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RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

NOV 12 2009

TIME: 9:30am
BY: ju
FILE No. OPA-PA 09-011

IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT PETITION

In the Petition of)	
)	
)	MEMORANDUM IN SUPPORT OF
TOWN HOUSE DEPARTMENT STORES,)	
INC., dba)	PETITION TO COMPEL DECISION
ISLAND BUSINESS SYSTEMS)	AND PRODUCE DOCUMENTS
& SUPPLIES,)	
APPELLANT/PETITIONER)	DOCKET NO. OPA-PA-09-011
_____)	

This Memorandum is lodged in response to the recent action by GSA as discussed below.

As the Petition to Compel detailed, Petitioner timely filed a Protest of GSA's IFB GSA-084-09 on August 28, 2009. On November 5, 2009 Petitioner filed its Petition to Compel Decision and Produce Documents after repeated efforts to obtain a resolution of or decision on the merits of the Protest.

Petitioner's Protest, a copy of which is attached to the Petition to Compel, raised numerous objections, summarized as:

1. The specifications failed to include essential information, namely the identity of the person responsible for drafting the specifications and any persons, technical literature or manufacturer's brochures relied upon.
2. The evaluation criteria were improper in that they only included four specific items, to be subjectively scored, all dealing solely with bidder responsibility.
3. The Multi-step bid format of the solicitation is improper where standard, commercial off-

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the-shelf supply items are being solicited.

4. The IFB is an attempt to masquerade an improper blanket purchase agreement as an indefinite quantity/multiple award bid, as well as being improper in other respects.
5. The IFB intended to pave the way to enable GSA to purchase from the Federal Supply Schedule, but did not provide fair and equitable notice to bidders.
6. The bid specifications were internally inconsistent and unduly restrictive, especially considering the standard commercial items being sought, failing to maximize competition.

On November 10, 2009, GSA faxed a copy of its response to Petitioner's Protest. Copy attached. This response contained a partial denial of Petitioner's Protest, and declared "it is the position of the Government that it is in the best interests of the Territory that this bid be cancelled".

At first glance, this would seem to dispose of the matter, but first glances are deceptive. Closer examination reveals GSA's response is neither a Decision on nor a cancellation of the Protest.

Petitioner asks the Public Auditor to Compel a full Decision of the Protest, as sought in its Petition.

ARGUMENT:

5 GCA § 5425, of course, provides the remedy and process for protests. Petitioner raised six grounds for protest. GSA did not seek to *resolve* any of the grounds of protest, but has rendered a *partial response* rejecting just two of the grounds, leaving four additional grounds unspoken and unresolved.

Petitioner is entitled to a full resolution of its protest, including the four grounds which GSA has ignored. Its rejection of only two of the grounds does not fully resolve the Protest, nor is the response a decision, as discussed below.

Petitioner further anticipates the argument that this Petition is made moot by its declaration of its position that the bid should be cancelled. Petitioner rejects that argument, if made. GSA's response is neither in the form of a cancellation, nor does it substantively rise to the requirements of a cancellation.

- FIRST, as discussed, the Protest is not resolved; there are still four issues undecided. § 5425(c) *requires* that a decision be made if the protest is not resolved by mutual agreement. Rendering a partial decision falls short of what is required. To the contrary, the mandate of a decision in § 5425(c) is unqualified, except for the one qualification "if the protest is not resolved". Here, there are four unanswered, therefore unresolved, grounds of Protest.

Furthermore, the *response* is not a *decision* on the protest because it fails to provide the notice of administrative and judicial review required by 5 GCA § 5425(c)(2).

Thus, there has still been no decision on Petitioner's protest.

- SECOND, as of the writing of this Memorandum, there has been no cancellation of the solicitation.

Cancellation of a solicitation in this case requires a specific notice containing three specific items (2 GAR § 3115(d)(1)(D), only two of which, at best and only arguably, are met by GSA's response to Petitioner.

GSA has failed to state adequate grounds to cancel the solicitation. GSA's stated ground is that "we [must] adjust the language in our terms and conditions that may be subject to different interpretations."

2 GAR § 3115(d)(1)(B)(iii) does not allow a cancellation unless there are "proposed amendments ... [which] would be **of such magnitude** that a new solicitation is desirable". Mere clarifications do not do that; it is standard practice for agencies to issue clarifications in many if not most solicitations.

It must be noted that GSA did admit, "[y]our comments did raise concerns as to whether the General Services Agency terms and conditions were following the law and were as clear as it could have been". However, they do not give any hint as to *how* they may not be following the law because they did not render any decision agreeing to any of the grounds of protest. All the response did was deny two of them (to which Petitioner objects, but that would be grounds for appeal when this matter, if ever, becomes ripe for appeal).

Finally, the automatic stay does not allow the government to cancel a solicitation before a final resolution of the protest, assuming, for argument sake, that GSA's response passes muster as a valid cancellation. Final resolution requires, if no mutual agreement, a Decision on all grounds of the Protest.

§ 5425(g) directs the government "not [to] proceed further with a solicitation ... prior to final resolution of such protest...." Resolution of the protest takes precedence over all other matters having to do with the solicitation.

If the government could simply cancel a solicitation during the pendency of a protest, it would negate a "final resolution of such protest". Mooting a protest is not resolving it; it is sweeping it under the rug.

To repeat, § 5425(c) requires a decision on a protest. Cancelling a protested solicitation without decision side-steps this prophylactic review procedure. This violates the spirit if not the law of

§5425.¹

Petitioner argues that until there has been a full decision on the protest addressing all grounds specifically raised, the protest remains unresolved and the automatic stay *prevents a cancellation* that would pull the rug out from under the substantive argument of protest.

CONCLUSION:

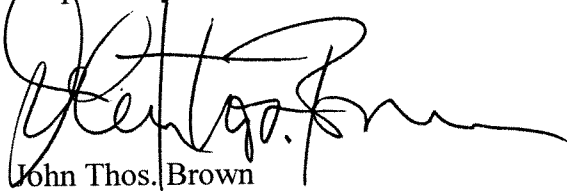
Petitioner urges that a full decision, answering to each ground of protest, is necessary to permit the continued development of procurement policies and practices. (5 GCA § 5001(b)(2).) Here GSA acknowledges some concern that it may not be following the law, but does not tell us how. It does not provide any response to four objections, but we do not know, and cannot know without further elucidation in a full decision, whether any of those grounds are the basis for GSA's concerns or whether something else came up in their "serious internal review of the issues raised" in the Protest.

It is the purpose and policy of the Procurement Act to clarify the law governing procurement, and provide for increased public confidence in the procedures followed in public procurement (5 GCA § 5001(b)(1) and (2)). Dealing with a protest in the truncated and cryptic manner exhibited in GSA's response does nothing to help us understand those matters it considers possibly violate the law, nor does it clarify for a protestor questions it rightly raises in a protest.

A government agency, when responding to a bid protest, should be transparent, not opaque; that is the manner in which uniform and discernible procurement policies and practices are established.

The Public Auditor is also charged with the duty of promoting the purposes and policies of the Procurement Act, and is requested to exercise that duty by compelling the Decision sought in this Petition.

Respectfully submitted,



John Thos. Brown
General Counsel for Petitioner

¹ See Commentary No. 1 to Model Procurement Act §9-101, the MPC counterpart to 5 GCA § 5425: "It is essential that bidders, offerors, and contractors have confidence in the procedures for soliciting and awarding contracts. This can best be assured by allowing an aggrieved person to protest the solicitation, award or related decision."

Felix P. Camacho
Governor



GENERAL SERVICES AGENCY

(Ahensian Setbision Hinirat)
Department of Administration
Government of Guam

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Michael W. Cruz, M.D.
Lt. Governor

Joseph C. Manibusan
Deputy Director
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Lourdes M. Perez
Director
Department of Administration

Fax

To: Mr. John Thos. Brown
General Counsel for Island Business Systems
From: Claudia S. Acfalle – CPO

Agency: Island Business Systems

Fax: 472-6153

Pages: 3

Phone: 475-1710 (Frasia Lujan)

Date: November 10, 2009

Re: Letter re: Procurement Protest on
GSA 084-09

cc:

- Urgent
- For Review
- Please Comment
- Please Reply
- Please Recycle

● **Comments:**

To follow is a letter dated November 10, 2009 re: Procurement Protest GSA 084-09.
Please acknowledge receipt by re-sending this cover page.

Thank You. Frasia

ACKNOWLEDGEMENT COPY

RECEIVED BY: J. Lujan

DATE: 11-10-09

FAXED
DATE: _____

FAXED
DATE: 11-10-09
15:39

Felix P. Camacho
Governor



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Michael W. Cruz
Lt. Governor

November 10, 2009

Memorandum

Mr. John Thos. Brown
General Counsel for Island Business Systems
and Supplies
545 Chalan Machaute, Route 8. @ Biang St
Maite, Guam 96910

Re: Procurement Protest on GSA 084-09

Dear Mr. Brown:

We are in receipt of your memorandum dated August 28, 2009, in which you filed a protest on GSA bid number 084-09 "A Sixty Month Lease Agreement Inclusive of Equipment, Services, and Related Consumables and Software Solutions for Digital Multi-functional Systems". Your comments did raise concerns as to whether the General Services Agency terms and conditions were following the law and were as clear as it could have been.

For example, you indicated that the government did not comply with 5 GCA Section 5267 which stated in pertinent part:

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 relief upon by the responsible person in drafting the specifications.

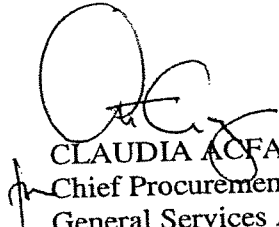
We believed that our action of having the agency or department confirming the specifications does identify the person or persons responsible for drafting the specification and does follow the requirement of the law.

Another issue that you raised is our possible use of the Federal Schedule by the government. You indicated that vendors are placed at a disadvantage by the failure of the government to adequately provide full information whether we will use the Federal GSA or not. The note is more than sufficient to provide everyone with knowledge that the

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government is looking for a bidder that can be both responsible and responsive and provide the lowest cost to the Government. The notation that we may look to the federal schedule only confirms that possibility. So this complaint in the protest is also one without merit.

Nevertheless, after a serious internal review of the issues raised by your complaint, it is the position of the Government that it is in the best interest of the Territory that this bid be cancelled and that we adjust the language in our terms and conditions that may be subject to different interpretations.



CLAUDIA ACFALLE
Chief Procurement Officer
General Services Agency

Procurement protest084-09