



Jerrick Hernandez <jhernandez@guamopa.com>

In the Appeal of Track Me Guam LLC; OPA-PA-21-002

Claire Pollard <cpollard@rwtguam.com>
To: Jerrick Hernandez <jhernandez@guamopa.com>
Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>

Thu, Oct 7, 2021 at 4:19 PM

Dear Mr. Hernandez:

Please see the attached *[Proposed] Findings of Fact and Conclusions of Law* to be filed in the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,
Claire Pollard

RAZZANO WALSH & TORRES, P.C.

139 Murray Blvd. Ste. 100

Hagatna, Guam 96910

(T): 989-3009

(F): 989-8750

 **10.7.21 Appellant's Findings of Fact and Conclusions of Law.pdf**
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RAZZANO WALSH & TORRES, P.C.

SUITE 100, 139 MURRAY BLVD.

HAGÁTÑA, GUAM 96910

TELEPHONE: (671) 989-3009

FACSIMILE: (671) 989-8750

*Attorneys for Appellant
Track Me Guam, LLC*

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

Track Me Guam, LLC.,

Appellant.

DOCKET NO. OPA-PA-21-002

**[PROPOSED]
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

INTRODUCTION

This matter came before the Office of Public Accountability (“OPA”), through the Public Auditor, on an appeal filed by Track Me Guam, LLC, (“TrackMe” or “Appellant”) regarding the notice of award in GPA-IFB-024-21 seeking Fleet and Fuel Management Software Services by Guam Power Authority (“GPA”) to PTI Pacifica, Inc. dba: IT&E (“IT&E”).

The OPA conducted an evidentiary hearing on September 7, 2021. The hearing was conducted with restrictions on the amount of individuals that could be physically present because of the COVID-19 pandemic. In addition to counsel for the parties, institutional representatives were physically present at the hearing. Physically present at the hearing for TrackMe was its corporate representative Mr. Allan Delos Santos. Beautrice Limtiaco was the representative for procuring agency GPA.

The OPA has considered the evidence, including the testimony of witnesses and exhibits admitted into evidence, the procurement record maintained and its supplements prepared by GPA, and the submissions placed into the record by the parties. The OPA has further considered the written arguments and proposed Findings of Fact and Conclusions of Law submitted by counsel for the parties.

The OPA hereby enters the following Findings of Fact and Conclusions of Law. To the extent that Findings of Fact, as stated, may be considered Conclusions of Law, they shall be deemed Conclusions of Law. Similarly, to the extent that matters expressed as Conclusions of Law may be considered Findings of Fact, they shall also be deemed Findings of Fact

FINDINGS OF FACT

1. The Guam Power Authority issued Bid Invitation GPA-024-21 seeking Fleet and Fuel Management Software Services for GPA's fleet. Appellant's Exhibit Binder ("AEB"), 8-004.

2. The procurement was established "to provide the Guam Power Authority, Transportation Division with Fleet and Fuel Management Services for 200 vehicles to include web-based software, technical assistance, devices, installation, replacement and/or removal of devices for the Authority's fleet. AEB, 8-004.

3. The specifications for the procurement were generated based upon TrackMe's existing work for the Agency. Testimony of Pedro Sanchez.

4. The procurement required the winning offeror to provide various fleet management devices, software services, and continuing product support so that GPA could track its fleet and the fuel used by that fleet. AEB, 8-004-006.

5. Bids were opened on January 28, 2021, and TrackMe was informed on March 8, 2021, that an award was recommended for IT&E. AEB, 10-012.

6. TrackMe initiated an agency level protest on March 12, 2021.

7. TrackMe's protest alleged that the selection of IT&E under the IFB would mean that GPA would be selecting a non-responsive and ultimately non-responsible bidder, since IT&E's proposed tracking solutions for GPA that cannot comply with requirement C.1-17 (Fuel dispense tracking) as specified in the IFB. AEB, 10-014.

8. Following that initial protest, TrackMe obtained new information discovered on March 29, 2021, following GPA's production of documents to TrackMe, pursuant to a Sunshine Request submitted to GPA with TrackMe's first protest.

9. From the documents produced, TrackMe identified four (4) issues with IT&E's bid that further rendered the bid non-responsive and IT&E non-responsible: (1) inability to comply with requirement C.1-17 of the IFB; (2) inability to comply with requirement B.6 of the IFB; (3) inability to comply with requirement C.1-13; and (4) inability to comply with requirement C.2. Those failures were identified to GPA in TrackMe's correspondence of April 6, 2021. AEB, 10-017.

10. On June 16, 2021, TrackMe received correspondence from GPA Denying its Protests of March 21 and April 6, 2021. AEB, 10-021. TrackMe's Notice of Appeal to the OPA followed.

11. GPA's June 16, 2021, denial of TrackMe's protests did not substantively address the allegations that IT&E's proposal was non-responsive to the IFB.

12. Rather than conduct its own inquiry into the responsiveness of IT&E's submitted bid, GPA instead requested that IT&E respond to the allegations raised in the protests. AEB, 10-021; Testimony of Pedro Sanchez.

13. More, GPA did not address at all the allegations of non-responsiveness raised by TrackMe's April 6, 2021, protest supplement. The procurement record shows that GPA prepared an inquiry regarding those protest grounds, but never sent the inquiry. AEB 1-001; testimony of Pedro Sanchez as clarified by GPA counsel.

14. GPA accepted the limited responses it did receive from IT&E consultant DCS regarding the protest grounds raised by TrackMe on March 12, 2021, and denied TrackMe's protest in a 1 ½ page letter that addressed none to the technical deficiencies raised by the protests. AEB 10-021; AEB 1-001; testimony of Pedro Sanchez; testimony of Allan Delos Santos.

15. GPA's Protest Denial contained no substantive response to the material technical issues that formed the basis of TrackMe's April 6, 2021, Protest. AEB 10-021; AEB 1-001; testimony of Pedro Sanchez.

16. TrackMe's protest of April 6 raised the specific failure of IT&E to respond to the following requirements as grounds for the protest: Failure to Comply with Requirement C.1-17, Failure to Comply with Requirement B.6, Failure to Comply with Requirement C.1-13, and the Failure to Comply with Requirement C.2. Procurement Record ("PR"), Tab 16.

17. GPA's legal counsel directed the April 6 protest to the evaluation committee for action that same day. PR, Tab. 13 (pg. 247 of 1464).

18. On April 19, 2021, the committee prepared an unsigned memorandum meant for the Supply Management Administrator seeking to have IT&E provide clarification on the various matters raised in the protest. PR, Tab 13. (pg. 244 of 1464). AEB 10-021; AEB 1-001.

19. The Memo went nowhere while waiting for further internal action from GPA, and GPA instead simply chose to deny TrackMe's protest, without ever following through on the evaluation committee memorandum. PR, Tab 10. AEB 1-001.

20. GPA Management analyst Sanchez testified that he held meetings to address the contents of TrackMe's second protest, though he does not recall reviewing TrackMe's protest letters as part of the protest response process. AEB 10-021; AEB 1-001; testimony of Pedro Sanchez.

21. No record of these meetings exists in the procurement record. This failing of GPA in keeping an adequate procurement record and organization to handle TrackMe's protest violates Guam law.

22. GPA's procurement record was also flawed, in that GPA did not keep a contemporaneous procurement record, but instead prepared the record in response to the protest. Testimony of Melissa Jane Uncangco.

23. Furthermore, beyond addressing IT&E's failure to comply with IFB requirement C.1-17, GPA did not address the other material failings that formed the basis of TrackMe's April 6, 2021, Protest.

24. GPA's failure to address those issues in its protest decision violates procurement law, and leaves the technical failings of IT&E's submission as further grounds for appeal.

25. Following TrackMe's protest and Notice of Appeal, GPA management proceeded with cancelling TrackMe's existing contract as a response to the Notice of Appeal, and informed Jim Pangelinan, the director of the fleet program to inform TrackMe of the cancellation. *See*, AEB 12-001; Testimony of Allan Delos Santos; Testimony of Jim Pangelinan.

26. GPA proceeded forward with an award notice to IT&E despite the protests, though no recommendation for award was made following TrackMe's April 19, 2021.

IT&E WAS NON RESPONSIVE TO GPA REQUIREMENT C.1-17

27. IT&E has offered to supply GPA with "DFM 500D CAN," a differential fuel flow meter with associated software. Procurement Record ("PR") 1119; Testimony of Allan Delos Santos.

28. Requirement C.1-17 of the IFB mandates that the bidder provide a product that will supply data to include “date and time fuel dispense, amount of fuel dispensed in gallon, vehicle and/or equipment fueled, and personnel who dispensed the fuel.” AEB, 8-006; Testimony of Allan Delos Santos.

29. The DFM 500D CAN, however, does not have the capability of identifying what vehicle is being fueled nor the personnel who dispenses the fuel from the vehicle as required by GPA. AEB, 10-024; Testimony of Allan Delos Santos.

30. GPA’s IFB specifies a system that can monitor fuel dispensing, but the Wialon branded technology offered by IT&E is only for fuel *consumption*, not fuel *dispensing*. AEB, 7-017; Testimony of Allan Delos Santos.

31. IT&E’s solution can only fulfill the requirements of the IFB by integrating the software proposed by IT&E with a Russian partner hardware solution from a Russian partner unprepared to do work in the United States market. PR 939-940; Testimony of Allan Delos Santos.

32. The DFM 500D CAN also cannot identify who the specific individual is dispensing the fuel. This system requires that the driver of the vehicle is the same person that should fuel the vehicle — a requirement not specified by GPA and contrary to actual practice of the agency. Testimony of Allan Delos Santos.

33. IT&E is non-responsive because it requires steps not identified in the IFB. Documents provided by the Agency also shows that the “iButton Key Fob” accessory offered by IT&E provides data on the person dispensing the fuel. AEB, 7-050-51; Testimony of Allan Delos Santos.

34. The iButton, however, only provides the identity of the driver operating the vehicle. It does not identify the vehicle being fueled nor does it identify the personnel who specifically dispensed the fuel, both of which are key to successfully monitoring the data points set out in C.1-17. Thus, this accessory will not meet the C.1-17 requirement. Testimony of Allan Delos Santos.

35. Additionally, the DFM 500D CAN only work with vehicles that have diesel fuel engines, not gasoline engines. AEB, 4-019; Testimony of Allan Delos Santos.

36. The manual for the item states the DFM only works for diesel fuel, heating oil, burner oil, motor fuel, biofuel, and other liquid fuels and mineral oils with kinematic viscosity of 1.5 to 6 mm²/s. GPA's vehicle listing identifies only vehicles that use gasoline engines. Testimony of Allan Delos Santos.

37. Installing the DFM 500D CAN will lead to problems that make IT&E a non-responsible bidder. First, installing this onto GPA's gasoline vehicles may void the warranty for the vehicles. Second, gasoline is highly flammable, and installing this device would be very dangerous. Testimony of Allan Delos Santos.

38. GPA provided no testimony to the contrary disputing the nature of the existence of this specification.

IT&E WAS NON RESPONSIVE TO GPA REQUIREMENT B.6.

39. The IFB requires that the awardee be able to install the product within one (1) hour starting upon scheduled time of installation and/or replacement. AEB, 8-004; Testimony of Allan Delos Santos.

40. TrackMe's investigation, however, of the DFM 500D CAN identified in IT&E's proposal, has revealed that the installation time for the DFM 500D CAN is approximately four (4) hours. PR254; Testimony of Allan Delos Santos.

41. According to a third-party fleet management provider utilizing the DFM 500D CAN, the DFM 500D CAN requires at least four (4) hours to install the product and software. This is clearly more than the one (1) hour mandated by GPA; Testimony of Allan Delos Santos.

42. IT&E's use of the DFM 500D CAN is non-responsive to the B.6 requirement, and the Agency protest denial does not address this issue, and GPA provided no contrary testimony regarding the existence of this specification.

IT&E WAS NON RESPONSIVE TO GPA REQUIREMENT C.1-13.

43. IFB requirement C.1-13 requires that the bidder provide a system that can produce reports exportable to MS EXCEL, MS Word, CSV, and PDF file formats. AEB, 8-006. MiFleet, IT&E's offered software, however, can only export to html, PDF, EXCEL, XML, and CSV. PR 253. The exportable formats do not include MS Word. Testimony of Allan Delos Santos.

44. Therefore, IT&E does not comply with C.1-13. IT&E is non-responsive to this requirement, and the Agency protest denial does not address this issue, and GPA provided no contrary testimony regarding the existence of this specification.

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IT&E WAS NON RESPONSIVE TO GPA REQUIREMENT C.2.

45. IFB requirement C.2 requires the bidder provide a system that allows for remote disabling of a vehicle, unlocking of vehicle doors, and issuing of software updates. AEB, 8-006; Testimony of Allan Delos Santos.

46. IT&E notified GPA that it would comply, but GPA must “deliver the requirement i.e. older vehicle models may not be able to support fleet tracking application.” PR 1084. This is non-responsive.

47. IT&E’s further response supplied by GPA’s sunshine request stated, “Doing door lock/unlock feature that is controllable through the Electronic Control Unit (ECU) will only be possible with manufacturer’s Programming Guide for the Lock/Unlock for the specific vehicle models provided to IT&E by the Guam Power Authority.”

48. This is not compliant with the C.2 requirement because IT&E is requesting GPA provide an accommodation not specified in the IFB.

49. Nowhere in the IFB does it state GPA will provide access to the ECU if necessary.

50. IT&E is non-responsive to this requirement because it requires an extra step not identified in the IFB, and the Agency protest denial does not address this issue, and GPA provided no contrary testimony regarding the existence of this specification.

CONCLUSIONS OF LAW

1. A “Responsive bidder means a person who has submitted a bid which conforms in all material aspects to the Invitation for Bids.” 5 G.C.A. § 5201(g).

2. “Responsiveness addresses whether a bidder has promised to perform in the precise manner requested by the government. To be considered for an award a bid must comply in all material respects with the invitation for bids. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. If there is material nonconformity in a bid, it must be rejected. Material nonconformity goes to the substance of the bid which affects the price, quality, quantity, or delivery of the article or service offered.” *Bean Dredging Corp. v. United States* 22 Cl. Ct. 519, 522 (1991).

3. Adherence to the plain language of the IFB is essential for bidders and the integrity of the procurement system. *Baldrige v. Government Printing Office*, 513 Fed. Appx. 965, 967 (Fed. Cir. 2013) (“If the plain language of the IFB unambiguously called for delustered laminate film, that language controls.”); *Professional Bldg. Concepts, Inc. v. City of Cent. Falls Housing Authority*, 783 F.Supp. 1558, 1563 (U.S. Dist. R.I. 1992), *aff’d Professional Bldg. Concepts, Inc. v. City of Cent Falls*, 974 F.2d 1 (1st Cir. 1992). (“Unless ambiguous, it is the language of the IFB which controls the form that a bid guarantee must take.”)

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**GPA HAS A DUTY TO PROCURE IN A THOROUGH, FAIR, AND UNAMBIGUOUS
MANNER**

4. Once the proposals of the offerors were received, GPA should have substantively engaged in a review of the bids in order to make its own determination that all offerors were responsive to the specifications of the bid. *See* 5 G.C.A. 5201(g) (“Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.”).

5. Rather than determine if IT&E’s proposal was actually compliant with the specifications, GPA instead left the matter to IT&E to confirm its responsiveness for one issue, and ignored the others. The law does not allow such a derogation of duty. *See, e.g., Tel-Instrument Electronics Corp. v. U.S.*, 56 Fed. Cl. 174 (2003), *aff’d*, 87 Fed. Appx. 752 (Fed. Cir. 2004). (Clarifications or corrections after the bids are opened do not convert a nonresponsive bid into a responsive one); *Aqua-Tech, Inc. v. U.S. Army Corps of Engineers*, 564 F. Supp. 773, 31 Cont. Cas. Fed. (CCH) P 71243 (D.D.C. 1983). (“to allow supplementation after opening would invite mischief and unduly delay award determinations.”)

6. Instead of doing a substantive review of the bid offers, it appears now, given GPA's acceptance and defense of ITE's bid despite the procurement record being silent on any such review, that rather than engage in a meaningful technical review of price held up against those technical specifications, GPA has selected the lowest number on the page.

7. GPA’s reliance upon IT&E to determine responsiveness violated the law, in that GPA (1) did not conduct its own examination of the merits of TrackMe’s

protests and instead simply asked IT&E to confirm if IT&E were indeed responsive, and (2) IT&E's supplemental responses to GPA that were provided about requirement C.1-17 to demonstrate responsiveness constituted an impermissible supplementation of its bid package opened on January 28, 2021.

8. GPA has intentionally chosen to accept a non-responsive bid that is based upon a pricing structure that, because of its non-responsiveness, other bidders could not take advantage of.

9. It is clear that GPA did not evaluate the technical offer from IT&E for compliance with the specifications of the IFB, as only TrackMe provided an offer that complied with the IFB in all material respects.

10. It is fundamental that "The drafting of specifications to reflect the needs of the government and the determination as to whether those needs can be met by a given product are primarily with the jurisdiction of the procuring agency." *To the Sec'y of the Army*, 39 Comp. Gen. 570, 572 (Feb. 10, 1960) (internal citations omitted).

11. GPA's ultimate acceptance of IT&E's non-responsive bid prejudiced TrackMe, as TrackMe's bid price reflected its complete responsiveness to the IFB, and its price would have been lower had TrackMe not needed to comply with the IFB requirements that it did. Testimony of Allan Delos Santos.

12. If prior to award it is determined that a solicitation or proposed award of a contract is in violation of the law, then the solicitation or proposed award shall be (1) cancelled; or (2) revised to comply with the law. 2 GAR Div 4 § 9105.; 5 GCA §5451.

13. Guam law mandates that “each procurement officer shall maintain a complete record of each procurement.” 5 GCA § 5249 (emphasis added); *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5, ¶ 22. The law does not provide an exhaustive list of what a complete record contains, but instead provides a non-exhaustive list of items that “the record shall include.” 5 GCA §5249. (emphasis added).

14. GPA was required by Guam’s procurement laws to maintain a procurement record during the RFP process, and not create one in response to a bid protest.

15. The Superior Court of Guam canceled a procurement in which the Government Agency kept an incomplete procurement record. *See Teleguam Holdings LLC v. Government of Guam and Pacific Data Systems*. The Court in *Teleguam Holdings* held that where the “procurement record upon which IFB GSA 064-11 and the proposed awards were based is incomplete, [a] revision of the consequent proposed awards cannot render the preceding procurement record complete and it would remain in violation of the Procurement Law ...” The court ordered the IFB and the proposed awards canceled, noting specifically that “[i]f another invitation for bids regarding this matter is issued, the agencies involved shall maintain a complete procurement record in compliance with the Procurement Law.”

16. Here, GPA personnel have testified to meetings about IT&E responsiveness that no record exists of. Because GPA failed to maintain a complete

procurement record as required under 5 GCA § 5249, the Notice of Award to IT&E must be set aside.

17. Guam law is clear that, in order to protect the integrity of the bidding process, a procurement record must be kept and maintained. 5 G.C.A. § 5252 (a). That record must include the papers, papers including “drafts... and other papers or materials used in the development of specifications.” 5 G.C.A. § 5249 (d). The record must also be certified, in writing, as having been properly maintained and complete. 5 G.C.A. § 5249.

CONCLUSION

GPA issued an IFB for a tracking service that carried specifications that intended awardee IT&E could not meet. GPA neglected to substantively review IT&E’s lack of responsiveness, and for the limited issues it did review, GPA improperly relied upon IT&E to determine its own responsiveness. The effect of GPA’s failures is the failure to recognize that only one bidder was responsive to the technical specifications actually issued by GPA. TrackMe should be made the awardee GPA-024-21 as the only responsive bidder. Therefore, it is hereby ordered:

- (1) That GPA disqualify IT&E from eligibility for Award under this IFB, as IT&E’s proposal was non-responsive and did not materially comply with the technical requirements of the IFB established by GPA;
- (2) That GPA determine IT&E to be a non-responsible offeror given the inability of its proposed solutions to the IFB to safely and efficiently perform as specified by GPA; and

- (3) That GPA award GPA-IFB-024-21, to TrackMe as the next lowest price responsive bidder to the IFB

Submitted this 7th day of October, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSHUA D. WALSH
Attorneys for Appellant
Track Me Guam, LLC