file an amended protest after receiving records. Hong Ye Letter to Director of Procurement and Supply, October 2, 2020 (Director's Report, p. 8).

On October 7, 2020, the Director denied Hong Ye's protest. Director's Decision, October 7, 2020 (Director's Report, p. 183-186). The Director concluded that Hong Ye's protest must be denied because their bid, while the lowest, was not responsive under because it included ambiguous

contradictory certifications of compliance and non-compliance with the Buy America Certification and therefore failed to “represent an unequivocal offer to perform” and accept all “material terms and conditions.” Id. at 4

Hours after receiving the Director’s decision denying their protest on October 7, 2020, Hong Ye received a response from DPW to their OGA request. Appeal, p. 4 (October 22, 2020).

Hong Ye, through counsel, filed an appeal with OPA on October 22, 2020. Hong Ye’s appeal states several grounds: DPW unlawfully withheld public records in violation of the OGA; the Director knew of DPW’s OGA violations but failed to provide additional time for Hong Ye to present its protest with the benefit of information from DPW; DPW violated the procurement regulations by failing to notify Hong Ye of the award to RNV; DPW failed to notify Hong Ye that their bid had been rejected as non-responsive and for unilaterally determining that Hong Ye could not re-certify its Buy America Certification; that DPW’s checklists included in the bid package were misleading and caused Hong Ye’s error in signing both the certification of compliance and non-compliance, and; that an award to RNV would constitute a waste of public funds.

On December 11, 2020, the Director issued the Director’s Report on the appeal. In the Report, the Director addresses several of Hong Ye’s contentions. The Director clarified that Procurement and Supply had not violated the OGA; that there are no inconsistencies or conflicts regarding the DPW checklists and that any allegation regarding the same would be time-barred as it was not raised at the protest level; that Hong Ye’s suggestion that, by virtue of the utilizing the same compliant steel supplier as a competitor did not cure their ambiguous offer; that there is no requirement for Procurement and Supply to notify a bidder that their bid was rejected as non-responsive and any delay in notice did not harm Hong Ye; that Hong Ye has not supported its claim that award to RNV is a waste of public funds as the price of RNV is within range of other offers and is the lowest responsive and responsible bid, and; that Hong Ye had not been denied due process. Director’s Report, p 1-3.

Hong Ye submitted comments on the Director’s Report to OPA on December 31, 2020. Hong Ye Comments, December 31, 2020.

DPW submitted comments on January 8, 2021 in rebuttal to Hong Ye's comments to the Director's Report. DPW Comments, January 8, 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. 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.*, 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.

DISCUSSION

Though Hong Ye's appeal cites many anomalies in the process of the present procurement, it is important to focus on the decision by the Director and determine whether it is supported by the CNMI Procurement Regulations and other applicable law. OPA will address the myriad issues raised by Hong Ye after a discussion of the underlying basis of rejection of Hong Ye's bid and the decision of the Director in denying Hong Ye's protest.

Responsiveness, Materiality, and Rejection

By its own admission, Hong Ye's bid contained both a certification of compliance and a certification of non-compliance with the Buy America Act. Appeal, p. 11. The threshold issue before OPA is whether Hong Ye's error rendered its bid non-responsive and ineligible for award.

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-A094, p. 6-7 (February 28, 2020); *In re: Appeal of GPPC, Inc.*, OPA Appeal No. BP-A061 p. 5 (April 1, 2010). To be responsive, a bid must comply in all material respects to the IFB, accept all material terms and conditions of the solicitation, and 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).

Certifications of compliance with laws, when required in an IFB, are material terms of a solicitation because they affect the legal obligations of the contracting party. *Id.* at 9. In *Hawaiian Rock*, OPA upheld a finding of non-responsiveness where party’s bid failed to include a required blanket certification that the bidder was in compliance with all local and federal laws. *Id.* In determining the lack of a required legal certification was material, OPA found that without the certification, the contracting agency could not be confident that acceptance of the bid would result in an enforceable contract. *Id.*

In the present matter, the ITB bid package included the Buy America certification and required bidders to execute that certification, among others. The bid package included language from COTA that warned a “[f]ailure to return the following fully executed forms may be ground (sic) for disqualification.” COTA checklist (Director’s Report, p. 169). There was also a separate checklist prepared by DPW that listed required documents and specified “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.” DPW checklist (Director’s Report, p. 168). Finally, the ITB specified: “this is a federally funded project by the Federal Transit

Administration under the United States Department of Transportation; bidders are required to comply with FTA contract clauses as applicable.” IFB at p. 1, (Director’s Report, p. 165).¹

The Hong Ye bid’s conflicting certifications of compliance and non-compliance renders it non-responsive. The IFB required execution of the Buy America certificate and the requirement clearly affects the legal obligations of the bidder as it affirms their commitment to abide by certain federal sourcing requirements, and is therefore material. The defect rendered Hong Ye’s bid subject to rejection.

Waiver of Defect or Opportunity to Cure

Having determined that Hong Ye’s bid was non-responsive and subject to rejection, the inquiry turns now whether conditions exist to excuse Hong Ye’s oversight or to allow Hong Ye to cure its error. Hong Ye suggests three separate theories. First, Hong Ye suggests the solicitation itself was flawed, creating confusion about how to comply with the required certifications, inviting Hong Ye’s execution of both the certification of compliance and non-compliance. Appeal, p. 11. Second, Hong Ye suggests they should have been afforded an opportunity to cure its error before its bid was rejected, or at least request recertification from the FTC. Appeal, p. 9-10. Finally, Hong Ye suggests that DPW had sufficient information available to it at bid opening to render the error harmless. Appeal, p. 11. OPA will address each argument in turn.

OPA has addressed claims of ambiguity within solicitations in a prior decision. In *Hong Electric*, a bidder on ITB whose bid was rejected for including a project completion time beyond solicitation’s stated limit claimed an ambiguity in the solicitation rendered its bid responsive or at least should have allow modification. *In re: Hong Electric Enterprises*, OPA Appeal No. BP-A064 (October 26, 2010). In *Hong Electric*, the ITB and addendums did include some conflicting performance schedules. However, the contracting agency squarely addressed the ambiguity in the

¹ The Federal Transit Authority website also makes clear that “FTA’s Buy America requirements apply to third-party procurements by FTA grant recipients” and recipients solicitations must “require, as a condition of responsiveness, that the bidder or offeror submit with the bid or offer a completed Buy America certification in accordance with 49 CFR §§ 661.6 or 661.12.” See, FTA website at: <https://www.transit.dot.gov/buyamerica>.

question and answer responses that were included in the ITB addendums and even addressed a question from the actual bidder about performance time. *Id.* at 4. OPA held that no reasonable ambiguity existed in the ITB because of the clarifications in the bid documents, the bid was properly rejected for failing to comply with time limitation in the ITB, and there was no justification to require a re-bid of the solicitation. *Id.*

In the present matter, in support of their claim that the language in the ITB documents caused their inadvertent error. Hong Ye points to the language in the checklist that warned “Failure to return the following **fully executed** forms may be grounds for disqualification” and the fact that the form included BOTH a certification of compliance and a certification of non-compliance created confusion. Appeal, p. 11 (citing the ITB (emphasis added)). Essentially Hong Ye’s argument is that the language “fully executed” implies that every blank signature line must be signed or the bid would be subject to disqualification.

OPA finds this argument unconvincing. Execute means, in the context of a legal document, “to bring into its final, legally enforceable form.” *Black’s Law Dictionary* (11th Edition, 2019). Fully executed simply suggests completely executed. Reviewing the language of the form with respect to the Buy America requirements, one signature line has this heading above “Certificate of **Compliance** with 49 U.S.C. 5323(j)(1) The bidder or offeror hereby certifies that it **will meet** the requirements of ...” and just below that the next signature line has this heading “Certificate of **Non-Compliance** with 49 U.S.C. 5323(J)(1) The bidder or offeror hereby certifies that it **cannot** comply with the requirements of....” Hong Ye bid (Director’s Report, p. 110-111). The language in the certification statement could not be clearer to anyone who actually reads it. The plain language indicates that only one of the two signature blocks can be properly completed in order to “execute” the document because the two certifications are clearly mutually exclusive. The only way to “bring that certification to its final, legally enforceable form” would be to select which provision applies and sign it. One could not possibly comply and not comply at the same time. While it is understandable how one could get lost in the boilerplate of federal certifications, there is nothing misleading or ambiguous about the ITB or certification to invite or excuse Hong Ye’s error in their bid.

Hong Ye makes several arguments to suggest they should have been given the opportunity to cure the error in their bid. Hong Ye cites to a letter from the Office of the Attorney General which concludes that a failure to include proper Buy America Certifications was not a mandatory basis for bid disqualification and that DPW could waive the error and, in the interests of saving over \$600,000.00 of funds on the project, should waive the error. Appeal, p. 8-9; OAG Letter to DPW, January 24, 2020 (Director's Report, p. 163-164).² Hong Ye also contends that DPW's conclusion that the Buy America requirements do not permit waivers or opportunity to recertify, should have been made with input from Hong Ye. Appeal, p. 10. Finally, Hong Ye claims, relying on the same FTA letter as cited by DPW, that there exists a process within the FTA whereby bidders who have included certification errors in their bids may petition the FTA to recertify and that Hong Ye was not given the opportunity to pursue this process because of a failure of notice by COTA or DPW. Appeal, p. 10; Letter from FTA to Watts Contractors (Director's Report, p. 226-227).

According to the plain language of the FTA regulations, Hong Ye could not cure the certification error in its bid proposal. As cited by the Director in his decision and the FTA counsel in the letter relied upon by COTA and DPW, the Buy America requirements prohibit recertification when a bidder or offeror submits certificates of both compliance and noncompliance. *See* 49 C.F.R. § 661.13 (b)(1); Letter from FTA to Watts Contractors, p. 1, (Director's Report, p. 226-227). The Code of Federal Regulations provides:

(1) A bidder or offeror who has submitted an incomplete Buy America certificate or an incorrect certificate of noncompliance through inadvertent or clerical error (**but not including** failure to sign the certificate, **submission of certificates of both compliance and non-compliance**, or failure to submit any certification), may submit to the FTA Chief Counsel within ten (10) days of bid opening of submission....

49 C.F.R. § 661.13 (b)(1) (emphasis added). Similarly, under the applicable CNMI procurement regulations, there are limited means of curing clerical errors in bids, subject to the discretion of the contracting agency, and **no** means of waiving material errors in bids even if the contracting agency desired to grant such an opportunity to the bidder. *See* NMIAC § 70-30.3-205 (l)(1)(i); *see also*,

² It appears the letter from the OAG conducted only a limited review of COTA and DPW checklists as well as the ITB, as there are no references to, or analysis of, any of the federal regulations applicable to FTA-funded projects.

In re: Appeal of GPPC, Inc., OPA Appeal No. BP-A094, p. 4-5 (February 28, 2020) (when evaluating similar provision in CUC regulations, OPA found that agency lacked authority to waive material defects in bid, even where reservation in ITB allowed for waiver).

Finally, Hong Ye's contention that information available to the COTA at bid opening rendered the conflicting certifications harmless ignores the requirement that bid responsiveness must be measured at the time of bid opening - by the contents of the bid - and not by supplemental information. *In re: Appeal of GPPC, Inc.*, OPA Appeal No. BP-A094, p. 6-7 (February 28, 2020) (finding under similar regulatory scheme in CUC regulations that agency cannot ascertain responsiveness of one contractor's bid based on information contained in competing bid). Essentially, Hong Ye's argument posits that because their bid listed an *American* steel company and the same American steel company is listed as supplier for a competing bid (and that competing bid included proper Buy America documentation) that it was "obvious from HYC's proposal that it complied with the Buy America requirements." Appeal, p. 11. Hong Ye's bid containing conflicting certifications was non-responsive on its face and procurement officers cannot be required to wade through competing bids to ascertain that Hong Ye's listed steel supplier was in compliance with the Buy America requirements.

In the present matter, the contracting authority initially selected Hong Ye as the "apparent lowest and responsive bidder," but later determined that its bid contained a material defect and rejected it as non-responsive. OPA finds nothing misleading or ambiguous regarding the language in the ITB or checklists and nothing objectionable with the DPW or COTA's "unilateral" determination that the federal regulations prohibit correction of Hong Ye's certification. Nothing in the regulations require consultation with bidders prior to rejection of their bid. Moreover, it appears any missed opportunity for Hong Ye to petition the FTA to allow for recertification was harmless as the federal regulations and the FTA's decision unequivocally prohibit recertification under these circumstances.

Open Government Act Violations, Lack of Notice, and Waste.

Hong Ye cites numerous other concerns with this procurement matter, including violations of the Open Government Act, lack of proper notice, and waste of public funds. OPA will address each in turn.

Violations of the Open Government Act (“OGA”) undermine the public’s confidence in government operations and can tarnish otherwise clean government actions. However concerning any OGA violations by DPW would be, as alleged, OPA is not the appropriate forum to decide any such claims. Furthermore, Hong Ye has not demonstrated any prejudice to the merits of their appeal by any alleged OGA violation. While Hong Ye’s initial protest was rather blindly submitted without the benefit of any underlying documents, and their request to amend the protest or delay the protest decision were not entertained by the Director, fortunately Hong Ye was able to obtain the requested documents prior to submitting the present appeal. Though OPA will not address whether DPW violated the OGA, it did not limit Hong Ye’s arguments, addressed above, to only those issues raised in their initial protest and has entertained all issues raised in the present appeal including those discovered only after reviewing the information ultimately disclosed by DPW in response to their OGA request.³

The procurement regulations require unsuccessful bidders be “promptly notified” of the award of a contract to another bidder. NMIAC § 70-30.3-205 (m)(1). Moreover, while there is no similar requirement of prompt notice that a bid has been rejected as non-responsive, common courtesy would suggest that a bidder who had been selected as the “apparent lowest responsive bidder” and had entered the next stage of a responsibility determination, should have been notified when the agency later concluded their bid was non-responsive. Notwithstanding, Hong Ye received little communication in this case.

³ OPA generally does not limit appellants to only those issues raised at the protest level, but instead will entertain all issues raised on appeal once jurisdiction is established over some claims. *In re: Appeal of M. V. Reyes Catering*, OPA Appeal No. BP-A011, p. 9 (Nov. 19, 1997); *In re: Reconsideration of JWS Air Conditioning*, OPA Appeal No. BP-A014.1, p. 8-9 (May 18, 1998).

Records do indicate that DPW made an effort to contact Hong Ye after their bid was determined to be non-responsive. A facsimile error report shows DPW made an attempt on April 20, 2020 to send Hong Ye a notice letter dated April 17, 2020 to the fax number provided by Hong Ye in their bid. Letter from P&S Director to Hong Ye (Director's Report, p. 198); Fax Report (Director's Report p. 199). It is unknown why the fax attempt was unsuccessful, however OPA notes the fax number provided by Hong Ye was the same as the telephone number they provided, indicating the contact number may not have been a dedicated fax line. *See*, Hong Ye bid, p. 2 (Director's Report, p. 88). In any case, Hong Ye never received actual notice between the time they submitted documents for a responsibility assessment and when Hong Ye president Michael Sheu received an email invitation to the groundbreaking ceremony of the COTA facility after the contract was awarded to their competitor, RNV. Declaration of Hong Ye President Michael Sheu (Director's Report, p. 181).

Though communication between DPW and Hong Ye was clearly lacking in this case,⁴ it is unclear whether any violation of the procurement regulations occurred. Prompt notice is only required once a contract has been awarded. Notice of an intent to award was sent to the winning bidder RNV on August 15, 2020. DPW Letter to RNV Construction, dated August 15, 2020 (Director's Report, p. 120). Hong Ye received actual notice from DPW on August 20, 2020, only five days later, when DPW contacted President Michael Sheu and advised him pick up a letter at DPW. Declaration of Hong Ye President Michael Sheu (Director's Report, p. 181). The letter, dated August 13, 2020, was from the DPW Secretary and notified Hong Ye that the contract was awarded to RNV as the lowest responsive bidder and that Hong Ye's bid bond would be returned. DPW Letter to Hong Ye, dated August 13, 2020 (Director's Report, p. 218). In any event, any failure of notice to Hong Ye had no effect on their status as to this procurement because their bid was flawed upon submission.

OPA's special duty to detect and prevent fraud waste and abuse in the collection and expenditure of public funds arises by statute and is distinct from its role as hearing officer for procurement

⁴ It is unclear why, though under no **obligation** to follow up, Hong Ye never made any attempt to inquire with DPW or COTA as to the status of the responsibility inquiry or any decision by DPW between January 28, 2020 and August 19, 2020, almost seven months, for a contract worth nearly three million dollars.

appeals. OPA's designation as an intermediate appellate body arises by designation from the Department of Finance Regulations. As a designated procurement body, OPA's primary role is to review the merits of procurement appeals based on violations of the procurement regulations against the administrative record brought before it. While OPA is not expected to turn a blind eye to any fraud, waste, or abuse of funds presented to it, and may consider fraud, waste, or abuse when analyzing a violation of the procurement regulations, it may not do so as an independent fraud, waste, or abuse inquiry.⁵ Such an investigation, not coupled with a violation of the procurement regulations, would need to be undertaken as a separate engagement. So long as the procurement regulations are followed and the decisions of the procuring officials have a reasonable basis, those decisions will not be second guessed based solely on a less than perfect deal for the Commonwealth.

In the present matter, while it can be difficult to select a firm at a cost of over \$600,000 more based solely on a certification error, the contracting authority's options were limited. Once Hong Ye's bid was properly rejected as non-responsive, the regulations require award to the next lowest responsive and responsible bidder. DPW and COTA's only alternate option would be to cancel the solicitation, if it were determined to be in the best interests of the government, and re-bid the project. OPA notes, that while RNV's bid is over \$600,000 more than Hong Ye's, it is nearly \$40,000 less than the next lowest bidder, HBR International, Inc. Bid Opening Summary Sheet, p. 1-3 (Director's Report, p. 204-206). Thus there is nothing in the record to suggest that an award to RNV is unreasonable or constitutes waste.

DECISION

For the reasons set forth above, the appeal by Hong Ye Corporation of the protest decision of the Director of Procurement and Supply is hereby denied.

⁵ In *Reconsideration of JWS Air Conditioning*, OPA relied upon its special duties to prevent and detect fraud, waste, and abuse to support its contention that the remedy of contract cancellation was available to OPA after making findings that the contracting agency had violated the procurement regulations. *See, In re: Reconsideration of JWS Air Conditioning*, OPA Appeal No. BP-A014.1, p. 6 (May 18, 1998).

Dated this 12th day of March, 2021.

BY:



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