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IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

IN THE APPEAL OF
PACIFIC DATA SYSTEMS, INC.,
Appellant.

Docket No. OPA-PA-12-017

**TELEGUAM HOLDINGS, LLC'S
COMMENTS**

Teleguam Holdings, LLC, and its wholly owned subsidiaries ("GTA"), support the General Services Agency's ("GSA") position as stated in its Agency Report. In particular, GSA reports that the issues raised by PDS were minor or insignificant informalities and that GSA took the proper steps to cure any deficiencies in GTA's submission. *See* Agency Report. GSA therefore denied the protest. That denial should be upheld.

Moreover, GTA submits the following further comments in support of GSA's position. In general, GTA's bid was responsive because it conformed to the material aspects of GSA064-11. Also, GSA, pursuant to procurement regulations, allowed GTA to correct any minor

informalities or mistakes after bid opening. PDS' protest and appeal must be dismissed.

I. BACKGROUND & SCOPE OF APPEAL

PDS' protest is limited to the award for **Bid Form 10** of GSA-064-11, and specifically to the issues of whether GTA's bid was responsive and whether the procurement regulations allow corrections after bid opening. While PDS prays that the OPA reject GTA's "entire bid" for GSA064-11, PDS' current protest deals only with Bid Form 10.

Bid Form 10 solicited Integrated Services Digital Networking PRI Interface ("ISDN PRI"), Integrated Services Digital Networking - Basic Rate Interface ("ISDN BRI"), SIP Trunks, and a Direct Inward Dialing ("DID") Number Block of 25 numbers. *See* Agency Rep. filed in OPA-PA-12-011, Tab 6 at 1. GSA awarded Bid Form 10 in its entirety to GTA.

The Special Reminder to Prospective Bidders of the IFB indicated that "[f]ailure to submit an Affidavit Disclosing Ownership and Commission may be cause for disqualification and rejection of the bid." Agency Rep., Tab 6 at 2. Other than that language, the IFB made no mention specifically addressing the Affidavit Disclosing Ownership and Commission.

On April 18, 2012, GSA's Chief Procurement Officer sent a memorandum to GTA requesting that GTA provide an updated Major Shareholder and Commission affidavit so that GSA could move toward closure of the bid evaluation for IFB No. GSA-064-11. *See* Procurement Appeal, Ex. G. Based on this request, on April 19, 2012, GTA submitted a revised Affidavit Disclosing Ownership and Commission. *See* Procurement Appeal, Ex. H.

II. GTA'S BID WAS RESPONSIVE

PDS raises three grounds for appeal: (1) that GTA's Affidavit Disclosing Ownership and Commission rendered its non-responsive; (2) that conditions introduced with GTA's bid rendered it non-responsive; and (3) that the joint submission by GTA and its subsidiaries was improper. None of these grounds are supported by law or the record.

A. GTA'S AFFIDAVIT

1. The Contents of the Affidavit

The affidavit submitted by GTA states that the persons, companies, partners, or joint ventures who have held more than 10% of the shares of interest in the offering business during the 365 days immediately preceding the submission date of the proposal are AP Teleguam Holdings, Inc. and Teleguam Holdings, LLC. *See Agency Rep., Tab 5.*

In June 2011, GTA underwent a change in ownership, wherein AP Teleguam acquired a 100% interest in Teleguam Holdings, LLC. This was widely publicized in Guam, and approved by the FCC and the Guam Public Utilities Commission. *See In re Joint Application of Teleguam Holdings, LLC and GTA Telecom, LLC for Approval of the Transfer of Control of Telguam Holdings, LLC and GTA Telecom, LLC to AP Teleguam Holdings, Inc., Guam Public Utilities Comm'n Docket No. 10-09.* While GTA's Affidavit omitted to include information regarding shareholders prior to the purchase of the company by AP Teleguam Holdings, Inc. in June of 2011, it was an oversight, carrying no secretive intentions, as evident by the public nature of the approval process necessary to change ownership.

2. Errors in GTA's Affidavit Were Immaterial

The term "responsive bidder," as used in Guam's Procurement Law and Regulations, means a person who has submitted a bid which conforms in all **material** respects to the Invitation for Bids. *In the Appeal of Dick Pacific Constr. Co., Ltd., OPA-PA-07-007 at 7 (Dec., filed Jan. 18, 2008).* A requirement is material if the failure to comply is disqualification and rejection of the bid. *Id.* at 8 (based on plain language of the IFB the C41 License and resumes of key personnel were material requirements because their omission would result in disqualification and rejection of the bid). For example, material conditions involve price, quantity, quality, delivery, or contractual conditions. 2 GAR § 3109(m)(4)(B).

None of the mistakes in GTA's bid involve price, quantity, quality, delivery, or contractual conditions. Rather, GTA inadvertently provided incomplete information as to the identity of its prior shareholders. This information did not affect the price bid by GTA, or the quantity, quality, or delivery of services, or any contractual conditions.¹ Accordingly, GTA's error did not materially affect the bid and are correctable as minor informalities under section 3109(m)(4)(B).

Even more, the IFB itself did not portray the submission of the Affidavit as a material requirement. Rather, the IFB states, "[f]ailure to comply with the above requirements *may* be cause for disqualification and rejection of the bid." Agency Rep. filed in OPA-PA-12-011, Tab 6 at 2 (emphasis added). Based on this language, GSA advised bidders that failure to comply did not result in disqualification or rejection of any bid. In fact, as discussed below, failure to submit such an affidavit may be and has been corrected.

The present situation also differs from *In the Appeal of Pacific Data Systems, Inc.*, OPA-PA-10-005, in which the OPA found the submitted Affidavit was a material requirement of the IFB and that GTA's inaccurate submission rendered it non-responsive. The OPA determined the Affidavit submitted in OPA-PA-10-005 was false because GTA did not correctly identify the owners who held more than a ten percent interest in GTA at the time it submitted its bid. *Id.* at 8-10. In contrast, the Affidavit Disclosing Ownership submitted by GTA in GSA064-11 is not false, but rather, incomplete. GTA stated correctly that it was owned by AP Teleguam Holdings, Inc. and that the subsidiary LLCs were owned by Teleguam Holdings, LLC at the time it submitted its bid. GTA inadvertently omitted information that others held shares in the company prior to the sale in June 2011. This is unlike a situation of submitting an entirely different entity holding ownership or an interest in the bidder. Another difference includes the OPA's

¹ Notably, GTA was under AP Teleguam's control at the time of the bid.

determination in OPA-PA-10-005 that GTA's bid was non-responsive because the requirement of submitting an Affidavit was a material requirement of the IFB. *Id.* at 11. As stated above, however, the submission of an Affidavit is not a material requirement of the IFB in this appeal.

There being significant differences between this case and OPA-PA-10-005, as well as GSA's intention that the Affidavit not be a material condition of the bid, the OPA should find that GTA's bid remained responsive.

3. GSA Properly Allowed GTA to Correct its Affidavit.

Guam law permits the correction of minor informalities after the opening of bids. Again,

Minor informalities are matters of form, rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Procurement Officer shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the territory. . . .

2 GAR § 3109(m)(4)(B); *see also* 5 GCA § 5211(f). This provision clarifies that the Guam procurement laws and regulations foresee mistakes being made in bid submissions and actually require corrections to be made pursuant to duly adopted regulations so long as the integrity of the competitive bidding system is not compromised.

GSA allowed GTA to correct their original Major Shareholders Disclosure Affidavit. *See* Procurement Appeal, Ex. H. In compliance with 2 GAR § 3109(m)(4)(C), GSA's Procurement Officer for the IFB prepared a written determination granting the correction of the minor informality. *See* Procurement Appeal, Ex. G. Therefore, any mistake on behalf of GTA was appropriately corrected and waived as a minor informality by GSA pursuant to 2 GAR §3109(m)(6).

B. GTA DID NOT CONDITION ITS BID

In response to the Protest, GTA admitted to mistakenly submitting Terms and Conditions

which were applicable to private customers, not to the government and not to this particular Bid. Again, this error can be waived.

This is similar to *In the Appeal of Town House Dept. Stores, Inc. dba Island Business Sys. & Supplies*, OPA-PA-11-02 (Decision and Order filed Aug. 8, 2012), at 15-16. In that case, in response to a bid, competing bidder Xerox Corporation submitted terms and conditions which eventually became part of DOE's Purchase Order. The protestant claimed that the submission of the additional terms rendered Xerox's bid non-responsive. However, the OPA found that the additional terms and conditions were offers which the agency had the right to reject. *Id.* The OPA found that Xerox remained bound to the specific terms specified in the IFB, and not to any additional offered terms. *Id.*

Similarly, here, as stated in the IFB, GTA is bound to perform according to the IFB's terms and conditions. GSA is free to reject any additional terms offered by any bidder, including those additional terms mistakenly submitted by GTA. As the OPA found in OPA-PA-11-02, the submission of additional terms does not render a bidder non-responsive. The OPA should find here that the GTA remained bound to the terms of the IFB and was not otherwise non-responsive.

Moreover, again, these terms and conditions were mistakenly submitted, and thus, GSA had the authority to allow GTA to make minor corrections that did not affect price, quantity, quality, delivery, or contractual conditions. As GTA's submission of these terms was unintentional, they could be withdrawn without affecting any material term or prejudicing any other bidder.

C. GTA'S COLLECTIVE SUBMISSION WAS NOT IMPROPER

The submission of GTA's bid in the collective name of Teleguam Holdings, LLC and its wholly owned subsidiaries is not prohibited by the Guam Procurement Act. PDS points to no

specific IFB requirement or any statute or regulation that prohibits this because none exist. The subsidiaries are appropriately licensed to conduct business in the Territory. While each subsidiary is in fact a separate entity, all the subsidiaries are considered disregarded entities and as a result, the subsidiaries are in fact treated as divisions of Teleguam Holdings LLC. PDS claims that the Government should know with whom it is doing business, however, GSA clearly had no issue with GTA's collective submission. PDS offers no support for its position and its Appeal should be denied.

III. CONCLUSION

Based on the foregoing, GSA's denial of PDS' appeal should be upheld because the issues raised were minor or insignificant informalities and because GSA took the proper steps to cure any deficiencies in GTA's submission. Moreover, GTA's bid was responsive because it conformed to the material aspects of GSA064-11.


For these reasons, GSA did not err in denying PDS' appeal.

IV. REQUEST FOR HEARING

GTA hereby requests for a hearing in this matter.

DATED: Hagåtña, Guam, November 15, 2012.

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