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In the Appeal of	)	APPEAL NO. OPA-PA-07-009
	)	
PACIFIC SECURITY ALARM, INC.,	)	APPELLEE'S HEARING
	)	BRIEF
Appellant.	)	
	)	
	)	
	)	

INTRODUCTION

This brief constitutes the statement of legal and factual issues to be presented to the Office of the Public Auditor (the "OPA") by Guam Memorial Hospital Authority ("GMHA") at the scheduled hearing February 21, 2008.

SUMMARY OF GMHA'S DEFENSE AT TRIAL

At the trial of this cause, Pacific Security Alarm, Inc. ("PSA") bears the burden of proof to show that it is entitled to force GMHA to undo its cancellation of the bid and enter a contract for which GMHA has no funds allocated. If PSA fails to meet that heavy burden, then the OPA should leave the parties as it finds them. The OPA should not

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substitute its judgment for that of GMHA, unless GMHA's actions were irrational or arbitrary.

PSA will attempt to misguide and distract this tribunal as to the issues in this case; nonetheless, we will address each in turn. However, the real issues in this appeal are matters of law and only warrant simple explanation. First, GMHA properly canceled GMHA Bid No. 023-2007 (the "Bid") for "insufficient funds," because all bids received were a **minimum of three-hundred thousand dollars (\$300,000.00), or fifty percent (50%)**, over the budget allocated for the project. Second, in the Bid Status letter canceling the bid, and rejecting all bids, GMHA stated that the reason for the cancellation was for "insufficient funds." This is where the inquiry *should* end. However, PSA has attempted to force GMHA to rescind the cancellation, or in the alternative, to "adjust the quantities to come within available funds" with respect to the bid. Apparently, PSA would have the OPA find that removing and replacing the alarms system room by room is in the "best interests" of Guam.

## ANALYSIS

### I.

#### **PSA HAS FAILED TO CARRY ITS BURDEN TO JUSTIFY RESCINDING THE CANCELATION OF GMHA BID 023- 2007**

GMHA properly cancelled GMHA Bid No. 023-2007 (the "Bid") and PSA must meet a particularly high standard to force GMHA to rescind said cancellation. The aggrieved bidder bears the burden of showing that cancellation of the bid was "arbitrary or

capricious.” “A necessary corollary to that burden is consideration of the discretion accorded to procurement officials.” Parcel 49C Ltd. Partnership v. United States, 31 F.3d 1147, 1153 (Fed. Cir. 1994). It is the burden of the aggrieved bidder to demonstrate that the challenged agency decision is either irrational or involved a clear violation of applicable statutes and regulations. Banknote Corp. of America, Inc. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004). Moreover, “to prevail in a protest the protestor must show not only a significant error in the procurement process, but also that the error prejudiced it.” Data General Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996). To demonstrate prejudice, “the protestor must show ‘that there was a substantial chance it would have received the contract award but for that error.’” Alfa Laval Separation, Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (quoting Statistica, Inc. v. Christopher, 102 F.3d 1577, 1582 (Fed. Cir. 1996)). “The court [or the OPA] may not substitute its judgment for that of the awarding authority, but may only act where the authority’s decision is **irrational or arbitrary**.” J&B Modern Tech v. Guam Int’l Airport Auth., et al., Sup. Ct. Guam, Case No. CV0732-06, *Findings of Fact and Conclusions of Law*, at 8 (Barrett-Anderson, J., 7/25/2007) (citing Princeton Combustion Research Labs., Inc. v. McCarthy, 674 F.2d 1016, 1022 (3<sup>rd</sup> Cir. 1982); Housing Auth. v. Pittman Constr. Co., 264 F.2d 695, 703 (5<sup>th</sup> Cir. 1959) (recognizing right of awarding authority “to be **wrong, dead wrong, but not unfairly, arbitrarily wrong**” (emphasis added))).

PSA has not met and cannot meet these high standards. Thus, the OPA should leave the parties where it found them.

A. **The Notice of Cancellation was Sufficient**

PSA argues that the cancellation of the Bid was defective because “GMHA failed to explain or justify why there were insufficient funds.” *Response to Agency Report*, at 5. In J&B Modern Tech v. Guam Int’l Airport Auth., et al, decided in the Superior Court of Guam, the court was asked to issue an injunction to require the Airport Authority to reverse the cancellation of a solicitation on the grounds that the notice was deficient because it stated only that the cancellation was based on the “inadequate specifications.” J&B, *supra*, at 5. The court denied the bidder’s request to reinstate the original solicitation, finding that, under Guam law, “all that is required is that the notice of cancellation ‘**briefly explain the reason for the cancellation.**’” Id. The court held that the “notice of cancellation was sufficient on its face. The reason stated, “inadequate specifications” is plainly sufficient to justify cancellation of a bid.” Id. at 6 (citing 5 GCA § 5225). Finally, the court stated that Guam law does not require a governmental agency to provide greater explanation in the cancellation notice and “ordering an agency to provide a detailed recitation of reasons and causes for the cancellation in the notice document is beyond this Court’s jurisdiction.” Id. at 8.

Similarly, the GMHA Procurement Rules and Regulations require only that GMHA “briefly explain the reason for the cancellation,” which it did specifically by stating that there were insufficient funds for the project.

**B. The Cancellation of the Bid was in the Best Interests of the Territory**

PSA argues that the Bid was not canceled in the best interests of the Territory. However, as stated, the Procurement regulations specifically provide that a bid may be canceled when “prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds.” 2 GAR § 3115(d)(2)(A)(iv). Here, the funds allocated for the Bid were \$600,000.00. PSA was the lowest bidder with a bid of \$927,021.79. PSA’s bid greatly exceeded available funds. Therefore, the cancellation was in the best interests of the Territory.

**C. GMHA Properly Canceled the Bid Post Opening of the Bid**

**1. The solicitation of the Bid provided that the Bid is subject to cancellation**

PSA argues that GMHA did “not specify that the bid could be cancelled in the solicitation.” *See Response to Agency Report*, at 3. On the contrary, the Sealed Bid Solicitation Instructions of the IFB provided unequivocally, at Paragraph 23, page 3, that “the Hospital Administrator Shall have the authority to award, **cancel**, or reject bids, in whole or in part for any one or more items if he determines it is in the public interest . . .” (emphasis added).

**2. GMHA can cancel the Bid after opening**

PSA argues that GMHA cannot “cancel” the bid after the opening; rather, GMHA can only “reject all bids” after the opening of the bid. *Response to Agency Report*, at p. 7. PSA is clearly confusing the issue and is not “seeing the forest through the trees.” In the J&B case, the Airport Authority issued an invitation for bid. J&B, *supra*, at 1.

Several bids were received and *after the bids were opened*, but prior to the award of any contract under the IFB, GIAA *cancel*ed the IFB. *Id.* The Guam Superior Court held that:

Section 3115(d)(2) of the Guam Procurement Regulations dictates the procedure by which a solicitation may be cancelled after bid opening by prior to award, as in this instance; and it allows . . . the purchasing agency [] to cancel the solicitation by rejecting all of the bids, if doing so is ‘**in the territory’s best interest.**’ The Procurement Regulations expressly recognize that *canceling a bid* due to ‘ambiguous or otherwise inadequate specifications,’ as was the case here, satisfies the “best interest” requirement.

Citing 2 GAR § 3115(d)(2)(A)(ii) (some emphasis added).

As the court stated in J&B, the Procurement Regulations expressly recognize that *canceling a bid* is proper when the purchasing agency finds it satisfies the “best interest” requirement. Moreover, the statute cited by the court in J&B also authorizes *canceling the bid* when “prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds.” 2 GAR § 3115(d)(2)(A)(iv). The court in J&B does not place significance on the distinction between canceling the bid and rejecting all bids; moreover, the court upheld the purchasing agency’s decision to **cancel the bid** and even used the same language. Thus, there is not a meaningful distinction between the cancellation of bid and a rejection of the bid.

Further, the title of the Procurement Regulation statute cited above, which authorizes the cancellation of the solicitation, is “**Cancellation of Solicitation: Rejection of All Bids or Proposals.**” 2 GAR. § 3115(d). This illustrates that they are one in the same. Therefore, according the Procurement Regulations, as confirmed by the court in

J&B, there is no distinction between the cancellation of a bid and rejection of a bid. Rather, the cancellation of a solicitation occurs simply when all bids are rejected.

In the alternative, if the OPA should find, for whatever reason, that there is a distinction between the cancellation of a bid and the rejection of a bid, PSA has failed to allege any prejudice from the alleged improper cancellation. PSA has not claimed any loss or rights or any harm from the canceling of the Bid after the opening. Thus, PSA's argument is without merit because in order "to prevail in a protest, the protestor must show not only a significant error in the procurement process, but also that the error prejudiced it." J&B, *supra*, at 4 (citing Data General Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed. Cir. 1996)).

**D. Adjusting the Quantities**

PSA argues that upon cancellation of a bid for insufficient funds, GMHA is required to "explain or state why 'it would not be appropriate to adjust quantities to come within available funds' as mandated by 26 GAR § 16316(d)(2)(A)(4)." *Response to Agency Report*, at p. 5.

**1. GMHA need not explain why it cannot "Adjust Quantities"**

As stated, the Procurement Regulations provide that a purchasing agency may cancel the solicitation when "prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds." 2 GAR § 3115(d)(2)(A)(iv). In J&B, the court emphasized that while the Procurement Regulations required the purchasing agency to "briefly explain the reason for cancellation . . . No

statute or rule requires any further discussion of the matter in such notice of cancellation.” J&B, *supra*, at 6. The court found that the provision “does not state that cogent or compelling reasons must be given to the disappointed bidders – it **merely states, as a matter of policy, that there exist such reasons.**” *Id.* (italic in original, bold supplied).

Similar to the notice provision analyzed by the J&B court, no where in the Procurement Regulations do not mandate the purchasing agency to **state or further discuss and justify** its decision not to adjust the quantities to come within available funds.

**2. GMHA cannot “Adjust Quantities” for the Bid**

In the alternative, it would clearly have been inappropriate to the “adjust quantities” of the services requested in the instant Bid. Specifically, the “General Terms and Conditions” of the Bid Invitation, at paragraph 7, indicates that GMHA is “requesting all of the bid items to be bidded or none at all. The Government will not award on an itemized basis.”

Furthermore, it is not feasible to adjust the quantities for the Bid. The Bid was for the removal and replacement of the entire fire alarm system for GMHA. The fire alarm system must remain operational to protect the entire environment and this system can only be constructed in its entirety to do so. Finally, great cost is incurred in marginalizing the system to work as one functioning unit.

**E. GMHA Properly Secured Funding for the Bid**

Prior to the time of the opening of the Bid, GMHA had no reason to suspect that the available funds were insufficient for the performance of the Bid. The Bid was



federally-funded; and GMHA conducted the necessary procedures to determine the funds required for the Bid. Due to GMHA's extremely tight budget, it cannot now shift money from another source to make up for the insufficient funds. Therefore, GMHA did not fail to adequately secure funding before the Bid Invitation.

**F. GMHA'S Cancellation of the Bid was in Good Faith**

PSA maintains that GMHA's cancellation of the bid was not conducted in good faith because GMHA did not provide any "evidence showing the existence of funding at the time of the Bid Invitation coupled with GMHA's failure to offer any explanation for the lack of funds or proffer any reason why 'it would not be appropriate to adjust quantities to come within available funds.'" *Response to Agency Report*, at p. 7.

PSA has not properly alleged any bad faith by GMHA in canceling the solicitation. First, the GMHA's Procurement Regulations and the GAR do not require GMHA to explain why there is a lack of funds or to provide evidence showing the existence of funding at the time of the Bid Invitation in order to properly cancel the solicitation.

**II.**

**PSA WOULD NOT HAVE BEEN AWARDED THE BID IF  
THE BID WAS NOT CANCELED**

As stated, "to prevail in a protest the protestor must show not only a significant error in the procurement process, but also that the error prejudiced it . . . To demonstrate prejudice, 'the protestor must show that there was a substantial chance it

would have received the contract award but for that error.”” J&B, supra, at 5 (quoting Alfa Laval Separation Inc. v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (other citations omitted)). Guam Procurement Laws and Regulations require that a successful bidder be the lowest bidder and be responsive bidder. 5 G.C.A. § 5211(g) and 2 GAR § 3109(n)(1). PSA was not a *responsive* bidder, because it failed acknowledge the bid invitation cover sheet and failed to submit a resume of a Master Electrician or Professional Engineer, which was required to be submitted along with the sealed bid package. Therefore, even if GMHA, had improperly canceled the Bid, PSA cannot show that it was entitled to win the Bid.

#### CONCLUSION

The cancellation of the Bid was not arbitrary or capricious; and therefore, PSA’s appeal should be denied.

Dated this 19<sup>th</sup> day of February, 2008.

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