

PROCUREMENT APPEALS

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)	Appeal No.: OPA-PA-06-003
In the Appeal of)	
)	DECISION
L. P. Ganacias Enterprises, Inc. dba RadioCom)	
)	
Appellant)	
)	
_____)	

I. SUMMARY

This is a Decision by the Public Auditor on an appeal filed on December 19, 2006, by L.P. Ganacias Enterprises, Inc. dba RadioCom (hereafter Appellant or RadioCom) from the January 15, 2007, denial by the Chief Procurement Officer (hereafter CPO) of its December 5, 2006, protest regarding Purchase Order Nos. P066A06288 and P066A06304, Early Warning System or Outdoor PA System. The purchase orders were sole sourced on June 27, 2006, and June 28, 2006, by the General Services Agency¹ (hereafter GSA) to S.E.S. USA, Inc. (hereafter SES). The Public Auditor has jurisdiction of this appeal pursuant to §5425 and Article 12 of Chapter 5 of Title 5, Guam Code Annotated (hereafter GCA).

The Public Auditor determines that GSA’s actions were not consistent with the Guam Procurement Law relative to sole source procurement and not consistent with the Guam Procurement Law giving preference to businesses on Guam.

II. PROCEDURAL AND FACTUAL BACKGROUND

It is undisputed that the procurement the subject of this appeal was done at the request of the Office of Homeland Security (hereafter OHS), a part of the Office of the Governor since April 2003 pursuant to Executive Order No. 2003-13. At the request of the Office of the Governor/OHS, the GSA issued two purchase orders to SES for an early warning system by method of sole source procurement.

Representatives of RadioCom and Federal Signal Corporation met with the OHS Advisor on or about October 2005, and informed him of RadioCom’s interest in bidding on the early warning system; and informed him of an early warning system it had installed in Rota. RadioCom is a

¹ The General Services Agency is responsible for procurement for the Office of the Governor and all executive branch line agencies not exempted from centralized procurement pursuant to 5 GCA §5125 and §5113.

Guam corporation and is a vendor of an early warning system through Federal Signal Corporation. *See* Declaration of V. G. Borja, January 18, 2007.

On or about February 23, 2006, and pursuant to a request from OHS, SES began an assessment of Guam's early warning system needs, specifically to include recommended equipment, proposed sites, and a budget estimate for phased installation.² SES issued a March 7, 2006, *Report and Recommendations for Placement, Guam Office of Civil Defense & Homeland Security All Hazard Warning System* (Reference Contract: P066A00792) (hereafter Report).

The Report included a list of siren sites in those areas selected by Guam's Office of Civil Defense (OCD) and a list of alternate locations. The spreadsheet entitled "Guam All Hazards Warning System Locations Recommended Siting for Phase One Installations," dated March 5, 2006, detailed the location, latitude, longitude, site elevation, and recommended siren models for each site. All the siren models listed on the spreadsheet were Whelen Engineering Company, Inc., models.

No price or cost estimates were found in the Report, despite it claiming to include "a cost estimate for installation based on discussions with 'Island contractors', cost estimates for recommended siren models, and cost estimate for design of a radio communications system to provide and retrieve signals to remote sites".

Section 2.0 of the Report contained the following qualification: "Some details regarding installation options are not yet available due to time constraints of the potential contractors and will be provided in a final draft of this Report." A final draft of the Report is not contained in the Procurement Record.

As to installation, the Report provides in relevant part:

OCD prefers an installation plan similar to that of the systems operated by the U.S. Navy on Guam. That particular design includes a 55-foot concrete pole to mount the siren speakers, surrounded by a CMU fence designed to protect electronic cabinets and solar arrays.

Security of equipment from vandalism on the Naval installations are not the issue that it might be for remote sites on the rest of the island where there is no physical security for the site property. An option to provide a small concrete building to house electronics cabinetry and solar panels is included. (from p.7, Section 4 of Report, emphasis added.)

According to GSA's Procurement Record, specifications for the sole source procurements, in addition to the Report, are contained in the May 18, 2006, Transmittal Memorandum from SES

² Although documents evidencing the procurement of this assessment were not provided, testimony was given by the OHS Planner that the assessment was initiated by OHS via phone and followed up with SES physical site survey of Guam on February 23, 2006, for the purpose of compiling data for a report to the Guam OCD and OHS. This meeting was documented in SES Early Warning System assessment dated March 7, 2006.

to the OHS Planner, and in an undated, unsigned document entitled “All Hazards Warning System-Phase One A & B”. The OHS Planner testified at the hearing that both specification documents were prepared by SES. Both documents state, in relevant part:

In Conclusion the Contractor, S.E.S. USA INC, will supply a functional AHWS to Customer, Government of Guam, conforming to the abovementioned specifications in conformance with the Schedule. Systems will meet or exceed specifications of COMNAVMAR system and include five years of preventive maintenance and warranty...

(emphasis added).

A Price Quotation for All Hazards Warning System Phase One “A”, Phase One “B”, and Phase Two addressed to the OHS Planner, and dated May 23, 2006, for the amount of \$1,578,260, is also contained in the Procurement Record.

According to GSA, it received on June 23, 2006, a request from OHS to procure an All Hazards Warning System (Early Warning System), together with a justification for sole source procurement based on interoperability and standardization of the existing equipment currently used by the military and the entire island of Guam. *See* Agency Report, Item #8, p.2. Specifically, OHS’ memorandum, dated June 9, 2006, requested GSA to award contract to SES through sole source procurement, and provided:

The Guam Office of Civil Defense (OCD) has requested that S.E.S. USA, Inc., be awarded the contract due to their years of experience on Guam with the Andersen Air Force Base’s and ComNavMarianas’ ‘Whelen’ Siren Systems.

The OCD, aside from just witnessing how the S.E.S. USA, Inc., design worked and how the ‘Whelen’ Siren Systems of the military had withstood strong typhoons in the past years, is looking at interoperability and standardization of these systems with the military and the entire island of Guam.

Approval of the sole source procurements by GSA, evidenced by interoffice memorandums (forms) dated June 27, 2006 (for Req. No. Q060280193) and June 28, 2006 (for Req. No. Q060280194) stated:

Based on our review of this document, the sole source method of procurement is justified as follows:

Award based on the compatibility of equipment, accessories, or replacement parts.

Items, equipment or materials are standard and uniform to the government.

....

In view of the above, we have determined that the request by OFFICE OF THE GOVERNOR for the procurement of: ALL HAZARDS WARNING SYSTEM PHASE 1A-CY2006-I [and II], has met the test for sole source as stated in Section 3112 of the Guam Procurement Regulations. Therefore, this sole source procurement is in the best interest of the Government of Guam and the taxpayers of Guam.

According to the Agency Report, GSA's review of the sole source request included review of the following:

1. Email dated June 21, 2006, addressed to the OHS Planner, from the Systems Administrator, the Command Naval Region Marianas Emergency Annunciation Tower that the existing or current equipment being utilized by the Navy is designed and built by SES. The Navy included the caveat that the email was in no way an endorsement nor promotes the services or products of both SES or Whelen Engineering Company, Inc.

2. SES memorandum³ to GSA dated June 21, 2006, stating:

We wish to point out that it is vital for system to be supported, match and serviced with existing systems in Guam such as supplied to US AF and Navy.

In interest of safety for the people in Guam a mismatched supply of equipment would cause extreme problems. When critical demand necessary in an emergency does not allow for time to get spare parts or for technical personnel to learn how to service equipment.

SES USA IS THE ONLY COMPANY THAT CAN INTERFACE WITH THE WARNING SYSTEMS INSTALLED AT THE NAVAL BASE AND AIR FORCE BASE ON GUAM. . .

When installing equipment warrantee consideration factory training is vital to the success of entire system.

3. The Interim National Preparedness Goal issued March 31, 2005, and the Homeland Security Presidential Directive/HSPD-8 dated December 17, 2006, which also emphasized the importance of other Federal civilian departments and agencies, to establish and implement streamlined procedures for the ongoing development and adoption of appropriate first responder equipment standards that support nationwide interoperability and other capabilities consistent with the national preparedness goal, including the safety and health of first responders.

³This memorandum was submitted as part of the Procurement Record by GSA on January 15, 2007; however, the memorandum was not cited in the CPO Decision on the protest nor was it submitted as part of the Procurement Record by OHS on December 29, 2006.

GSA issued two purchase orders - P066A06288 for \$535,814, and P066A06304 for \$204,000, relative to the Warning System to SES on June 27, 2006 and June 28, 2006. Vendor signature July 10, 2006.

RadioCom learned of the procurements in question on or about November 29, 2006, and a protest was lodged against OHS and GSA on December 5, 2006, regarding both purchase orders on the following basis:

1. The award was not in compliance with the Guam Procurement Law, 5 GCA §5214, with respect to sole source procurement; and
2. The invitation to bid and any award of the contract was not in compliance with the Guam Procurement Law, 5 GCA §5008, regarding the policy in favor of local procurement or the procedures for competitive bidding.

RadioCom filed an appeal with the Office of the Public Auditor (hereafter OPA) on December 19, 2006, and served the same on GSA and OHS on the same date.

The CPO determined the protest was without merit on January 15, 2007.⁴ In response to Issue No. 1, the CPO Decision stated that the sole source procurement was justified based on:

...justification provided by the Guam Office of Homeland Security for interoperability and standardization of equipment, with the Naval and Air Force Bases here on Guam. To further justify the use of the sole source a copy of an email from the Command Naval Region Marianas indicating that the Naval Region is in fact still using the equipment provided by S.E.S., USA Inc. to ensure that the equipment requested by the Guam Office of Homeland Security is in fact still being used by the Naval and Air Force Bases here on Guam.

In addition, the HSPD8 under the Federal Preparedness Assistance on the topic of Equipment Item #14 indicates the importance of interoperability and other capabilities consistent with the national preparedness goal, including the safety and health of first responders and Item #15 indicates to the extent permitted by law, equipment purchased through Federal preparedness assistance for first responders shall conform to equipment standards in place at time of purchase. And the National Preparedness Goal under National Priorities 3.1.2 Expanded Regional Collaboration (page 11).

(emphasis added by CPO).

⁴ While the CPO Decision was dated January 9, 2007, it was received by RadioCom on January 15, 2007, or 41 days after the protest was filed, and 27 days after the appeal was filed.

In response to Issue No. 2 of the protest, the CPO Decision stated:

The award was based on the justification provided by the Guam Office of Homeland Security to include the directive of the HSPD8 and the National Preparedness Goal in ensuring the interoperability or compatibility of the existing equipments is the paramount consideration. Based on the existing equipments installed at the Naval and Air Force Bases a determination has been made for compatibility of existing equipments.

A copy of the Procurement Record was submitted by GSA to OPA on January 15, 2007.

RadioCom filed an Amended Notice of Appeal on January 29, 2007, on the same basis as the original appeal, and referencing the formal CPO Decision on the protest.

Hearing on this matter was held on February 9, 2007, pursuant to Notice of Hearing distributed to the parties and the media on January 30, 2007.

III. ISSUES ON APPEAL

RadioCom raised the following issues on appeal:

- A. Does the Public Auditor have jurisdiction of appeals relative to procurements utilizing federal funds?**
- B. Was CPO Decision that proper procedures were followed in processing the two purchase orders as sole sourced procurements consistent with applicable sole source procurement laws and regulations or an abuse of discretion?**
- C. Was CPO Decision that proper procurement procedures were followed in processing the two purchase orders consistent with statutes and regulations mandating preference for procurement from local businesses?**

IV. ANALYSIS

The Public Auditor in reaching this Decision has considered and incorporates herein the Findings and Recommendations of the Hearing Officer, issued on March 12, 2007, except where inconsistent herewith. In addition, this Decision is based on the Procurement Record and all documents submitted by the parties in the appeal, as well as all testimony and arguments presented at the February 9, 2007, hearing on this matter.

- A. The Public Auditor has jurisdiction over this appeal pursuant to Guam Procurement Law.**

The Public Auditor has *de novo* jurisdiction over appeals of protest decisions relative to solicitation or awards pursuant to §5425 and Article 12 of the Guam Procurement Law, 5 GCA Chapter 5.

On the day of the hearing, RadioCom verbally asserted that the Public Auditor did not have jurisdiction over procurements involving federal funds, but did not move to withdraw or dismiss its appeal, nor did it cite specific authority for that position.⁵ The Assistant Attorney General representing GSA had no objection to jurisdiction of the Public Auditor and made no objection to the applicability of any provision of the Guam Procurement Law to this procurement.

The OHS Grants Coordinator confirmed by his testimony at the hearing that OHS intended to use expiring federal funds to obtain the early warning system, and that the procurement would be subject to the Guam Procurement Law. Documentation regarding the specific source of funding or the extent of any local component was not presented by either party. Nor was any conflicting federal law, regulation, or contract provision shown to apply to the funds.

The actions of the government to date with regards to the funds in question clearly show that the local administrator of those funds finds any federal restriction of the funds to be consistent with the Guam Procurement Law. Absent proof to the contrary, the determination of the federal funds administrator is relied upon as consistent with the source of funding for purposes of this Decision. Accordingly, an analysis on the merits of the appeal under the Guam Procurement Law is appropriate.

B. Use of sole source exception to competitive bidding was not consistent with the Guam Procurement Law under these circumstances.

1. An independent assessment by GSA of the availability of product from other sources is required by 5 GCA §5214 and 2 GAR §3112.

RadioCom contends in its appeal that because it offers an early warning system, SES was not the only source for the system, in contravention of 5 GCA §5214 that requires an agency may only award a contract for supplies or services without competition (i.e., through sole source procurement) when the CPO “determines in writing that there is only one source for the required supply, service or construction item.” It is also undisputed that no public solicitation was done by OHS or GSA to determine if any other vendors could meet the specifications for an early warning system.

The CPO’s determination that there is only one source for the required supply is further governed by 2 GAR §3112, which provides, in relevant part:

(b) Conditions for use of Sole Source Procurement. Sole source procurement is not permissible unless a requirement is available from only a single supplier. A requirement for a particular proprietary item does not justify a sole source procurement if there is more than one potential bidder or offeror for that item. The following are examples of circumstances which could necessitate sole source procurement:

⁵The parties were requested by the Hearing Officer at the pre-hearing conference to address at the hearing any jurisdiction issues related to the possibility that federal funds might be used for this procurement.

- (1) where the compatibility of equipment, accessories, or replacement parts is the paramount consideration;
- (2) where a sole supplier's item is needed for trial use or testing;
- (3) where a sole supplier's item is to be procured for resale;
- (4) where public utility services are to be procured;
- (5) where supplies are offered through bankruptcy or receivership sales, or other disposition at lower than prevailing market prices.

The determination as to whether a procurement shall be made as a sole source shall be made by the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or designee of such officer. Such determination and the basis therefor shall be in writing. Such officer may specify the application of such determination and the duration of its effectiveness. In cases of reasonable doubt, competition should be solicited. Any request by a using agency that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.

(emphasis added).

In this case, the CPO made a determination that the sole source request had met the test as stated in 2 GAR §3112 and was in the best interest of the government of Guam and the taxpayers of Guam, based on two grounds:

1. Award based on the compatibility of equipment, accessories, or replacement parts; and
2. Items, equipment or materials are standard and uniform to the government.

See GSA Interoffice Memorandums (forms) dated June 27 and June 28, 2006 (Re: Requisition No. Q060280193 and Requisition No. Q060280194), Item #10 in Agency Report.

The Public Auditor finds that the second ground relied upon by the CPO (*standard and uniform to the government*) is vague, and not consistent with 2 GAR §3112 or 5 GCA §5214.

The CPO's justification on *compatibility* grounds was centered on OHS' request for sole source procurement, dated June 9, 2006, indicating that OHS was "looking at interoperability and standardization of these systems with the military and the entire island of Guam." Justification also relied on the HSPD-8 references to "interoperability" and "equipment standards in place at the time of purchase"; and the memorandum from SES on June 21, 2006, wherein it states that "interfacing" was necessary and that SES alone could interface with the military.

It is undisputed that there is no existing OHS or government of Guam equipment that will operate with the early warning system and that all references to "interoperability, standardization, and compatibility" by either GSA or OHS refer to compatibility with the military systems. However, the specifications for the procurement, as set forth by GSA in the

Agency Report and Procurement Record include “systems that will meet or exceed specifications of COMNAVIMAR system”, and “an installation plan similar to that of the systems operated by the U.S. Navy on Guam”. They do not include compatibility of equipment, accessories, or replacement parts.

In addition, the Public Auditor finds that interfacing was not required by the specifications, but only became relevant during the course of justifying the sole source procurement, when GSA received a letter from SES indicating that interfacing was necessary, and that SES alone could interface with the military system.

At the hearing, testimony by the OHS Planner in charge of this project was convincing and supports a finding that there were no formal plans for interfacing or directly connecting Guam’s early warning system with the military warning systems at the time of the purchase of this equipment. Potential advantages cited by OHS from interoperability included 1) that the military might be able to loan parts quicker than the government could obtain them in an emergency; 2) trained technicians that service the military equipment might be able to also service Guam’s equipment when necessary; and 3) to prevent confusion over the different siren sounds from different equipment on and off base. These advantages or abilities were not required by the original specifications.

Based on the above, the Public Auditor finds that neither compatibility nor interfacing were of paramount concern to the agency as required by §3112(b)(1). Use of the sole source method was not appropriate based on the *compatibility* grounds.

§3112 also requires that any request by a using agency that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need. While it was well documented that the military uses Whelen siren systems, the Public Auditor finds that the record is devoid of any independent findings by GSA or OHS that the system offered by SES was exclusively compatible or interoperable with the military systems and that no other company’s product would meet the needs as determined by the specifications. Further, a vendor’s representation that it alone can provide a service or supply does not constitute adequate explanation by the using agency as to why no other will be suitable or acceptable to meet the need, especially where the unique service or supply was not a part of the original specifications.

Pursuant to 5 GCA §5214 and 2 GAR §3112, GSA must make an independent assessment of the availability of potential suppliers based on appropriate methods, such as a survey of the local businesses, or inquiry with the using agency and other procuring entities as to any known interest in bidding for this or similar projects on Guam. It is unreasonable to rely on a single, unsupported statement by a vendor that it is the sole provider of equipment (that it does not manufacture) that will meet the needs of the government to the exclusion of all other businesses when that same vendor wrote the specifications, made the needs assessment, and is the sole bidder in an unsolicited procurement.

This need for an independent assessment by GSA of an agency’s need for off-island providers is especially pronounced under the current circumstances. Here, the requesting agency was fully aware that there was a local company interested in bidding on an early warning system; the local

company had installed a similar system in Rota recently; and the Navy is entertaining proposals or requesting sirens from this same company to meet the standard of equal to or better than and compatible with their existing Whelen sirens. *See* Declaration of V.G. Borja, January 18, 2007.

Based on the above, the Public Auditor finds that use of the sole source exception to competitive bidding was not consistent with §3112 under these circumstances.

2. The CPO must independently monitor Specifications used in sole source procurements.

5 GCA §5262(a) provides that:

§5262. Duties of the Chief Procurement Officer and Director of Public Works.

(a) The Chief Procurement Officer shall prepare, issue, revise, maintain and monitor the use of specifications for supplies and services required by the Territory.

In working with using agencies and when expert advice or assistance is necessary, 5 GCA §5264 provides:

§5264. Relationship With Using Agencies.

The Chief Procurement Officer and the Director of Public Works shall obtain expert advice and assistance from personnel of Using Agencies in the development of specifications and may delegate in writing to a using agency the authority to prepare and utilize its own specifications.

There is no evidence of delegation to OHS or the Office of the Governor the authority to prepare its own specifications. Even if the authority had been delegated to the using agency, delegation of this duty to the sole source vendor is inappropriate and must be monitored by GSA to prevent specifications in violation of the §5265 and §5268 of the Guam Procurement Law, which provide:

§5265. Maximum Practicable Competition.

All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the Territory's needs, and shall not be unduly restrictive.

§5268. Salient Features.

(a) Specifications shall not include requirements, such as but not limited to restrictive dimensions, weights or materials, which unnecessarily restrict competition, and shall include only the essential physical characteristics and functions required to meet the Territory's minimum needs.

(b) Purchase descriptions shall not specify a product having features which are peculiar to the products of one

manufacturer, producer or distributor unless it has been determined in writing by the Director of the using agency that those particular features are essential to its requirements and specifying the reason that similar products lacking those features would not meet minimum requirements for the item.

- (c) Purchase descriptions shall describe the salient technical requirements or desired performance characteristics of supplies or services to be procured without including restrictions, which do not significantly affect the technical requirements or performance characteristics.

While the Procurement Record did not identify the drafter of the specifications,⁶ it was elicited at the hearing that the specifications were drafted by the sole source vendor, and did not expressly contain an interfacing requirement prior to the request for sole source procurement. The requirement for interfacing appears only in the sole source vendor's letter of June 21, 2006 to GSA to justify the procurement on a sole source basis.

The sole source request from OHS did not meet the Director's burden in §5268(b) to determine in writing that the ability to interface is essential to the government's requirements when this peculiar feature was not included in the specifications or purchase descriptions. Neither did the sole source request letter or the SES memorandum specify the reason that similar products lacking the interfacing feature would not meet the minimum requirements for an early warning system.

Based on the above, GSA's determination that interfacing was a requirement and peculiar to SES was not consistent with §5268. In addition, §5262 and §5265 place the duty on the CPO to ensure that specifications requiring only one vendor, especially when written by that vendor, are monitored to ensure maximum competition.

3. The Procurement Record is insufficient for independent review of the sole source procurement.

The Procurement Record is incomplete when examined in light of 5 GCA §5249, which mandates that a complete record be maintained by each Procurement Officer and details the items to be included such as a log of all communications, an agency's statement of need, and drafts and materials used in development of the specifications.

Based on testimony by OHS that this procurement was not an unsolicited offer by SES, it is evident that the records do not document all meetings or correspondence, or contain a log of communications with potential vendors or the chosen vendor. The author of the specifications is not readily apparent from the Procurement Record, and knowing this might have assisted GSA in reviewing the request for sole source. The Procurement Record submitted by GSA on January

⁶§5267. Publication of Source of Specifications.

The specifications contained in any invitation for bids or request for proposals, and any amendment thereto, for the procurement of supplies shall identify the person responsible for drafting the specifications and any persons, technical literature or manufacturer's brochures relied upon by the responsible person in drafting the specifications.

15, 2007, differed from the records submitted by OHS on December 29, 2006, and differed from the documents provided to RadioCom prior to filing of the appeal.

It is also evident that the Procurement Record was not certified for completeness under penalty of perjury prior to the award. 5 GCA §5250 requires:

§5250. Certification of Record.

No procurement award shall be made unless the responsible procurement officer certifies in writing under penalty of perjury that he has maintained the record required by §5249 of this Chapter and that it is complete and available for public inspection.

The certificate is itself a part of the record.

The CPO testified at the hearing that certification of the record was indicated on the Abstracts of June 27, 2006, and June 28, 2006 (*See* Item #6 of Agency Report). While the language of the abstracts⁷ is applicable towards compliance with 5 GCA §5232 and 2 GAR §3118(b) relative to pricing data, it is insufficient for the purposes of §5250.

In light of the above, the Public Auditor finds that the award was made in contravention of §5250. GSA requires a different form for certification of the Procurement Record and should ensure that a complete record is maintained at all steps of the procurement process and accessible to review, notwithstanding the use of the sole source method, to support independent review of those specifications and the sole source procurement by the CPO.

C. Purchase from an off-island vendor was inconsistent with Guam Procurement Law mandating preference for local businesses.

RadioCom raises on appeal the issue of whether the CPO Decision on the protest was consistent with applicable laws and regulations favoring local procurement, specifically, 5 GCA §5008 and 2 GAR §1104.⁸ 5 GCA §5008 provides:

§5008. Policy In Favor of Local Procurement.

All procurement of supplies and services shall be made from among businesses licensed to do business on Guam and that maintain an office or other facility on Guam, whenever a business that is willing to be a contractor is:

- (a) a licensed bonafide manufacturing business that adds at least twenty-five percent of the value of an item, not to include administrative overhead, using workers who are U. S. Citizens or lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United State[s] to work, based on their former citizenship in the Trust Territory of the Pacific Islands; or

⁷ “I certify that the foregoing statement of informal quotation is true and correct and prices charged are just, fair and reasonable, and the best obtainable for the described below.”

⁸ 2 GAR §1104 is essentially identical to 5 GCA §5008.

(b) a business that regularly carries an inventory for regular immediate sale of at least fifty percent (50%) of the items of supplies to be procured; or

(c) a business that has a bonafide retail or wholesale business location that regularly carries an inventory on Guam of a value of at least one half of the value of the bid or One Hundred Fifty Thousand Dollars (\$150,000) whichever is less, of supplies and items of a similar nature to those being sought; or

(d) a service business actually in business, doing a substantial portion of its business on Guam, and hiring at least 95% U. S. Citizens, lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United States to work, based on their citizenship in any of the nations previously comprising the Trust Territory of the Pacific Islands.

Procurement of supplies and services from off Guam may be made if no business for such supplies or services may be found on Guam or if the total cost F.O.B. job site, unloaded, of procurement from off island is no greater than eighty-five percent (85%) of the total cost F.O.B. job site, unloaded, of the same supplies or services when procured from a business licensed to do business on Guam that maintains an office or other facility on Guam and that is one of the above-designated businesses entitled to preference.

(emphasis added).

There is no dispute between the parties that SES is an off-island vendor of Whelen systems and sirens, and that RadioCom is a vendor of another brand of early warning systems and sirens. There is no evidence in the record that any attempt was made by GSA prior to the procurement to determine if a local business could be found for an early warning system, or that any price comparison was done in the course of this procurement between SES' product and the product of any local business.

In the CPO Decision on the protest, the CPO justifies procuring from an off-island vendor with the same justification used to justify the sole source procurement, i.e., compatibility of existing equipment. SES in its memorandum of June 21, 2006, assured GSA that SES is the only company that can "interface" with the military systems. That memorandum is the sole assessment on record of whether any business on Guam could provide an early warning system that was compatible with the military systems or could "interface" with the equipment installed on the Naval and Air Force Bases. There is no assessment on record of whether any businesses on Guam could meet the original specifications for the procurement.

The Public Auditor finds that the CPO must make an independent assessment of the availability of on-island businesses based on appropriate methods. It is unreasonable to rely on a single, unsupported statement by a vendor that it is the sole provider of equipment (that it does not manufacture) that will meet the needs of the government to the exclusion of all local businesses when that same vendor wrote the specifications, made the needs assessment, and is the sole

bidder in an unsolicited procurement. Nor is it reasonable to rely on assertions of uniqueness (ability to interface) when the specifications do not clearly mandate that feature.

The analysis relative to the sole source procurement are equally applicable and incorporated here.

The Public Auditor finds that the purchase from an off-island vendor without assessing the price or availability of any other local vendors was inconsistent with 5 GCA §5008 under these circumstances.

It is noted that federal funding restrictions against the use of statutorily imposed local geographical preferences⁹ may affect the applicability of Guam's local preference statutes to procurements made with federal funds, although conflicting restrictions were not presented by the Office of the Attorney General in this case.¹⁰ GSA and OHS will need to firmly ascertain federal restrictions when the project is re-bid, or seek approval to allow the local preference to be effective, as appropriate.

D. Limited remedies are available pursuant to 5 GCA §5452.

Remedies after an award are governed by 5 GCA §5450 and §5452, and include ratification or termination of the contract. Where no bad faith by the person awarded the contract is found, and performance has begun, termination is the preferred remedy where the violation cannot be waived without prejudice to the territory or to other bidders, pursuant to 2 GAR §9106.

The evidence does not support a finding of bad faith. However, the Public Auditor finds that under these circumstances there is prejudice to the government and other bidders in the denial of competition, and it remains in the best interest of the government to protect the integrity of the procurement process by terminating the contract pursuant to 2 GAR §9106.

The record does not indicate that much progress has been made on the whole contract. In accordance with 2 GAR §9106, GSA should examine the actual costs, including the possibility of returning supplies delivered under the contract, and the possibility of obtaining a more advantageous contract by resoliciting, and shall terminate the contract at minimum cost to the government.

⁹ For example, Subsection (c)(2) of the federal Department of Homeland Security's Uniform Administrative Requirements For Grants and Cooperative Agreements To State and Local Governments, 44 C.F.R. §13.36 requires that:

Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws...

¹⁰ See discussion on Jurisdiction in Part III, A of this Decision.

V. DECISION

Based on the foregoing, the Public Auditor determines that:

1. Use of the sole source procurement method was improper where the specifications and agency needs were not independently reviewed by GSA; and
2. An independent assessment of agency needs and the availability and pricing of businesses on Guam is mandatory before procurement of services and supplies from off Guam can be made.

This office recommends that GSA obtain the assistance of the Office of the Attorney General to terminate the agreement with SES at minimum cost to the government in accordance with 2 GAR §9106, including negotiation with SES for recovery of the advanced payment, and a return of any delivered items to SES, where possible.

Additionally, should OHS wish to proceed with the procurement of an early warning system after termination of the current agreement, this office recommends that the specifications be redone and closely monitored by the CPO to ensure maximum competition between vendors of early warning systems; and that the project be competitively bid.

This is a final administrative Decision. Parties are hereby informed of their right to appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with Part D of Article 9 of 5 GCA Chapter 5, within fourteen days after receipt of a final administrative Decision.

A copy of this Decision shall be provided to the parties and their respective attorneys, in accordance with 5 GCA §5702, and shall be made available for review on the OPA Website www.guamopa.org.

Dated this 12th day of March, 2007.



Doris Flores Brooks, CPA, CGFM
Public Auditor