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**PROCUREMENT APPEAL OF DENIAL OF PROCUREMENT PROTEST
IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

PART I.

In the Appeal of

ST Corporation, Inc.,

Appellant.

DOCKET NO. OPA-PA- 20-008

NOTICE OF APPEAL

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 11-24-2020
TIME: 4:15 AM PM BY: MO
FILE NO OPA-PA: 20-008

PART II: APPELLANT INFORMATION

Appellant's Name	ST Corporation, Inc.
Appellant's Mailing Address	Lej Teodosio
Appellant's Business Address	147 Frank G. Benavente St. South, Barrigada, Guam 96913
Appellant Representative's Direct Email Address	671-637-7101

Appellant is represented by legal counsel in this appeal. For purposes of this appeal, please direct correspondence to ST Corporation, Inc's ("ST") counsels, Joshua D. Walsh and Edwin J. Torres of Razzano Walsh & Torres, P.C.

Counsel's Mailing Address	139 Murray Blvd. Suite 100, Hagatna, Guam 96910
Counsel's Telephone	671-989-3009
Counsel's Facsimile	671-989-8750
Counsel's Direct Email Address	jdwalsh@rwtguam.com

PART III: APPEAL INFORMATION

- A. Purchasing Agency: General Services Agency, Department of Administration.
- B. Solicitation Number: GSA-047-20 Janitorial Supplies.
- C. The Decision being appealed was provided to the Appellant on the evening of Wednesday, November 10, 2020. The Decision—sent with unattributed suggested redline edits included — was signed by Procurement Officer Claudia S. Acfalle as the Chief Procurement Officer. The Decision was attached to an email sent “per Mr. Robert Kono....”
- D. Appeal is made from a Decision on Protest of an Award.
- E. The names of competing offerors known to Appellant are as follow:
 - 1. There are currently no competing offerors currently known to Appellant.

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PART IV: STATEMENT OF GROUNDS FOR APPEAL

A. THE GROUNDS FOR APPEAL

1. Relevant Procedural and Factual History.

General Services Agency Invitation for Bid (“IFB”) GSA-047-20 seeks a variety of janitorial and cleaning supplies, and in relaying the product descriptions for those supplies, the General Services Agency (“Agency” or “GSA”) included additional very specific size specifications for many of the products sought. The IFB was issued on September 14, 2020. ST Corporation, Inc. (“ST” or “Appellant”) sent questions regarding the IFB three days later. On September 24, 2020, ST again wrote to GSA about the narrow specifications that GSA included, and sought clarification from GSA inquiring whether pricing could be submitted for similarly sized products and in such a way so that GSA could obtain the best value offers for the various supplies requested. When GSA did not provide answers in a timeframe that would have been useful for offerors to use in shaping their bids, ST initiated an agency level protest on October 8, 2020.¹ That protest was sustained by GSA on the same day, with the promise that the answers sought should have been provided in a timely manner, were not, and would be provided as ST had requested.²

¹ ST’s protest was of both GSA-047-20 for Janitorial Supplies, as well as the companion procurement GSA -046-20 for Office Supplies. ST’s Protest of October 8, 2020, is attached to this Notice of Appeal as **Exhibit A**.

² GSA’s Decision sustaining ST’s protest was issued on October 8, 2020, and is attached to this Notice of Appeal as **Exhibit B**.

On October 14, 2020, ST finally received GSA's responses to the questions previously posed.³ ST requested clarification on whether GSA would accept a price per unit that nonetheless supplied the total product amount requested by GSA in the IFB, but was not quoted in the particular product amounts specified by GSA. For example, ST asked whether GSA in GSA-047-20 would accept a price per ounce as opposed to "price per can" for item no. 2.1. GSA responded with "per specifications per can[.]" For every question posed, GSA informed ST that it would not deviate from the listed specification, even though ST could provide prices for the quantities needed in a manner that would allow GSA to determine the best value amongst various bidders for the types of products sought.

ST also asked whether GSA would accept a can or bottle in different amounts than the particular bottle sizes that were narrowly specified. For example, ST asked whether GSA would accept a 12 oz. bottle for item no. 8.1. GSA responded with "24oz or equal[.]" This answer provided no justification for the exact size specification and provided no clarity into whether two 12 oz bottles would be considered "equal" to the 24 oz bottle size specified. GSA responded in this way for every other similar question posed by ST. GSA also failed to respond to Question Number 19 submitted on September 24, 2020. Question Number 19 asked whether GSA would "accept products in metric units as opposed to imperial units?" GSA did not provide a response to this question and has provided no explanation for the decision to refuse to respond.

³ GSA's delayed answers are attached to this notice of appeal at **Exhibit C**.

GSA's responses provided on October 14, 2020, served as the basis for ST's agency level protest filed on October 21, 2020.⁴ On November 10, 2020, the Department of Administration, General Services Agency, issued a "memorandum" denying the protest as "untimely." That protest decision was signed by Procurement Officer Caludia S. Acfalle as the Chief Procurement Officer. The Decision was attached to an email sent "per Mr. Robert Kono..."⁵

2. GSA's declaration that ST's Protest was untimely is in error.

ST filed its Agency level protest just 7 days after receiving GSA's answers to the various questions posed by ST and other bidders regarding the product specifications. Its protest was made necessary by the answers that the GSA provided to ST about offering quantities and prices for requested products that would both allow the GSA to meaningfully compare the value offered by various bidders, and to avoid holding to unnecessarily narrow specifications. GSA's belief that ST was untimely in its protest is premised upon a legal position that is absurd on its face, *i.e.*, that an offeror may be out of time to bring a protest about the specifications contained in an IFB even before the IFB is issued and can be responded to. This position is unsupported by law and must be rejected.

GSA's untimeliness determination is contained within a memorandum that appears to be inchoate; it contains unformatted redline edits, as well as text

⁴ ST's Bid Protest received by the GSA on October 21, 2020, is attached to this Notice of Appeal as **Exhibit D**.

⁵ The November 10, 2020, protest decision that serves as the basis for this appeal, and its covering email, are attached to this Notice of appeal as **Exhibit E**.

suggested for deletion that, despite being struck, remains within the memorandum.⁶ GSA's decision also references two dates that seem to form the basis for claiming that ST's protest comes more than 14 days after it should have. The GSA claims that on May 1, 2020, ST's undersigned counsel was contacted for "market research." It remains unclear in GSA's protest denial why a request for "market research" would have precluded as untimely ST's instant protest, especially since the claimed request for "market research" in May 1, 2020, comes *four months before* the tender from GSA for this procurement was even issued.⁷

The GSA also indicates that ST⁸ was aware on August 7, 2020, that the government intended to move forward with the procurement using the narrow specifications that ST now questions. This claim is made because ST—according to the GSA—responded on that date to another bid "without indicating any concerns about the specifications." The GSA is incorrect, and its reliance upon correspondence that predates the issuance of the IFB being protested here to make a claim of untimeliness strains credulity. Here, the IFB was issued on September 14, 2020. ST sought clarifications and answers to questions about the specifications on September 17, 2020, and again on September 24, 2020. Its first protest regarding

⁶ ST is unable to determine if the language that contains the marks for deletion should either be included or excluded from the final agency decision. Because of this, ST specifically reserves all its rights to address the Decision accordingly if ever GSA clarifies itself.

⁷ ST did receive an email inquiry on May 1, 2020, about "market research" for another procurement, and did inform GSA on August 1, 2020, that ST would consider being an offeror on future supply procurements.

⁸ GSA's protest decision is directed and addressed to ST's counsel but appears to be meant for ST directly.

the lack of responses to those questions— the same questions at issue in this Appeal— was sustained by the GSA, and the GSA found no issue with timeliness in that first protest determination.⁹ When the responses did eventually come on October 14, 2020, ST reviewed the answers and determined that it needed to protest. That protest was filed on October 21, 2020 — well before the fourteen-day statutory deadline for action lapsed. 5 G.C.A. § 5425 (a).

3. GSA, in declaring ST's protest as untimely, is seeking to avoid Public Auditor review of a procurement process that stifles competition.

The GSA Decision, in resting entirely on the timeliness of ST's protest, fails to engage in the merits of a procurement that stifles competition and prevents the territory from comparing the best value offered for the janitorial products sought. Guam's procurement code mandates that 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." 5 G.C.A. § 5265. Moreover, the 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." *Id.* at 5268(a). GSA's October 14, 2020, responses that prospective bidders may not deviate or provide pricing that allows for comparison between different product weights and measures

⁹ GSA's decision to sustain ST's first protest is attached to this Notice of Appeal as **Exhibit B**.

show this procurement to be plagued by unduly restrictive specifications that limit value to the territory. This is especially true given the fact that Guam law requires that the territory should endeavor to procure "Standard commercial products whenever practicable" and avoid unique requirements. 2 G.A.R. § 4102(a)(3)). A cursory review of standard commercially available spray can air freshener, for instance, shows the products widely available in sizes ranging from 3 oz. to 15 oz. Despite, this, GSA's answers restrict the procurement to only a 10 oz. can. This falsely restricted series of specifications is repeated time and again throughout the IFB. Laundry detergent powder, for instance, is specified by GSA to be provided in the size of 180 loads/box, while boxes are commonly commercially available in sizes from 50 to 200 loads.

By requiring prospective bidders to meet these specifications, GSA is unduly restricting competition and preventing the Territory from obtaining the best price. More, it appears as if GSA may be driving the procurement to only a particular offeror(s) that can provide the unique item size requested, even though that particular item size is not material to the efficacy or usefulness of the product being procured, and may in fact cause the territory to pay more for the product. Such restrictive specifications cannot be used unless a written determination has been made that the restrictive specification must be used. *See*, 2 G.A.R. § 4106(a); 5

G.C.A. § 5268(b). No such determination exists here. The lack of such written determinations invalidates the IFB's use of unduly restrictive specifications.¹⁰

The IFB is fundamentally flawed so long as GSA holds to restrictive product sizing, and this is especially true if GSA, as relayed in its answers to bidder questions, will not permit pricing that can allow for comparison across different sized products. A price per ounce, for instance, will supply the Territory the total amount of product it is requesting, and the Territory can obtain the best price. Allowing bidders to submit a price per ounce will also ensure all bidders are competing on an equal basis. Finally, allowing bidders to provide products marked in either metric or imperial units, so long as a price comparison can be made, would further allow for the Territory to obtain the best pricing for the products it seeks. GSA failed to answer Question Number 19 from ST about measuring units, and GSA's failure to answer the question violates procurement law.

B. RULING REQUESTED

ST respectfully requests that the Office of Public Accountability provide the following relief:

- (1) Issue a Determination that Appellant's protest was timely submitted to the Agency;
- (2) Issue a Determination that the specifications identified in GSA-047-20 and clarified in its responses calling for specific item package size are unduly restrictive;

¹⁰ ST reserves its right to protest such a determination if one is ultimately provided.

- (3) Order the Agency to amend the IFB to allow prospective bidders to submit prices in such a manner to allow comparison between products of different size, and to allow price submission based on the total amount of product requested; and
- (4) Determine that the agency's failure to answer Question Number 19 violated procurement law, and Order the Agency allow bidders to provide products marked in either metric or imperial units, so long as a price comparison can be made between price offers.

C. SUPPORTING EXHIBITS, EVIDENCE OR DOCUMENTS

Submitted with this appeal are the following supporting exhibits, evidence, and documents:

- (1) ST's Protest of October 8, 2020, is attached to this Notice of Appeal as Exhibit A.
- (2) GSA's Decision sustaining ST's protest on October 8, 2020 is attached to this Notice of Appeal as Exhibit B.
- (3) GSA's answers to ST's questions are attached to this notice of appeal at Exhibit C.
- (4) ST's Bid Protest received by the GSA on October 21, 2020 is attached to this Notice of Appeal as Exhibit D.
- (5) The November 10, 2020 protest decision, and its covering email, are attached to this Notice of appeal as Exhibit E.

PART V: DECLARATION RE COURT ACTION


Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his knowledge,

no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to, and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Respectfully Submitted this 24 day of November, 2020.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSHUA D. WALSH
EDWIN J. TORRES
Attorneys for Appellant
ST Corporation, Inc.

VERIFICATION

I, Lej Teodosio, am a duly authorized representative of ST Corporation, Inc., and I am authorized to make this verification. I have read the foregoing Notice of Appeal, and, based on information and belief and to the best of my knowledge, the facts stated therein are true and correct. I declare under penalty of perjury under the laws of Guam that the foregoing is true and correct. This verification was executed on the 24 day of November, 2020.

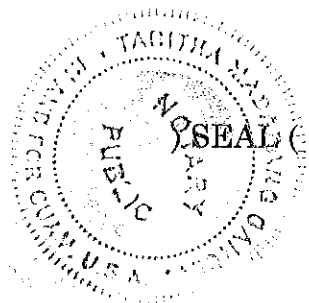
By: 

LEJ TEODOSIO
ST Corporation, Inc.

GUAM, U.S.A.,)
) (ss.:
City of Hagåtña.)

On this 24 day of November, 2020, before me, a notary public in and for Guam, personally appeared Lej Teodosio, known to me to be the person whose name is subscribed to the foregoing **NOTICE OF APPEAL**, and he acknowledged to me that he executed the same.

WITNESS my hand and official seal.





TABITHA MADARANG GARCIA
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: **JAN. 08, 2024**
140 As Conejo Pl, Barrigada, GU 96913

EXHIBIT A



Corporation

P.O. BOX 12699 TAMUNING, GUAM 96931 · Tel: (671) 637-7101 · Fax: (671) 637-7175

October 8, 2020

Claudia S. Acfalle, Chief Procurement Officer
General Services Agency
Government of Guam
P.O. Box FG
Hagatna, Guam 96910

Re: General Service Agency Bid Nos. GSA-046-20 and GSA-047-20

Dear Procurement Officer Acfalle:

PROCUREMENT PROTEST

This is a pre-award procurement protest of General Service Agency Bid Nos. *GSA-046-20* and *GSA-047-20*, and as such this correspondence serves as a statutory trigger for an Automatic Stay regarding the continued procurement of both *GSA-046-20* and *GSA-047-20*. Pursuant to 5 GCA § 5425(g), the Territory shall not proceed further with the solicitation or with the award of the contract prior to final resolution of this protest.

As you know, ST Corporation is an interested and prospective bidder who is preparing to submit bids pursuant to two related Invitation for Bids ("IFBs") issued by the General Service Agency ("GSA") and currently set for bid openings in the coming days. One IFB is for office supplies and is due on October 9, 2020 (GSA 046-20) and the other is for Janitorial Supplies and is due on October 12, 2020 (GSA 047-20). Our company proudly carries many products that we feel are responsive to these IFBs, and that can provide the best value for the GSA and the Guam tax payers.

To help us provide responsive bids for your consideration, our company submitted, within the time allowed, several questions seeking clarification on various issues related to the IFBs. We sought various clarifications in these related IFB requests, including definitions for some terms as well as questions regarding product quantities and sizing. Unfortunately, no answers have yet been provided. We followed up with GSA yesterday about the pending answers, and have not yet received a response. Given

that the first of the IFB offers is due tomorrow, it is now clear that the lack of timely responses means that our company cannot, in the limited time remaining, prepare and submit meaningfully responsive bids. Because of this reality, our company is forced to preserve its rights under the law and submit this procurement protest of both IFBs where answers have not been provided.

Even if the answers we were seeking are provided today, the IFB due dates of tomorrow and Monday mean that our bid preparation cannot be done, as we would be operating under an extremely truncated bid submission calendar that cannot be met. The truncated bid timing regime created by GSA's inability to answer the questions it invited violates procurement law. The procurement regulations require that bidders be provided with a reasonable time to prepare their bids. With bids due tomorrow and Monday, and no responses provided by GSA, there is simply no time to prepare meaningfully responsive bids to the IFBs.

We sincerely hope the issues raised in our protest can be resolved so that bids can be submitted. We ask that the GSA provide the answers to the questions we have submitted, and amend the bid submission dates for each IFB to a period of at least 14 days after the answers and clarifications are provided by the GSA. We look forward to working with the GSA on resolving our protest of these IFBs.

Sincerely,



Lejani Teodosio
Consumer Goods Manager
ST CORPORATION

EXHIBIT B



EDWARD M. BIRN
Director (Direktor)

EDITH C. PANGELINAN
Deputy Director (Sigundo Direktor)

**DEPARTMENT OF
ADMINISTRATION**
DIPATTAMENTON ATMENESTRASION

GENERAL SERVICES AGENCY
(Ahensian Setbision Hinlrat)

Telephone (Telfon): (671) 475-1707/1729 • Fax (Faks): (671) 472-4217/1727



LOURDES A. LEON GUERRERO
Governor (Maga'håga)

JOSHUA F. TENORIO
Lt. Governor (Sigundo Maga'låhi)

October 8, 2020

Memorandum

Lejani teodosio
Consumer Goods Manager
St Corporation
PO Box 12699
Tamuning, Guam 96931

Re: Protest Dated October 8, 2020

We are in receipt of your protest dated October 8, 2020 in which you protested the opening of the GSA bid numbers 046-20 and 047-20. The stated reason for your protest was the failure of GSA to respond to your questions on these bids.

GSA response: We acknowledge that the government agency did not provide the responses to you in a timely manner, and are preparing an amendment to extend the bid opening to a later date.

Therefore, your protest is granted. You have the right to seek any administrative or judicial review authorized by law.

CLAUDIA S. ACFALLE
Chief Procurement Officer

Please Print
ACKNOWLEDGEMENT COPY (Re-fax to GSA)
Received By: _____
Date: _____
Company Name: _____
Fax to: 475-1727 or 472-4217
E-mail to: gsaprocurement@gsadoa.guam.gov

EXHIBIT C



EDWARD M. BIRN
Director (Direktot)
EDITH C. PANGELINAN
Deputy Director (Sigundo Direktot)

DEPARTMENT OF ADMINISTRATION

DIPATTAMENTON ATMENESTRASION

GENERAL SERVICES AGENCY

(Ahensian Sethision Hinirat)

Telephone (Telifon): (671) 475-1707/1729 • Fax (Faks): (671) 472-4217/1727



LOURDES A. LEON GUERRERO
Governor (Maga'håga)

JOSHUA F. TENORIO
Lt. Governor (Sigundo Maga'åhti)

October 13, 2020

INVITATION FOR BID - GSA-047-20 JANITORIAL SUPPLIES

Questions received from: ST Corporation on 9/17/20

Question 1: Would GSA accept a slightly different size from what is indicated in the bid form? Or does it need to be the exact measurement? For Example, in Item No. 8.1 Cleaner Degreaser, 24 oz./Bottle, would GSA accept 32 oz. size?

Response: The requirement is for a 24 oz./Bottle. It would be up to the vendor to provide equal value.

Question 2: Would GSA accept a different form of packaging? For example, in Item No. 14.1 Disinfectant Spray, 15 oz./Can, would GSA accept trigger spray bottle? For Toothbrush, would GSA accept packaging in blister pack instead of box?

Response: The requirement is for "Spray Can". Would accept individual packs
 (Note: Spec states "Box" example: 144/box)

Question 3: For Item No. 28.1 Soap, Bath 5.75 oz., can you specify if this is bar or liquid soap?

Response: Bath Bar

Question 4: For Item No. 6.1, would any bleach disinfectant containing sodium hypochlorite be responsive to Item No. 6.1?

Response: As long as it contains bleach sodium hypochlorite.

Questions received from: Shiby Wholesale on 9/21/20

Question 1: Item No. 5.1 Antibacterial, Hand Soap Refill 800 Mil 27 FL oz./bag, Ref: Gojo or Equal. Is this item to be in the bag or can be in a bottle?

Response: Request is for "Bag".

Question 2: Item No. 23.1 Mask, Procedure, Earloop 50/bx., Ref: Henry Schein 104-8600. Is the quantity box or case?

Response: Quantity is "Box"

Anita Cruz

From: Anita Cruz
Sent: Tuesday, October 13, 2020 5:34 PM
To: 'Lej Teodosio'; 'shiby.gcm1@gmail.com'; 'Richard Luo'; 'Jean Grape'; 'yongqiaoluogu@gmail.com'; 'csoriano@mdwholesaleguam.com'
Cc: gsaprourement; Ovita A. Nauta
Subject: GSA-047-20 JANITORIAL SUPPLIES
Attachments: GSA-047-20 QUESTIONS & RESPONSES 10-13-20.pdf

PLEASE ACKNOWLEDGE RECEIPT OF THE ATTACHED "QUESTIONS & RESPONSES" FOR THE ABOVE BID NUMBER. ONCE SIGNED AND ACKNOWLEDGE FORWARD BACK TO GSA FOR THE RECORD AND FILE. THANK YOU AND BE SAFE.

Anita T. Cruz
Buyer Supervisor II



Questions received from: ST Corporation on 9/24/20

Question 1: GSA has instructed bidders to provide a "Unit Price" and a "Price Extension", and has also instructed bidders to submit bids for a certain quantity of product per item. What does GSA mean by the "Unit Price" and the "Price Extension"?

Response: Unit price is the cost of the item that is being sold for. Price extension is the Unit price times the quantity of items requesting. Example: Qty. 100 x Unit Cost \$2.00 = Price extension \$200.00

Question 2: GSA has specified that item 2.1 should be a 10 oz. spray can of air freshener, with prices submitted for 100 cans. Is the "Unit Price" GSA is seeking the price for each can, or the price for each 100 can quantity specified? What would be the "Price Extension"?

Response: Price per can would be the cost of the item times the quantity of items requesting

Question 3: GSA has specified that item 2.1 should be a 10 oz. spray can of air freshener, with prices submitted for 100 cans.

a. Would GSA accept a slightly different size from what is specified? For example, would GSA accept a 12 oz. or 8 oz. spray can?

Response: 10oz or equal

b. Would GSA allow bidders to submit prices in such a manner that GSA can compare the value between offered products of slightly different sizes, i.e., supply a price per ounce as opposed to a price per can?

Response: per specifications per can

Question 4: GSA has specified that item no. 5.1 should be Antibacterial, Hand Soap Refill 800 ml 27 fl. Oz/bag, with prices submitted for 100 bags.

a. Would GSA accept a slightly different size from what is specified? For example, would GSA accept a 32 fl. Oz/bag?

Response: 27 fl oz/bag or equal

b. Would GSA allow bidders to submit prices in such a manner that GSA can compare the value between offered products of slightly different sizes, i.e., supply a price per fluid ounce as opposed to a price per bag?

Response: per specifications per bag

Question 5:

GSA has specified that Item No. 6.1 should be Bleach Disinfectant 1 Gallon, with prices submitted for 300 gallons.

a. Would GSA accept a slightly different size from what is specified? For example, would GSA accept 3.5 quarts?

Response: 1 gallon is requested

b. Would GSA allow bidders to submit prices in such a manner that GSA can compare the value between offered products of slightly different sizes, i.e., supply a price per quart as opposed to a price per gallon?

Response: per specifications 1 gallon

Question 6: GSA has specified that Item No. 8.1 should be Cleaner Degreaser, 24 oz/bottle, with prices submitted for 100 bottles.

a. Would GSA accept a slightly different size from what is specified? For example, would GSA accept a 12 oz/bottle

Response: 24oz or equal

b. Would GSA allow bidders to submit prices in such a manner that GSA can compare the value between offered products of slightly different sizes, i.e., supply a price per ounce as opposed to a price per bottle?

Response: per specifications per bottle

Question 7: GSA has specified that Item No. 9.1 should be Cleaner Detergent, 1 Gallon, with prices submitted for 100 gallons.

a. Would GSA accept a slightly different size from what is specified? For example, would GSA accept 3.5 quarts?

Response: 1 gallon is requested

b. Would GSA allow bidders to submit prices in such a manner that GSA can compare the value between offered products of slightly different sizes, i.e., supply a price per quart as opposed to a price per gallon?

Response: per specifications per gallon

Question 8: GSA has specified that Item No. 10.1 should be Cleaner, Glass Window Spray 32 oz/bottle, with prices submitted for 100 bottles.

a. Would GSA accept a slightly different size from what is specified? For example, would GSA accept a 27 oz/bottle?

Response: 32oz or equal

b. Would GSA allow bidders to submit prices in such a manner that GSA can compare the value between offered products of slightly different sizes, i.e., supply a price per ounce as opposed to a price per bottle?

Response: per specifications per bottle

Question 9: GSA has specified that Item No. 13.1 should be Detergent Powder, Laundry 180 loads/box, with prices submitted for 100 boxes.

a. Would GSA accept a slightly different size from what is specified? For example, would GSA accept a 200 loads/box?

Response: 180 loads or equal

b. Would GSA allow bidders to submit prices in such a manner that GSA can compare the value between offered products of slightly different sizes, i.e., supply a price per load as opposed to a price per box?

Response: per specifications per bottle

Question 10:

GSA has specified that Item No. 31.1 should be Toilet Bowl Cleaner, 32 oz/bottle, with prices submitted for 100 bottles.

a. Would GSA accept a slightly different size from what is specified? For example, would GSA accept a 27 oz/bottle?

Response: 32oz or equal

b. Would GSA allow bidders to submit prices in such a manner that GSA can compare the value between offered products of slightly different sizes, i.e., supply a price per ounce as opposed to a price per bottle?

Response: per specifications per bottle

Question 11:

GSA has specified that Item No. 32.1 should be Tooth Paste, 8 oz., with prices submitted for 500 units.

a. Would GSA accept a slightly different size from what is specified? For example, would GSA accept a 12 oz?

Response: 8oz or equal

b. Would GSA allow bidders to submit prices in such a manner that GSA can compare the value between offered products of slightly different sizes, i.e., supply a price per ounce as opposed to a price per unit?

Response: per specifications each

Question 12:

GSA has specified that Item No. 33.1 should be Tooth Paste, 0.85 oz., with prices submitted for 250 units.

a. Would GSA accept a slightly different size from what is specified? Or does it need to be the exact measurement? For example, would GSA accept a 0.65 oz?

Response: 0.85 oz or equal

b. Would GSA allow bidders to submit prices in such a manner that GSA can compare the value between offered products of slightly different sizes, i.e., supply a price per ounce as opposed to a price per unit?

Response: per specifications each

Question 13:

Would GSA accept a different form of packaging for item no. 14.1? For example, would GSA accept trigger spray bottle instead of can?

Response: per specifications spray can

Question 14:

Would GSA accept a different form of packaging for item no. 32.1 and item no. 33.1? For example, would GSA accept packaging in blister pack instead of box?

Response: per specifications each

Question 15:

For item no. 28.1 Soap Bath 5.75 oz., can GSA specify if this is bar or liquid soap?

Response: Bar soap is requested

Question 16:

For item no. 6.1 would any bleach disinfectant containing sodium hypochlorite be responsive to item 6.1?

Response: As long as it contains bleach sodium hypochlorite.

Question 17:

In reference to the email we received from GSA Storekeeper I, Ms. Charleen Evangelista on May 1, 2020, subject: Market Research, it was indicated in the last page of Market Research for Janitorial supplies - All items must be imprinted/embossed/watermarked "PROPERTY OF GOV GUAM". Does GSA require that any of the items in IFB No. GSA-047-20, like similar items previously procured by GSA, be imprinted/embossed/watermarked "PROPERTY OF GOV GUAM"?

Response: no it will not be imprinted/embossed/watermarked "Property of GovGuam"

Question 18:

For item no. 18.1 Flashlight, 3D Water Proof, H/D, can you specify what 3D and H/D means?

Response: It requires 3, D batteries and must be heavy duty.


DAVID M. CRUZ
Assist. Chief Procurement Officer

EXHIBIT D

RAZZANO WALSH & TORRES, P.C.

www.rwtguam.com

Sender's Direct E-Mail:
jdwalth@rwtguam.com

October 20, 2020

BID PROTEST

This is a pre-award procurement protest of General Services Agency Invitation for Bid GSA-047-20 (the "IFB"), and as such this correspondence serves as a statutory trigger for an Automatic Stay regarding the continued procurement of the IFB. Pursuant to 5 GCA § 5425(g), the Territory shall not proceed further with the solicitation or with the award of the contract prior to final resolution of this protest.

VIA HAND DELIVERY AND FACSIMILE

Claudia Acfalle
Chief Procurement Officer
General Services Agency
475-1727

ACKNOWLEDGEMENT COPY
RECEIVED BY CA
DATE 10/21/20 10:00pm

RE: Bid Protest of Invitation for Bid No.:
GSA-047-20 Janitorial Supplies; Sunshine Act Request.

Dear Ms. Acfalle:

PROCUREMENT PROTEST

Our office represents ST Corporation ("ST") who intends to be an offeror on GSA-047-20 Janitorial Supplies (the "IFB").

Background

The IFB seeks a variety of janitorial and cleaning supplies, and in relaying the product descriptions for those supplies, the General Services Agency ("GSA") included additional very specific size specifications for many of the products sought. On September 24, 2020, ST wrote to GSA about the narrow specifications that GSA included, and sought clarification from GSA inquiring whether pricing could be submitted for similarly sized products and in such a way so that GSA could obtain the best value offers for the various supplies requested. When GSA did not provide answers in a timeframe that would have been useful for offerors to use in shaping their bids, ST initiated a protest on October 8, 2020. That protest was sustained by GSA on October 8, 2020, with the promise that the answers sought would be provided.

Pan American Building 139 Murray Blvd Suite 100 • Hagåtña, Guam 96910
(T): 671-989-3009 (F): 671-989-8750

On October 14, 2020, ST finally received GSA's responses to the questions posed by ST Corporation. ST requested clarification on whether GSA would accept a price per unit that nonetheless supplied the total product amount requested by GSA but was not quoted in the amount specified by GSA. For example, ST asked whether GSA would accept a price per ounce as opposed to price per can for item no. 2.1. GSA responded with "per specifications per can[.]" For every question posed, GSA informed ST that it would not deviate from the listed specification, even though ST could provide prices for the quantities needed in a manner that would allow GSA to determine the best value amongst various bidders for the types of products sought.

ST also asked whether GSA would accept a can or bottle in different amounts than the one specified. For example, ST asked whether GSA would accept a 12 oz. bottle for item no. 8.1. GSA responded with "24oz or equal[.]" This answer provided no justification for the exact size specification, and provided no clarity into whether two 12 oz bottles would be considered "equal" to the 24 oz bottle size specified. GSA responded in this way for every other similar question posed by ST.

Significantly, GSA also failed to respond to Question Number 19 submitted on September 24, 2020. Question Number 19 asked whether GSA would "accept products in metric units as opposed to imperial units?" GSA did not provide a response to this question.

GSA's responses provided on October 14, 2020 serve as the basis for this protest.

Discussion

Procurement Law mandates that 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." 5 G.C.A. § 5265. Moreover, the 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." *Id.* at 5268(a); *see also Dynamic Corp.*, B-296366 (June 29, 2005) ("Specifications must be sufficiently definite and free from ambiguity so as to permit competition on an equal basis.").

Procurement Law also requires agencies to answer questions submitted by bidders in a timely and reasonable manner. *See Matter of: Amec Earth & Envtl., Inc.*, B-401961 (Dec. 22, 2009) ("An agency may not mislead an offeror through the framing of a discussion question or a response to a question into responding in a manner that does not address the agency's concerns, or misinform the offeror

concerning a problem with its proposal or about the government's requirements.”).

Here, GSA's responses that prospective bidders may not deviate or provide pricing that allows for comparison between different product weights and measures violates procurement law. GSA's October 14, 2020 answers show this procurement to be plagued by unduly restrictive specifications that limit value to the territory. This is especially true given the fact that Guam law requires that the territory should endeavor to procure "Standard commercial products whenever practicable" and avoid unique requirements. 2 GAR § 4102(a)(3)). A cursory review of standard commercially available spray can air freshener, for instance, shows the products widely available in sizes ranging from 3oz to 15 oz. Despite, this, GSA's answers restrict the procurement to only a 10oz can. This is repeated time and again throughout the IFB. Laundry detergent powder, for instance, is specified by GSA to be provided in the size of 180 loads/box, while boxes are commonly commercially available in sizes from 50 to 200 loads.

By requiring prospective bidders to meet these specifications, GSA is unduly restricting competition and preventing the Territory from obtaining the best price. More, it appears as if GSA may be driving the procurement to only those offerors than can provide the unique item size requested, even though that particular item size is not material to the efficacy or usefulness of the product being procured. As you are aware, such restrictive specifications cannot be used unless a written determination has been made that the restrictive specification must be used. *See*, 2 GAR § 4106(a); 5 GCA § 5268(b). The lack of such written determinations invalidates the IFB's use of unduly restrictive specifications.

This IFB is fundamentally flawed so long as GSA holds to restrictive product sizing, and this is especially true if GSA will not allow for submission pricing that can allow for comparison across different sized products. A price per ounce, for instance, will supply the Territory the total amount of product it is requesting, and the Territory can obtain the best price. Allowing bidders to submit a price per ounce will also ensure all bidders are competing on an equal basis. Finally, allowing bidders to provide products marked in either metric or imperial units, so long as a price comparison can be made, would further allow for the Territory to obtain the best pricing for the products it seeks. GSA failed to answer Question Number 19 from ST about measuring units, and GSA's failure to answer the question violates procurement law.

RELIEF REQUESTED

ST requests that GSA render a decision that:

- (1) Determines that the specifications identified in the IFB and clarified in its

responses are unduly restrictive;

(2) Amend the IFB to allow prospective bidders to submit prices in such a manner to allow comparison between products of different size, and to allow price submission based on the total amount of product requested; and

(3) Determines that its failure to answer Question Number 19 violated procurement law and issue a response to Question Number 19.

Finally, this is a pre-award procurement protest of GSA-047-20 Janitorial Supplies, and as such this correspondence statutorily triggers the Automatic Stay regarding GSA-047-20. Pursuant to 5 GCA § 5425(g), the Territory shall not proceed further with the solicitation or with the award of the contract prior to final resolution of this protest.

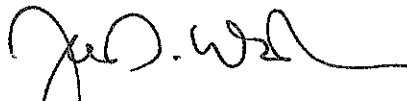
We look forward to your prompt and expeditious resolution of this protest.

SUNSHINE ACT REQUEST

In addition to the instant protest, ST also requests, pursuant to the Guam Sunshine Act, PL 25-06 and 5 G.C.A. § 10101, *et seq.* the following documents:

- The entire procurement record for GSA-047-20.
- Any written determination reflecting the need for the particular product size specifications contained in the IFB.

Sincerely,



Joshua D. Walsh

EXHIBIT E



EDWARD M. BIRN
Director (Direktot)

EDITH C. PANGELINAN
Deputy Director (Sigundo Direktot)

**DEPARTMENT OF
ADMINISTRATION**
DIPATTAMENTON ATMENESTRASION
GENERAL SERVICES AGENCY
(Ahensian Setbision Hinirat)

Telephone (Telifon): (671) 475-1707/1729 • Fax (Faks): (671) 472-4217/1727



LOURDES A. LEON GUERRERO
Governor (Maga'håga)

JOSHUA F. TENORIO
Lt. Governor (Sigundo Maga'låhi)

November 10, 2020

Memorandum

Mr. Joshua D. Walsh
c/o Razzano Walsh and Torres, P.C.
Pan American Building
139 Murray Blvd. Suite 100
Hagatna, Guam 96910

RE: Bid Protest on GSA Bid No GSA-047-20 and Freedom of Information
Request for the above bid

We are in receipt of your memorandum dated October 20, 2020, in which you requested for the GSA Bid No. 47-20, and related information on particular product size determination, as well as filing a protest on the above entitled bid.

As to the Freedom on Information request, by separate cover, we have addressed your request.

Protest: The General Services Agency (GSA) is failing to justify why bidders cannot provide the same material as requested to GSA in the manner other than requested by GSA. As such, the specifications provided ~~For example, GSA will require 24 oz cans. GSA will not accept two (2) 12-oz cans in the materials requested in this bid are restrictive its place.~~

GSA Response:

As correctly noted in your bid protest, 2 Guam Administrative Rules and Regulations (GARR) Division 4 Section 4102(a)(2) states

"Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the territory. To facilitate the use of such criteria, using agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met. It is recognized, however, that the preference if use of functional or performance specifications is primarily applicable to the procurement of supplies and services.

However, 2 GARR, Division 4, Section 4102(a)(3) Preference for Commercially Available Products state:

It is the general policy of this territory to procure standard commercial products whenever practicable. In developing specifications, acceptable commercial standards shall be used and unique requirements shall be avoided, to the extent practicable. (Emphasis added).

The determination of the specifications developed are based on both the standard commercially available products available and the needs of the government, and no unique requirements are stated.

Further, as noted in 2 GARR, Division 4, Section 4103(b)(1)(d) Use of Existing Specifications:

If a specification for a common or general use item has been developed in accordance with subsection 4103(b)(2)(a) of this Section or a qualified products list has been developed in accordance with Subsection 4103(B0(2)(D) of this Section for a particular supply, service, or construction item, it shall be used unless the Chief Procurement Officer or the Director of Public Works makes a written determination that its use is not in the territory's best interest and another specification shall be used.

Procedures for Development of Common or General Use Items is stated in 2 GARR Division 4, Section 4103(b)((2)(a)(i): Preparation and Utilization: A specification for common or general use shall, to the extent practicable, be prepared to be utilized when:

(A) A supply, service, or construction item is used in common by several using agencies or used repeatedly by one using agency, and the characteristics of the supply, service or construction item, as commercially produced or provided, remain relatively stable while the frequency or volume of procurement is significant.

On May 1, 2020, you were informed that the General Services Agency was soliciting requests for information on available types of products that the government was interested in carrying throughout the fiscal year. The information was requested through a "Market Research". In the information provided to you, it indicated the specifications that were designated for the supplies. The government was looking to provide **the same supplies with the same specifications as it had in two (2) previous bids (GSA 0119-12, and GSA-118-16)**. As you are aware, you bid and won several items on GSA Bid 118-16. As to the latest bid, you responded on August 7th regarding the janitorial supplies without indicating any concerns about the specifications.

The Guam Supreme Court recently ruled as to when a protest is untimely. **In DFS Guam L.P. v. The A.B. Won Pat International Airport Authority Guam 2020 Guam 14 (August 11, 2020)**. A protest is untimely when it is filed more than fourteen days after it knew or should have known of the facts given rise to its protest.

In its opinion, the Supreme Court held that during the RFP process for vendor space at the Guam Airport, protestor DFS Guam had knowledge of purported misconduct on the part of its competitor. That knowledge was available to DFS Guam before the RFP was made and thus formed a sufficient basis for DFS to file a protest against the qualifications of its competitor and thereby relief prior to the issuance of an award. 2020 Guam 14 at 96, 133.

Here, you were aware that the government was going to use the same specifications as it had previously used in obtaining these supplies as of August 7, 2020. You did not raise any objections to these specifications. As such, your protest is untimely.

Based upon the above, your protest is deemed DENIED. You have the right to seek any administrative or judicial review authorized by law.


CLAUDIA S. ACFALLE
Chief Procurement Officer



Joshua D. Walsh <jdwalsh@rwtguam.com>

Bid Protest on GSA Bid No. GSA-047-20

gsaprocurement <gsaprocurement@gsadoa.guam.gov>
To: "jdwalsh@rwtguam.com" <jdwalsh@rwtguam.com>
Cc: Robert Kono <robert.kono@gsa.guam.gov>

10 November 2020 at 10:59

Hafa adai,

Please see the following attachment per Mr. Robert Kono for GSA Bid No. GSA-047-20.

Kindly confirm upon receipt of this email.

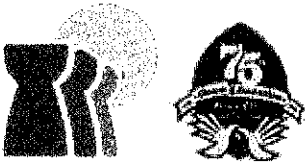
Thank you,

GSA Procurement

475-1707/08

Gsa.doa.guam.gov

General Services Agency



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