



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,
PACIFIC DATA SYSTEMS, INC.

Appellant

APPEAL NO: OPA-PA-10-005

DECISION

I. INTRODUCTION

This is the Decision of the Public Auditor for an appeal filed on October 12, 2010, by PACIFIC DATA SYSTEMS, INC., (Hereafter "PDS") regarding the GUAM COMMUNITY COLLEGE, Government of Guam's (Hereafter "GCC") October 5, 2010 denial of PDS's August 3, 2010, protest concerning GCC's solicitation of Invitation for Bid No. GCC-FB-10-015 Voice Over-Internet Protocol (VoIP) Telephone System Project (Hereafter "IFB"). The Public Auditor holds that GCC erroneously deemed Interested Party TELEGUAM HOLDINGS LLC, dba GTA TELEGUAM's (Hereafter "GTA") bid to be responsive to the IFB after GTA failed to include a valid Major Shareholder's Affidavit at the time GTA submitted its bid. Accordingly, PDS's appeal is GRANTED.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, pursuant to PDS' November 29, 2010 Withdrawal of Request for Hearing. Additionally, the Public Auditor has considered and incorporated herein all testimony and arguments presented at the November 23, 2010 Hearing on

Decision- 1

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1 the PDS's Motion to Compel GCC to Provide Complete Agency Report. Anthony R. Camacho,
2 Esq. served as the Office of Public Accountability's Hearing Officer at said Hearing. Based on
3 the aforementioned record in this matter, the Public Auditor makes the following findings of
4 fact:

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6 1. On or about May 3, 2010, GCC issued the IFB.¹

7 2. The IFB required bidders to submit an Affidavit of Disclosure of Major Shareholders
8 with their bids. Specifically, the IFB required that such affidavits:

9 a. Be notarized and dated on the same month as the bid opening and the date of
10 the signature of the person authorized to sign the bid and the notary date must be the same.²

11 b. Be submitted by all bidders in accordance with the requirements of Public Law
12 18-44 and that failure to do so will mean disqualification and rejection of the bids.³

13 c. Be substantially in the same format as the example Major Shareholders
14 Disclosure Affidavit included in the IFB.⁴

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17 3. The IFB set the original deadline for submission of bids at 10:00 a.m. on May 19,
18 2010.⁵ On or about May 12, 2010, GCC extended the deadline to 10:00 a.m. on May 26, 2010.⁶

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21 ¹ Bid Invitation, Tab 2, Procurement Record filed on October 19, 2010.

22 ² Special Reminder to Prospective Bidders, Id.

23 ³ Special Provision for Major Shareholders Disclosure Affidavit, Id. NOTE:

24 This part of the IFB quotes Section 44 of Public Law 18-44 which is now
25 codified as 5 G.C.A. §5233. There is no substantial difference in the
26 language in this part of the IFB and 5 G.C.A. §5233.

27 ⁴ Major Shareholders Disclosure Affidavit, Id.

28 ⁵ Bid Invitation, Id.

⁶ Amendment No. 1, Tab 4A, Id.

1 On or about May 25, 2010, GCC extended the deadline to 10:00 a.m. on June 10, 2010.⁷

2 4. On June 10, 2010, GCC received bids responding to the IFB from PDS, GTA, and
3 IT&E (Hereafter "ITE").⁸

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5 5. GTA submitted a Major Shareholders Disclosure Affidavit with its bid. GTA filled
6 out the blanks in the example Major Shareholders Disclosure Affidavit included in the IFB and
7 said Affidavit disclosed that the persons holding more than ten percent (10%) of the company's
8 shares were: "TeleGuam Holdings, LLC," whose address was: "624 N Marine Corps Drive,
9 Tamuning, Guam, 96913," and whose percentage of shares held was: "100%."⁹ The Affidavit
10 was signed on June 3, 2010 by John J. Kim, GTA's Controller, and his signature was notarized
11 that same day.¹⁰

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13 6. PDS also submitted a Major Shareholders Disclosure Affidavit with its bid. PDS also
14 filled out the blanks in the example Major Shareholders Disclosure Affidavit included in the IFB
15 and said Affidavit disclosed that the persons holding more than ten percent (10%) of the
16 company's shares were: "Pacific Systems Corporation," whose address was: "2nd Floor, Tan
17 Marikita Bldg., PMB 236, Box 10000, Saipan, MP, 96910," and whose percentage of shares held
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21 ⁷ Page 3, Amendment No. 5, Tab 4E, Id.

22 ⁸ Bid Abstract, Tab 6, Id. NOTE: Said Bid Abstract states that the date was
23 May 26, 2010, however, it was signed by the persons opening the bids and
24 witnessing the opening on June 10, 2010. The Public Auditor finds that the
25 date of the bid opening for the IFB was June 10, 2010 based on said dated
26 signatures and Amendment Nos. 1 and 5 of the IFB.

27 ⁹ GTA's Major Shareholders Disclosure Affidavit, Section 2, Government
28 Documents, GTA's Bid, Tab 7, Procurement Record filed on October 19, 2010.

¹⁰ Id.

1 was: "99%."¹¹ The Affidavit was signed on June 7, 2010 by John Day, and his signature was
2 notarized that same day.¹²

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4 7. ITE also submitted a Major Shareholders Disclosure Affidavit with its bid. ITE also
5 filled out the blanks in the example Major Shareholders Disclosure Affidavit included in the IFB
6 and said Affidavit disclosed that the persons holding more than ten percent (10%) of the
7 company's shares were: "Micronesian Telecommunications, Corp.," whose address was: "P.O.
8 Box 500306, Saipan, MP, 96950," and whose percentage of shares held was: "100%."¹³ The
9 Affidavit was signed on June 9, 2010 by Jovino G. Lorenzo, Jr., and his signature was notarized
10 that same day.
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12 8. On June 23, 2010, GCC completed its evaluation of the bids and recommended GTA's
13 "Avaya" System Bid for award based on its price.¹⁴

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15 9. On July 27, 2010, GCC issued a Notice of Intent to Award the Contract for the IFB to
16 GTA.¹⁵

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20 ¹¹ PDS' Major Shareholders Disclosure Affidavit, Section 1, Affidavits and
21 Forms, PDS Bid, Tab 7, Procurement Record filed on October 19, 2010.

22 ¹² Id.

23 ¹³ ITE's Major Shareholders Disclosure Affidavit, Appendix C Other/Required
24 Bid Documents, ITE's Bid, Tab 7, Procurement Record filed on October 19,
25 2010.

26 ¹⁴ VoIP Evaluation Summary dated June 23, 2010, Tab 8, Procurement Record
27 filed on October 19, 2010.

28 ¹⁵ Notice of Intent to Award dated July 17, 2010, Tab 9, Procurement Record
filed on October 19, 2010.

1 10. On July 28, 2010, PDS received GCC's Notice of Intent to Award.¹⁶

2 11. On August 3, 2010, five (5) days later, PDS filed its Protest concerning GCC's Intent
3 to Award the IFB's Contract to GTA arguing that GTA's bid must be disqualified for four (4)
4 reasons.¹⁷ These reasons were that GTA's bid bond, Major Shareholder's Disclosure Affidavit,
5 Non-Collusion Affidavit, and Representations regarding Ethics in Public Procurement did not
6 conform to the IFB's requirements.¹⁸ PDS also provided GCC with documents GTA filed with
7 the Federal Communications Commission (FCC) indicating that on or about September 24, 2004,
8 Shamrock TeleGuam Holdings, LLC directly owned and controlled 87.27% of GTA, and that the
9 remaining 12.73% was owned by Robert Taylor, or was being held for the future benefit of
10 Robert Taylor and other members of GTA's management team.¹⁹

11 12. On September 17, 2010, GCC responded to PDS' Protest by stating that GTA's Bid
12 Bond and Non-Collusion Affidavit substantially conformed to the IFB's requirements, and GCC
13 denied that GTA was required to submit an affidavit to show compliance with Ethics laws and
14 regulations governing Public Procurement.²⁰ Further, GCC stated that GTA's Major Shareholder
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16 ¹⁶ Notice of Intent to Award dated July 27, 2010, Exhibit 2, Procurement
17 Appeal filed on October 12, 2010.

18 ¹⁷ PDS' Protest dated August 3, 2010, Exhibit 3, Procurement Appeal filed on
19 October 12, 2010.

20 ¹⁸ Id.

21 ¹⁹ Page 2, Domestic Section 214 Application filed for transfer of control of
22 the Guam Telephone Authority to TeleGuam Holdings, LLC, WC Docket No. 04-382
23 (FCC, September 24, 2004), Exhibit E, Id.

24 ²⁰ Letter from Sarah A. Strock, Esq., to John Day dated September 17, 2010,
25 Exhibit 4, Id.

1 Disclosure Affidavit substantially complies with Guam Law, however, GCC acknowledged that
2 this issue required further inquiry to determine whether GTA was a responsive bidder.²¹ Finally,
3 GCC acknowledged that its September 17, 2010 letter to PDS was not a denial of PDS' Protest
4 and that GCC would give a formal decision to said protest after GTA responded to GCC's
5 responsibility inquiry.²²

7 13. On or about September 24, 2010, GCC conducted a responsibility inquiry on GTA
8 pursuant to 2 G.A.R., Div. 4, Chap. 3, §3116(b)(2)(B), and said inquiry consisted of GCC
9 requesting documents from GTA concerning GTA's responsibility as an bidder.²³

11 14. On or about September 30, 2010, GTA responded to GCC's responsibility inquiry, in
12 relevant part, by providing GCC with a second Major Shareholder's Disclosure Affidavit, which
13 indicated that Shamrock Capital Advisors owned 60% and that GE Asset Management, Inc.
14 owned 29% of GTA's shares for the past twelve months.²⁴

16 15. On October 5, 2010, GCC denied PDS' August 3, 2010 protest, stating that GTA's
17 Bid Bond substantially conformed to the IFB's Bid Bond requirements and that GTA's Bid
18 Bond, and Non-Collusion Affidavit substantially conformed to the IFB's requirements, and GCC
19 denied that GTA was required to submit an affidavit to show compliance with Ethics laws and
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21 ²¹ Id. Page 3.

22 ²² Id. Page 4.

23 ²³ Id., and Page 4, GCC's Denial of PDS' August 3, 2010 Protest, Exhibit C,
24 Agency Report filed on October 26, 2010, and Letter from Jennifer Sgambelluri
25 to Carmen K. Santos dated September 30, 2010, Exhibit A, Id.

26 ²⁴ Id., and GTA's Major Shareholder's Disclosure Affidavit dated September 30,
27 2010 attached to Letter from Jennifer Sgambelluri to Carmen K. Santos dated
28 September 30, 2010, Exhibit A, Id.

1 regulations governing Public Procurement.²⁵ Concerning GTA's Major Shareholder's
2 Disclosure Affidavit, GCC admitted that GTA's original Major Shareholders Disclosure
3 Affidavit stated that TeleGuam Holdings, LLC owns 100% of TeleGuam Holdings, LLC and
4 that this issue required further inquiry by GCC.²⁶ However, GCC found that GTA's failure to
5 provide all required information relating to responsibility in the IFB was not fatal and that
6 information requested in IFBs can be supplemented after the submission of the bid to cure
7 shortcomings in bid submissions pursuant to 2 G.A.R., Div. 4, Chap. 3, §3116(b)(3) and that
8 GTA's September 30, 2010 Major Shareholder's Disclosure Affidavit sufficiently ensured
9 GTA's responsibility pursuant to 2 G.A.R., Div. 4, Chap. 3, §3116(b)(3) and (2)(B) and cured
10 GTA's initial failure to submit a valid Major Shareholder's Disclosure Affidavit with its bid.²⁷
11 Accordingly, GCC denied PDS' August 3, 2010 Protest.²⁸

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14 16. On October 7, 2010, GCC awarded the IFB to GTA.²⁹ However, GCC did not issue
15 a Purchase Order to GTA and GTA did not provide any services to GCC under the contract.³⁰

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17 17. On October 12, 2010, seven (7) days after GCC denied its August 3, 2010 Protest,
18 PDS filed this appeal. However, PDS limited its appeal to the issue of whether GTA's bid was
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21 ²⁵ GCC's Denial of PDS' August 3, 2010 Protest, Exhibit C, Agency Report filed
22 on October 26, 2010.

23 ²⁶ Page 3, Id.

24 ²⁷ Page 4, Id.

25 ²⁸ Page 5, Id.

26 ²⁹ Notice of Bid Award dated October 7, 2010, Tab 12, Procurement Record filed
27 on October 19, 2010.

28 ³⁰ Letter from Mary A.Y. Okada to Sarah Strock, Esq., dated January 6, 2011
made in response to OPA's Inquiry Re GTA Purchase Order.

1 responsive due to GTA's failure to submit a valid Major Shareholders Affidavit at the time the
2 bids were received.

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5 **III. ANALYSIS**

6 **A. GTA Submitted a False Major Shareholder Disclosure Affidavit With Its Bid.**

7 GTA submitted a false Major Shareholders Disclosure Affidavit with its bid on June 10,
8 2010. As a condition of bidding, any partnership, sole proprietorship, or corporation doing
9 business with the Government of Guam shall submit an affidavit executed under oath that lists
10 the name and address of any person who has held more than ten percent (10%) of the outstanding
11 interest or shares in said partnership, sole proprietorship, or corporation, at any time during the
12 twelve (12) month period immediately preceding submission of the bid and such affidavit shall
13 contain the number of shares or the percentage of assets of such partnership, sole proprietorship,
14 or corporation which have held by each such person during the twelve (12) month period. 5
15 G.C.A. §5233 and 2 G.A.R., Div. 4, Chap. 3, §3109(e)(3)(E).³¹ GTA's June 3, 2010 Major
16 Shareholder's Disclosure Affidavit did not comply with this requirement. As stated above, the
17 Major Shareholder's Disclosure Affidavit GTA submitted with its bid on June 10, 2010 stated
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21 ³¹ Generally, Guam Community College (GCC) is exempt from the centralized
22 procurement regime created by 5 G.C.A. §5120, but is governed by Articles 1,
23 3, 6, 7, 10, 11, and 12 of Guam's Procurement Law. 5 G.C.A. §5125.
24 Further, although GCC is authorized to promulgate its own procurement
25 regulations pursuant to 5 G.C.A. §5131, GCC has adapted Guam's Procurement
26 Regulations as its procurement regulations. See GCC Procurement Policy No.
27 228 adopted on August 2, 2010 pursuant to GCC Board of Trustee Resolution No.
28 9-2010.

1 that 100% of GTA's shares were owned by itself, as TeleGuam Holdings, LLC, dba GTA
2 TeleGuam. GTA readily admits that its major shareholders are Shamrock Capital Advisors and
3 GE Asset Management, Inc.³² Further, GTA's September 30, 2010 Major Shareholder's
4 Disclosure Affidavit accurately reflects GTA's members who hold a greater than 10% interest in
5 GTA. Thus, the Public Auditor finds that GTA's June 3, 2010 Major Shareholder's Disclosure
6 Affidavit was false because it did not accurately disclose who held greater than 10% interest in
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There is no merit to GTA's argument that its June 3, 2010 Major Shareholder's
Disclosure Affidavit was "technically" correct. GTA believes its Guam Business License, which
indicates that TeleGuam Holdings, LLC is licensed to do business as "TeleGuam Holdings,
LLC," validates its June 3, 2010 Major Shareholder's Disclosure Affidavit because TeleGuam
Holdings, LLC owns 100% of the "TeleGuam Holdings, LLC" named in the license. However,
this belief is misplaced. Guam Procurement Law requires bidders to disclose, in the Major
Shareholder's Disclosure Affidavit, the name and address of any person who has held more than
ten percent (10%) of the outstanding **interest or shares** (bold emphasis added) in the
partnership, sole proprietorship, or corporation submitting a bid. 5 G.C.A. §5233 and 2 G.A.R.,
Div. 4, Chap. 3, §3109(e)(3)(E). In contrast, a Guam business license is defined as the
permission granted by the Government of Guam conferring upon the licensee the right to engage
in business or to practice a trade or profession, which without such authorization or permission
would be illegal. 11 G.C.A. §70103(h). Thus, the Public Auditor finds that merely disclosing
bidders who hold a Guam Business License is not the disclosure of the persons holding more

27 ³² Page 1, GTA's Comments on Procurement Appeal and Agency Report filed on
28 November 5, 2010.

1 than ten percent (10%) of the outstanding interest or shares in the partnership, sole
2 proprietorship, or corporation submitting a bid required by 5 G.C.A. §5233 and 2 G.A.R., Div. 4,
3 Chap. 3, §3109(e)(3)(E). Further, the term “interest” as used in 5 G.C.A. §5233 and 2 G.A.R.,
4 Div. 4, Chap. 3, §3109(e)(3)(E) readily applies to GTA. GTA is a Delaware limited liability
5 company.³³ Generally, persons are admitted as members of a Delaware limited liability
6 companies at the time such companies are formed or after their formation. 6 Del.C. §18-301(a)
7 and (b). Generally, members of limited liability companies can obtain an interest in the limited
8 liability company without making a contribution to the company, and unless otherwise provided
9 in a limited liability company agreement, persons can become members of limited liability
10 companies without obtaining an interest in the limited liability company or making a
11 contribution to such company, even if such member is the sole member of the company. 6
12 Del.C. §18-301(d). The term “limited liability company interest” as used in the aforementioned
13 statute means a member’s share of the profits and losses of a limited liability company and a
14 member’s right to receive distributions of the limited liability company’s assets. 6 Del.C. §18-
15 101(8). Here, as stated in GTA’s September 30, 2010 Major Shareholder’s Disclosure Affidavit,
16 GTA’s members have clearly defined interests in GTA, specifically, Shamrock Capital Advisors
17 and GE Asset Management, Inc. have a sixty percent (60%) and twenty-nine percent (29%)
18 respective interest in GTA. Therefore, the Public Auditor finds that 5 G.C.A. §5233 and 2
19 G.A.R., Div. 4, Chap. 3, §3109(e)(3)(E) apply to GTA and GTA was required to disclose all of
20 its members who held more than a ten percent (10%) interest in GTA at the time it submitted its
21 bid on June 10, 2010.

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³³ Id.

1 **B. GTA's Bid Was Non-Responsive.**

2 As a preliminary matter, the Public Auditor must decide whether GCC's argument that
3 the Major Shareholders Disclosure Affidavit solely concerns a bidder's responsibility has merit.

4 The Major Shareholders Disclosure Affidavit is required as a **condition of bidding** (bold
5 emphasis added). 5 G.C.A. §5233. Further, as stated above, the IFB expressly required the
6 bidders to include a Major Shareholders Disclosure Affidavit complying with 5 G.C.A. §5233
7 with their bids and failure to do so would result in disqualification and rejection of the bids.

8 Based on the statutory mandate and the IFB's express and specific requirements, the Public
9 Auditor finds that GTA's failure to submit a valid Major Shareholders Disclosure Affidavit with
10 its bid puts GTA's responsiveness at issue in this matter. The Public Auditor now turns to the
11 main issue in this matter which is whether GTA's bid, which lacked a valid Major Shareholders
12 Disclosure Affidavit, was **responsive** (bold emphasis added).
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15 GTA's bid was non-responsive because GTA failed to submit a Major Shareholder's
16 Disclosure Affidavit that complied with 5 G.C.A. §5233 and 2 G.A.R., Div. 4, Chap. 3,
17 §3109(e)(3)(E) with its bid. The term "responsive bidder," as used in Guam's Procurement Law
18 and Regulations, means a person who has submitted a bid which conforms in all material
19 respects to the Invitation for Bids. 5 G.C.A. §5201(g) and 2 G.A.R., Div. 4, Chap. 1, §1106(28).
20 The IFB specifically required bidders to submit a Major Shareholders Disclosure Affidavit in
21 accordance with Public Law 18-44 (now codified as 5 G.C.A. §5233 and 2 G.A.R., Div. 4, Chap.
22 3, §3109(e)(3)(E). This was a material requirement of the IFB because the IFB set forth the
23 penalty of disqualification and rejection of the bids if a bidder failed to comply with the
24 aforementioned instruction. This material requirement complies with Guam's Procurement Law
25 which requires Major Shareholder's Disclosure Affidavits as a **condition of bidding** (bold
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1 emphasis added). 5 G.C.A. §5233 and 2 G.A.R., Div. 4, Chap. 3, §3109(e)(3)(E). The plain
2 meaning of this clear statutory language is that bidding is conditional, based on the bidder
3 disclosing persons holding more than ten percent (10%) of the bidder's ownership interest or
4 shares. Here, as set forth above, GTA's June 3, 2010 Major Shareholder's Disclosure Affidavit,
5 which was submitted with its bid, was false and did not comply with the requirements of 5
6 G.C.A. §5233 and 2 G.A.R., Div. 4, Chap. 3, §3109(e)(3)(E). Thus, the Public Auditor finds that
7 GTA's bid is non-responsive due to its failure to submit a valid Major Shareholder's Disclosure
8 Affidavit with its bid, and GTA's bid must be disqualified and rejected as required by the IFB.
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12 **C. GTA's September 30, 2010 Major Shareholders Disclosure Affidavit Must Not**
13 **Be Accepted.**

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15 There is no merit to GCC's argument that the filing of GTA's second Major
16 Shareholder's Disclosure Affidavit on September 30, 2010 cured GTA's flawed original
17 affidavit. GTA's September 30, 2010 Major Shareholders Disclosure Affidavit is a late bid
18 modification. After bid opening, no changes in bid prices or other provisions of bids prejudicial
19 to the interests of the Government of Guam or fair competition shall be permitted. 5 G.C.A.
20 §5211(f). Any modification of a bid received after the time and date set for bid opening is late.
21 2 G.A.R., Div. 4, Chap. 3, §3109(k)(1). Further, no late bid modification will be considered
22 unless received before contract award and that such modification would have been timely but for
23 the action or inaction of Government of Guam personnel serving the procurement activity. 2
24 G.A.R., Div. 4, Chap. 3, §3109(k)(2). Here, GTA's September 30, 2010 Major Shareholders
25 Disclosure Affidavit was late because it was submitted on September 30, 2010 which is three (3)
26 months and twenty (20) days after the June 10, 2010 bid opening date. Although GTA
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1 submitted its September 30, 2010 Major Shareholders Disclosure Affidavit seven (7) days prior
2 to GCC awarding the contract to GTA on October 7, 2010, there is no evidence that the GTA's
3 late submission was caused by the action or inaction of GCC's procurement personnel. In fact,
4 GTA admits that its June 3, 2010 Major Shareholders Disclosure Affidavit was a clerical mistake
5 and that once contacted by GCC, GTA understood the IFB required the disclosure of the actual
6 members of TeleGuam Holdings, LLC which GTA provided to GCC on September 30, 2010.³⁴
7 Thus, the Public Auditor finds that the exception for late bid modifications caused by
8 Government of Guam procurement personnel set forth in 2 G.A.R., Div. 4, Chap. 3, §3109(k)(2)
9 does not apply to this matter. Further, there is no merit to GTA's argument that GCC's
10 acceptance of GTA's late bid modification was not prejudicial to other bidders.³⁵ As set forth
11 above, PDS and ITE, the other two (2) bidders, submitted valid Major Shareholders Disclosure
12 Affidavits with their bids on June 10, 2010 and acceptance of GTA's late bid modification
13 clearly prejudices these responsive bidders by making GTA's non-responsive bid acceptable
14 notwithstanding its defect. Therefore, the Public Auditor finds that GTA's September 30, 2010
15 Major Shareholders Disclosure Affidavit must not be accepted because it is a late bid
16 modification prohibited by Guam Procurement Law and Regulations.

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21 GCC's argument that GTA's September 30, 2010 Major Shareholder's Disclosure
22 Affidavit can be accepted to correct a minor mistake has no merit. Minor informalities are
23 matters of form rather than substance evident from the bid document or insignificant mistakes
24 that can be waived or corrected without prejudice to other bidders, that is the effect on price,
25 quantity, quality, delivery, or contractual conditions is negligible and the Procurement Officer
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27 ³⁴ Page 2, GTA's Comments on Procurement Appeal and Agency Report.

28 ³⁵ Id.

1 shall waive such informalities or allow the bidder to correct them depending on which is in the
2 best interest of the Government of Guam. 2 G.A.R., Div. 4, Chap. 3, §3109(m)(4)(B). Here,
3 GTA's failure to submit a valid Major Shareholder's Disclosure Affidavit with its bid is a matter
4 of substance and not merely a matter of form. Specifically, as stated above, GTA's original
5 affidavit disclosed that 100% of its interest was owned by itself and the substance of this
6 disclosure was false. The false substance of GTA's original Major Shareholders Disclosure
7 Affidavit far exceeds a matter of form such as the failure to provide sufficient copies or sign bid
8 documents. Further, GTA's failure to comply with the IFB's specific requirements for the
9 content of the Major Shareholders Disclosure Affidavit is not an insignificant mistake because
10 the IFB specifically states that bidders who fail to submit valid Major Shareholders Disclosure
11 Affidavits would have their bids disqualified and rejected. Finally, to allow GTA to correct
12 their original Major Shareholders Disclosure Affidavit as a minor informality requires that
13 GCC's Procurement Officer for the IFB prepare a written determination granting the correction
14 of the minor informality. 2 G.A.R., Div. 4, Chap. 3, §3109(m)(6). A review of the procurement
15 record in this matter reveals that no such written determination was made by GCC's Procurement
16 Officer. Therefore, the Public Auditor finds that GTA's original Major Shareholder's
17 Disclosure Affidavit could not be corrected or waived as a minor informality and that GCC did
18 waive or grant correction of said original affidavit as a minor informality.

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23 The Public Auditor is unpersuaded by GTA's argument that 48 C.F.R. §14-407, which is
24 the Federal Procurement Regulations governing verification of bids, should be applied to this
25 solicitation. Where a procurement involves the expenditure of federal assistance or contract
26 funds, or other federal funds as defined by Section 20 of the Organic Act of Guam, all persons in
27 the Government of Guam shall comply with such federal law and regulations which are
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1 applicable and which may conflict with or which may not be reflected in Guam's Procurement
2 Law. 5 G.C.A. §5501. Here, the IFB states that it is issued pursuant to and subject to Guam's
3 Procurement Law and Regulations.³⁶ Thus, the IFB expressly makes Guam Procurement Law
4 and Regulations applicable to the solicitation procedures. Further, the only federal laws
5 applicable to the IFB concern federal laws the contractor awarded the IFB would be required to
6 comply with. The IFB contains a general and broad requirement the bidder awarded the
7 contract must comply with the applicable standards, provisions, and stipulations of all pertinent
8 Federal and local laws, rules, and regulations relative to the performance of this contract and
9 furnishing of goods.³⁷ Further, the IFB states that because the IFB concerns a Federally Funded
10 Project, that the bidder awarded the contract is required to comply with the Federal Davis Bacon
11 and Related Acts which require all contractors and subcontractors performing work on federal
12 constructions projects or federally assisted contracts in excess of \$2,000 to pay their laborers and
13 mechanics not less than the prevailing wage rates and fringe benefits for such work determined
14 by the U.S. Secretary of Labor.³⁸ Thus, pursuant to the express terms of the IFB, the Public
15 Auditor finds that Guam Procurement Law and Regulations govern the IFB's solicitation
16 procedures and 48 C. F. R. §14-407 is not applicable.
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21 ³⁶ Paragraph 1, General Terms and Conditions, IFB, Procurement Record filed on
22 October 19, 2010. NOTE: Although the IFB cites the old Government Code
23 sections embodying Guam's Procurement Law (Title VII-A, Government Code),
24 said Procurement Law sections are now codified in 5 G.C.A., Chapter 5.
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26 ³⁷ Paragraph 35, Id.

27 ³⁸ Special Reminder to Prospective Bidders, and Informational Page regarding
28 Davis-Bacon and Related Acts, IFB, Procurement Record filed on October 19,
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3 **D. GCC's Responsibility Inquiry Did Not Make GTA's Bid Responsive.**

4 GCC could not correct GTA's original Major Shareholders Disclosure Affidavit through
5 a responsibility inquiry. As used in Guam's Procurement Law and Regulations, the term
6 "responsible bidder" means a person who has the capability in all respects to perform fully the
7 contract requirements, and the integrity and reliability which will assure good faith performance.
8 5 G.C.A. §5201(f) and 2 G.A.R., Div. 4, Chap. 3, §1106(27). A prospective contractor shall
9 supply information requested by the Procurement Officer concerning the responsibility of such
10 contractor and if such contractor fails to supply the requested information, the Procurement
11 Officer shall base the determination of responsibility upon available information or may find the
12 prospective contractor non-responsible if such failure is unreasonable. 5 G.C.A. §5230(a) and 2
13 G.A.R., Div. 4, Chap. 3, §3116(a). Here, as stated above, GCC used its responsibility inquiry to
14 permit GTA to modify its bid by providing GCC with GTA's September 30, 2010 Major
15 Shareholders Disclosure Affidavit. The Public Auditor finds that the GCC's use of the
16 responsibility inquiry to allow GTA to modify or correct their bid violates the provisions of
17 Guam's Procurement Laws and Regulations prohibiting such late modifications or corrections of
18 bids. The responsibility inquiry's main purpose is to obtain additional information from the
19 prospective contractor, to ensure such contractor can perform the contract requirements, and to
20 ensure the integrity and reliability of such contractor which will assure a good faith performance
21 of the contract requirements. Such inquiry does not negate or dilute the other provisions of
22 Guam's Procurement Law and Regulations, cited above, restricting late modifications or
23 corrections of bids. As stated above, none of the few exceptions governing such late
24 modifications or corrections apply in this case and allowing the responsibility inquiry to be used
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1 to waive GTA's non-curable defect in their bid poses a substantial threat to the integrity of the
2 procurement process. Specifically, by allowing the responsibility inquiry to be used to waive
3 non-curable defects in bids, after bid opening, a non-responsive lowest bidder who, for whatever
4 reason (i.e. change in business conditions or unprofitable low bid price), no longer wanted to be
5 awarded the contract, could refuse to provide the information requested in a responsibility
6 inquiry and the purchasing agency would have no choice but to reject the bid depriving the
7 purchasing agency of the bidders assurance that the contract would be entered into and
8 performed. Additionally, waiver of a non-curable defect in a bid after bid opening via the
9 responsibility inquiry places the non-responsive bidder in a position of advantage over the
10 responsive bidders. Here, had ITE and PDS known in advance that they could avoid timely
11 filing of their valid Major Shareholders Disclosure Affidavits, we can only speculate the
12 possibility whether this additional time would have allowed them to submit lower bids. Further,
13 the requirement of submitting a valid Major Shareholders Disclosure Affidavit may have
14 deterred others from bidding who would have otherwise bid if they had known that GCC would
15 have waived this requirement. Thus the Public Auditor finds that GCC's use of the
16 responsibility inquiry to waive GTA's non-curable defect in its Major Shareholders Disclosure
17 Affidavit undermines fair competition and must not be condoned.

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22 **E. Public Policy Favors the Rejection of GTA's Bid as Non-responsive.**

23 GCC and GTA argue that public policy favors waiving GTA's non-curable failure to
24 submit a valid Major Shareholders Disclosure Affidavit because GTA submitted the lowest bid.
25 The Competitive Sealed Bidding procedure requires that the contract be awarded to the lowest
26 responsible and responsive bidder whose bids meets the requirements and criteria set forth in the
27 invitation for bids. 5 G.C.A. §5211(g) and 2 G.A.R., Div. 4., Chap. 3, §3109(n)(1).
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1 Here, GCC and GTA are really asking that GTA be awarded the contract merely because it is
2 simply the lowest bidder and despite the fact that it submitted a non-responsive bid. Certainly
3 the policy of providing increased economy and the maximization of the purchasing value of
4 public funds supports this argument. 5 G.C.A. §5001(b)(5) and 2 G.A.R., Div. 4, Chap. 1,
5 §1102(4). However, the Public Auditor must balance this policy with other policies underlying
6 Guam's Procurement Laws and Regulations. Such as the policy to provide for increased public
7 confidence in the procedures followed in public procurement. 5 G.C.A. §5001(b)(3) and 2
8 G.A.R., Div. 4, Chap. 1, §1102(2). The policy to ensure the fair and equitable treatment of all
9 persons who deal with the procurement system. 5 G.C.A. §5001(b)(4) and 2 G.A.R., Div. 4,
10 Chap. 1, §1102(3). And the policy to provide safeguards for the maintenance of a procurement
11 system of quality and integrity. 5 G.C.A. §5001(b)(7) and 2 G.A.R., Div. 4, Chap. 1, §1102(6).
12 The strong public interest in an uninterrupted public procurement system must be outweighed by
13 the stronger public interest in having agencies abide by the appropriate statutes and regulations.
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15 *Multi-Line Corporation, Inc., v. Lorenzo C. Aflague, et.al.*, CV0667-88, Line 23, Page 10,
16 Decision, Findings of Fact and Conclusions of Law dated November 21, 1988 (Superior Court of
17 Guam). Finally, the Public Auditor must exercise her jurisdiction to promote the integrity of the
18 procurement process. 5 G.C.A. §5703 and 2 G.A.R., Div. 4, Chap. 12, §12103. The Public
19 Auditor finds that the public interest is best served by enforcing the provisions of
20 Guam's Procurement Law and Regulations requiring bidders to disclose their ownership interests
21 at the time of bidding and the standard of awarding contracts arising from the Competitive
22 Sealed Bidding Procedures to the lowest responsible and responsive bidder. The public must be
23 assured that the information in the Major Shareholders Disclosure Affidavit is accurate and
24 truthful when sworn to and cannot be subject to modification after bid opening to meet a
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1 condition of bidding that all other bidders meet in the first instance. The Public Auditor
2 recognizes that this will cause hardship on GTA, an otherwise responsible bidder who, through
3 simple negligence, failed to submit a valid Major Shareholders Disclosure Affidavit. However,
4 the policies underlying Guam's Procurement Laws and Regulations and the public interests they
5 protect are best served by strict enforcement of the requirement for submission of Major
6 Shareholders Disclosure Affidavits which must be complied with correctly at the time of bid
7 submission.
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10 **F. GCC's Award of the Contract to GTA is Void.**

11 The Public Auditor finds that GCC's award of the contract to GTA is void. If after an
12 award, it is determined that a solicitation or award of a contract is in violation of law, and the
13 person awarded the contract has not acted fraudulently or in bad faith, the contract may be: (1)
14 Ratified or affirmed if doing so is in the best interests of Guam; or (2) The contract may be
15 terminated and the person awarded the contract shall be compensated for the actual expenses
16 reasonably incurred under the contract plus a reasonable profit, prior to the termination. 5
17 G.C.A. §5452(a)(1). Here, as set forth above, the Public Auditor finds that the award of the
18 contract to GTA violated Guam's Procurement Laws and Regulations because GTA was not a
19 responsive bidder. Further, the Public Auditor finds that there is nothing in the record indicating
20 that GTA acted fraudulently or in bad faith in procuring the contract. The Public Auditor finds
21 that ratifying or affirming GCC's contract with GTA is not in the best interests of the
22 Government, because waiver of the statutory requirements for the submission of a valid Major
23 Shareholders Disclosure Affidavit and the statutory requirements that contracts arising from
24 Competitive Sealed bidding be awarded to the lowest responsible and responsive bidder are
25 serious threats to the integrity of the procurement system as stated above, and must not be
26 condoned by contract ratification. The Public Auditor finds that the contract awarded to GTA
27 shall be terminated as of the date of this Decision. The Public Auditor further finds that GTA
28 did not incur expenses and is not entitled to reasonable profits because GTA did not perform
work under the contract due to GCC not issuing GTA a purchase order as set forth above.

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IV. CONCLUSION

Based on the foregoing, the Public Auditor hereby determines the following:

1. Through simple negligence, GTA Submitted a false Major Shareholder Disclosure Affidavit with its Bid in violation of 5 G.C.A. §5233 and 2 G.A.R., Div. 4, Chap. 3, §3109(e)(3)(E) which resulted in GTA's bid being non-responsive to the IFB.

2. Guam Procurement Laws and Regulations prohibit GCC from accepting GTA's September 30, 2010 Major Shareholders affidavit because it is a late modification or correction of the bid after bid opening.

3. GCC's award of the contract to GTA is void because GTA was a non-responsive bidder which GCC should have disqualified and rejected at the time of bid opening.

4. PDS's Appeal is granted.

5. GCC's contract with GTA arising from the IFB for IFB Item Nos. 1.1 thru 7.1 is hereby terminated as of the date of this decision and although GTA is generally entitled to compensation for its actual expenses it reasonably incurred under the contract plus a reasonable profit for the period prior to the termination, the Public Auditor finds that GTA did not incur expenses and is not entitled to reasonable profits because GTA did not perform work under the contract due to GCC not issuing GTA a purchase order.

6. GCC shall consider the IFB's remaining bidders in accordance with Guam Procurement Law and Regulations.

7. PDS is hereby awarded, pursuant to 5 G.C.A. §5425(h)(2), PDS's reasonable costs incurred in connection with the solicitation and its August 3, 2010 protest, including PDS's reasonable bid preparation costs, excluding PDS's attorney's fees, because as PDS was the second highest scoring bidder, there is a reasonable likelihood that PDS would have been awarded the contract but for GCC's acceptance and attempted cure of GTA's non-responsive bid in violation of Guam Procurement Laws and Regulations as set forth above. GCC may object to PDS's cost demand by filing the appropriate motion with the Public Auditor no later than fifteen (15) days after PDS submits such cost demand to GCC.

1 This is a Final Administrative Decision. The Parties are hereby informed of their right to
2 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
3 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
4 Decision. 5 G.C.A. §5481(a).

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

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9 **DATED** this 12th day of January, 2011.

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15 DORIS FLORES BROOKS, CPA, CGFM
16 PUBLIC AUDITOR
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