



OFFICE OF THE PUBLIC AUDITOR

**PROCUREMENT APPEALS**

IN THE APPEAL OF,  
PACIFIC SECURITY ALARM, INC.,  
Appellant

**APPEAL NO: OPA-PA-07-009**

**FINDINGS AND RECOMMENDATIONS  
OF HEARING OFFICER**

**I. INTRODUCTION**

This is the Finding of the Hearing Officer, ANTHONY R. CAMACHO, ESQ., on an appeal filed on November 16, 2007, by Pacific Security Alarm, Inc., (Hereafter "PSA") regarding the Guam Memorial Hospital Authority's (Hereafter "GMHA") denial of PSA's protest of GMHA's August 7, 2007, cancellation of GMHA Bid No. 023-2007 (For GMHA Removal & Replacement of Fire Alarm System Project) (Hereafter "IFB").

The Hearing Officer recommends that the Public Auditor hold that GMHA's August 7, 2007, cancellation of the IFB is void. Accordingly, the Hearing Officer recommends that PSA's November 16, 2007, appeal be sustained.

**II. FINDING OF FACT**

These Findings are based on the Procurement Record, all documents submitted by the parties in the appeal, as well as all testimony and arguments presented at the February 21, 2008, and March 24, 2008, Hearings on this matter.

1. GMHA Bid No. 023-2007 solicited bids from contractors to remove GMHA's existing fire alarm system and replace it with a new fire alarm system.

2. The IFB's Bid Invitation states, in relevant part: "The Authority [GMHA] reserves the unqualified right, in its sole and absolute discretion, to reject any and all bids, or to waive a

1 minor informality in any Bid and accept that Bid or combination of Bids, if any, which in its sole  
2 and absolute judgment will under all circumstances best serve GMHA's interests."

3 3. Paragraph 23, page 3, of the IFB's General Terms and Conditions was marked so that  
4 it applied to the IFB and said paragraph states, in relevant part: "The Hospital Administrator  
5 shall have the authority to award, cancel, or reject bids, in whole or in part for any one or more  
6 items if he determines it is in the public interest."

7 4. Paragraph V.B., page 9, of the IFB's Instructions to Bidders states, in relevant part:  
8 "GMHA reserves the unqualified right, in its sole and absolute discretion, to reject any and all  
9 Bids, or to accept that Bid or combination of Bids, if any, which in its sole and absolute  
10 judgment will under all circumstances best serve GMHA's interests."

11 5. The deadline for bidders to submit bids in response to the IFB was at 1:30 P.M. on  
12 July 13, 2007.<sup>1</sup>

13 6. Two (2) bidders submitted bids in response to the IFB. The bids were publicly opened  
14 at 2:00 P.M. on July 13, 2007, the first bid opened was from Kevin & Steve Corporation, whose  
15 total bid price was \$996,000.00, and the second bid opened was from PSA, whose total bid price  
16 was \$927,021.79.<sup>2</sup>

17 7. On or about July 30, 2007, the bids were evaluated by GMHA's Facilities  
18 Maintenance Department Evaluation Committee, which recommended, to GMHA's Materials  
19 Management Administrator, Daniel C. Matanane, canceling the IFB due to various discrepancies  
20 in both bids and due to insufficient funds to execute the project.<sup>3</sup>

21 8. On or about July 31, 2007, GMHA's Materials Management Administrator, Daniel C.  
22 Matanane, made a recommendation to GMHA's Hospital Administrator, PeterJohn D. Camacho,  
23 that the IFB be cancelled pursuant to 26 G.A.R., Div. 2, Chap. 16, §16316(c), because prices  
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25 <sup>1</sup> Bidders Register, IFB.

26 <sup>2</sup> Abstract of Bids, IFB.

27 <sup>3</sup> PSA Exhibit 5, Letter from Craig T. Guevara to GMHA Materials Management Administrator dated July 30,  
28 2007.

1 exceed available funds and it would not be appropriate to adjust quantities to come within  
2 available funds.<sup>4</sup>

3 9. On or about August 7, 2007, GMHA Hospital Administrator PeterJohn D. Camacho  
4 canceled the IFB due to insufficient funds.<sup>5</sup>

5 10. On or about August 9, 2007, GMHA provided PSA notice of the cancellation of the  
6 IFB and said notice was received by PSA.<sup>6</sup>

7 11. On or about August 22, 2007, thirteen (13) days after PSA received notice of the  
8 cancellation of the IFB, PSA protested the cancellation of the IFB.<sup>7</sup> PSA argued that  
9 cancellation after publicly opening the bids was unfair and requesting that GMHA rescind the  
10 cancellation.

11 12. On or about November 1, 2007, GMHA denied PSA's August 22, 2007, protest  
12 finding, in relevant part, that GMHA's Procurement Rules and Regulations permit cancellation  
13 of a solicitation after bids have been opened but prior to award of a contract and that GMHA  
14 properly cancelled the IFB because it did not have sufficient funding.<sup>8</sup>

15 13. On or about November 1, 2007, PSA received GMHA's denial of their August 22,  
16 2007, protest.<sup>9</sup>

17 14. On or about November 16, 2007, fifteen (15) days after receiving GMHA's denial of  
18 its protest, PSA filed this appeal arguing the inherent unfairness of canceling the IFB after  
19 opening the bids and that GMHA failed to follow its procurement regulations.<sup>10</sup>

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21 <sup>4</sup> PSA Exhibit No. 6, Letter from Daniel C. Matanane to PeterJohn D. Camacho dated July 31, 2007.

22 <sup>5</sup> PSA Exhibit No. 7, Bid Status dated August 7, 2007.

23 <sup>6</sup> GMHA FAX Confirmation Letter addressed to PSA dated August 9, 2007, Agency Procurement Record, and  
24 GMHA's Agency Report, page 2.

25 <sup>7</sup> PSA Protest Letter dated August 23, 2007 received by GMHA on August 22, 2007, Agency Procurement Record.

26 <sup>8</sup> Letter from PeterJohn D. Camacho to Lee Palmer dated November 1, 2007, Agency Procurement Record.

27 <sup>9</sup> GMHA FAX Confirmation Letter addressed to PSA dated November 1, 2007, Agency Procurement Record.

28 <sup>10</sup> PSA Appeal.

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### III. ANALYSIS

#### A. PSA's August 23, 2007, Protest was timely.

GMHA argues that PSA's Protest was not timely because it cancelled the IFB on August 7, 2007, and PSA's protest was filed sixteen (16) days later on August 23, 2007.<sup>11</sup> A procurement protest shall be submitted in writing within fourteen (14) days after an aggrieved person either knows or should know of the facts giving rise thereto. 5 G.C.A. §5425(a) and 26 G.A.R., Div. 2, §16901(c)(1). Here, although GMHA cancelled the bid on August 7, 2007, GMHA admits that PSA did not receive notice of the cancellation until August 9, 2007.<sup>12</sup> Further, although PSA's Protest is dated August 23, 2007, GMHA's stamp clearly shows that GMHA received the protest on August 22, 2007. The Hearing Officer recommends that the Public Auditor find that there is no merit to GMHA's argument that PSA's Protest was untimely, because August 9, 2007, was the earliest date PSA became aware of GMHA's cancellation of the IFB and PSA filed their protest fourteen (14) days later on August 22, 2007.

#### B. GMHA's cancellation of the IFB violated GMHA's Procurement Regulations

GMHA's cancellation of the IFB after opening of the bids is not in accordance with GMHA's Procurement Regulations. GMHA is exempted from the Government of Guam's centralized procurement regime and its procurement is governed by its own procurement regulations, and, to the maximum extent practicable, Guam's Procurement Law. See 5 G.C.A. §5030(k) and §5125. Further, the Supreme Court of Guam has ruled that GMHA's procurement activities are governed by GMHA's Procurement Regulations and Guam's Procurement Law, unless a conflict exists between the two, in which case, Guam's Procurement Law prevails. *Guam Imaging Consultants, Inc., v. Guam Memorial Hospital Authority*, 2004 Guam 15 at ¶22.

Guam's Procurement Law states that an Invitation for Bids (IFB) may be cancelled, or any or all bids may be rejected in whole or in part as may be specified in the solicitation, when it

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<sup>11</sup> GMHA's Agency Report, page 2.

<sup>12</sup> *Id.*

1 is in the best interests of the Territory in accordance with regulations. 5 G.C.A. §5225. The first  
2 step of the analysis is to determine if GMHA cancelled the bid in accordance with the IFB's  
3 terms and conditions. Here, the IFB gives the Hospital Administrator the authority to: "award,  
4 cancel, or reject bids, in whole or in part for any one or more items if he determines it is in the  
5 public interest."<sup>13</sup> Thus, the Hearing Officer recommends that the Public Auditor find that,  
6 pursuant to the IFB's terms and conditions, the Hospital Administrator for GMHA had the  
7 authority to cancel the IFB if it was in the public interest.

8 On August 7, 2007, it was in the public's interest to cancel the IFB. GMHA cancelled  
9 the IFB due to insufficient funding for the project. Specifically, GMHA budgeted six-hundred-  
10 thousand dollars (\$600,000) for the project and the bids received were well in excess of that  
11 amount, PSA's bid was for \$927,021.79, and Kevin & Steve Corporation's bid was for  
12 \$996,000.00.<sup>14</sup> Although evidence presented in the hearing in this matter showed GMHA did  
13 receive additional funding for the project in late 2007, there is no question that on the August 7,  
14 2007, GMHA did not have sufficient funds to accept either of the bids it received. The Hearing  
15 Officer recommends that the Public Auditor find that GMHA's August 7, 2007, cancellation of  
16 the IFB was in the public interest because it is a compelling public interest that GMHA be able to  
17 satisfy its contractual obligations.

18 The Public Auditor should not be convinced by PSA's argument that GMHA acted in bad  
19 faith by canceling the IFB without explaining the lack of funding or offering a reason why it  
20 would not be appropriate to adjust quantities to come within available funds. Generally, all  
21 parties involved in the negotiation, performance, or administration of Government of Guam  
22 contracts must act in good faith. 5 G.C.A. §5003. Here, it is clear that at the time the IFB was  
23 cancelled, the bid prices were in excess of the amount GMHA had budgeted for the project.  
24 Further, GMHA explained that it is not feasible to adjust the quantities for the project because  
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27 <sup>13</sup> Paragraph 23, page 3, IFB General Terms and Conditions.

28 <sup>14</sup> PSA Exhibit 3, GMHA Requisition, and Abstract of Bids, Procurement Record.

1 they desire to remove and replace their entire fire alarm system in one project and at one time.<sup>15</sup>

2 The Hearing Officer recommends that the Public Auditor find that GMHA acted in good faith in  
3 canceling the IFB on August 7, 2007, and that GMHA's explanations as to why it is not feasible  
4 to adjust the quantities for the project are reasonable.

5 The second step of the analysis is to determine whether the cancellation was in  
6 accordance with GMHA's Procurement Regulations. GMHA's Procurement Regulations  
7 distinguish between the cancellation of an IFB and the rejection of all proposals. A cancellation  
8 of an IFB can only occur prior to the opening of the bids. 26 G.A.R., Div. 2, §16316(d)(1)(B).  
9 A rejection of all bids can only occur after opening of the bids, but prior to award. 26 G.A.R.,  
10 Div. 2, §16316(d)(2)(A). There is no question that GMHA cancelled the IFB after the opening  
11 of the bids. It is important to note that the form used by GMHA to cancel the IFB closely  
12 follows the language of the two aforementioned regulations, and that the blocks for canceling the  
13 IFB were checked instead of the boxes for rejection all bids. Interestingly, had the correct  
14 rejection boxes been checked instead of the impermissible cancellation boxes, the outcome of  
15 this issue may have been different. Thus, the Hearing Officer recommends that the Public  
16 Auditor find that GMHA's cancellation of the IFB after bid opening is not in accordance with  
17 GMHA's Procurement Regulations.

18 The Public Auditor should not be convinced by GMHA's argument that there is no  
19 meaningful distinction between the cancellation and rejection of a bid. As stated above, Guam's  
20 Procurement Law mandates that a cancellation of an IFB be in accordance with regulations. 5  
21 G.C.A. §5225. Further, as stated above, GMHA's Procurement Regulations clearly distinguish  
22 separate time frames for a cancellation and rejections of bids. Thus, the Hearing Officer  
23 recommends that the Public Auditor find that this argument has no merit because pursuant to  
24 GMHA Procurement Regulations, there is a significant difference between cancellations and  
25 rejections of bids in that cancellations are limited to the period prior to bid opening, and  
26 rejections of bids are limited to the period after bid opening, but prior to award.

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28 <sup>15</sup> Apellee's Hearing Brief, page 8.

1 The Public Auditor should also not be convinced by GMHA's argument that the rule in  
2 *J& B Modern Tech v. GIAA*, CV0732-06 (Superior Court of Guam) should control this issue.  
3 The rule in *J& B Modern Tech v. GIAA* is distinguishable from this matter because the rule in that  
4 case concerns whether boxes checked on a standard form, such as GMHA's August 7, 2007, Bid  
5 Status Form which cancelled the IFB, are sufficient notice of the reasons for cancellation, and  
6 the Court in that case did not decide whether a purchasing agency can cancel an IFB after the  
7 opening of bids which is the issue here. Thus, the Hearing Officer recommends that the Public  
8 Auditor find that *J& B Modern Tech v. GIAA*, CV0732-06 (Superior Court of Guam) is  
9 distinguishable from this case.

10 Finally, the Public Auditor should not be convinced by GMHA's argument that PSA is  
11 not prejudiced by an improper cancellation of the IFB. PSA's bid was publicly opened and is  
12 now a public record and PSA suffers prejudice because it will be at a substantial competitive  
13 disadvantage when GMHA re-solicits the project. Further, PSA was the lowest bidder and had a  
14 greater chance of being awarded the contract and is prejudiced by the improper cancellation of  
15 the IFB. Thus, the Hearing Officer recommends that the Public Auditor find that PSA was  
16 prejudiced by the improper cancellation of the IFB.

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18 **C. GMHA's August 7, 2007, cancellation of the IFB is void.**

19 GMHA's August 7, 2007, cancellation of the IFB is void. If prior to award it is  
20 determined that a solicitation of a contract is in violation of law, then the solicitation shall be  
21 revised to comply with the law. 5 G.C.A. §5441(b). Here, voiding the cancellation will revise  
22 the solicitation to comply with the law. Pursuant to GMHA's Procurement Regulations, GMHA  
23 has the following options: (1) Award the contract to the lowest responsive bidder; or (2) Reject  
24 all or some of the bidders as being non-responsive in accordance with Procurement Law and  
25 GMHA Procurement Regulations; or (3) Reject all bids in accordance with GMHA's  
26 Procurement regulations. (However, based on the evidence of additional funding, GMHA  
27 probably could not use insufficient funds as a legitimate reason for rejecting all the bids at this  
28 time).

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2 **IV. CONCLUSION**

3 Based on the foregoing, the Hearing Officer recommends that the Public Auditor  
4 determine the following:

- 5 1. PSA's August 22, 2007, Protest was timely.  
6 2. GMHA's August 7, 2007, cancellation of the IFB was not in accordance with  
7 GMHA's Procurement Regulations.  
8 3. PSA's Appeal is hereby sustained.  
9 4. GMHA's August 7, 2007, cancellation of the IFB is void.

10 A copy of this Finding shall be provided to the parties and their respective attorneys, in  
11 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website  
12 [www.guamopa.org](http://www.guamopa.org).

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14 **DATED** this 11<sup>th</sup> day of April, 2008.

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20 ANTHONY R. CAMACHO, ESQ.  
21 Hearing Officer, Office of the Public Auditor  
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