

extension of time pushing back the deadline for the RFP, the delayed selection of the most qualified offeror, and the upcoming expiration of A&M's agreement on October 31, 2016 - are all conditions entirely of GDOE's own making. Finally, A & M issued a Sunshine Act request to GDOE on August 10, 2016 for the procurement record and communications concerning RFP 05-2016. GDOE failed to provide a single document in response to the request and is taking the position that it is entitled to withhold all documents requested by A & M. GDOE is therefore contributing to delays in the case, since A & M may have no other option but to file an action with the Superior Court of Guam to compel disclosure of the requested documents. Under all of these circumstances, the motion for expedited appeal should be denied.

STATEMENT OF FACTS

A & M was awarded the bid in RFP11-2010 to provide Third Party Fiduciary Agent services in Guam to administer USDOE grant funds. T. Meighan Decl. These services were required because USDOE placed GDOE on a "high risk grantee" status in 2003 due to GDOE's inability to prove that it can properly manage and account for all the federal money it receives for the island's public schools. *Id.* As a condition for receipt of the federal funds, USDOE required GDOE to hire a third party fiduciary agent, acceptable to USDOE, to manage some \$60 million in total federal grant monies that GDOE receives annually. *Id.* A & M's Third Party Fiduciary Agent agreement ("TPFA") was executed in 2010 for a one-year term and was renewed in succeeding years. The current agreement is due to expire on October 31, 2016. *Id.*

Throughout the term of the TPFA, A & M, GDOE and USDOE representatives have held bi-weekly conference calls or meetings to discuss GDOE's progress and

administration of the TPFA. T. Meighan Decl. In November 2015, on either a conference call or meeting, USDOE reminded GDOE that GDOE needed to begin the RFP process for a TPFA as soon as possible. *Id.* Nothing was done by GDOE, however, until March 2016 when GDOE commenced the RFP process for a TPFA. In the RFP documents, GDOE set a deadline of May 5, 2016 for submission of proposals. A & M submitted its proposal three days prior to the deadline. On May 5, 2016 at 3:27 p.m., thirty-three minutes before the deadline was to close, A & M received an email that GDOE, without explanation, had decided to extend the deadline to May 11, 2016. GDOE representative Chris Anderson informed the Pacific Daily News that the deadline was extended “in order to maximize competition.” *See* Exh. 6 to Notice of Appeal.

In the RFP documents, GDOE stated that it “anticipates that a contract for these services will be in place by July 15, 2016 with services to begin no later than October 1, 2016.” The natural assumption would be that GDOE would have selected an offeror and entered into contract negotiations well before July 15, 2016. Instead, A & M received notification from GDOE on July 5, 2016 that A & M was ranked as the Second Most Qualified Offeror. *See* Exh. 7 to Notice of Appeal. A & M lodged its protest, which is the subject of this appeal, on July 15, 2016. *See* Exh. 8 to Notice of Appeal.

On August 10, 2016 A & M sent a Sunshine Act Request to GDOE requesting, among other things, documents comprising the procurement record in RFP 005-2016 and communications between GDOE and any person concerning RFP 005-2016. *See* Exh. 1 to Notice of Appeal. GDOE responded by exercising its right to a ten-day extension of time. *See* Exh. 2 to Notice of Appeal. On August 26, 2016, GDOE responded a second time, stating that “[c]ertain documents are being withheld from disclosure pursuant to 5 GCA

10108(i).” *See* Exh. A, attached hereto. A & M’s counsel sent an email on the same day, asserting that GDOE was in violation of the Sunshine Act by failing to provide the requested documents. *See* Exh. B, attached hereto. On August 30, 2016, A & M received a third response from GDOE “clarifying” its earlier second response, in which GDOE claimed that all of the documents requested by A & M are being withheld from disclosure under certain statutes and regulations. *See* Exh. C, attached hereto. GDOE’s refusal to provide the requested documents violates the Sunshine Act.

ARGUMENT

I. THE A & M TPGA MAY BE EXTENDED TO PREVENT A LAPSE OF USDOE FUNDS.

In her declaration, Taling Taitano avers that the expiration of A & M’s TPGA under RFP 11-2010 may result in a “lapse of service” without any Third Party Fiduciary Agent in place. T. Taitano Decl. She further states that USDOE must approve any offeror from RFP 005-2016, which will take further time, and that GDOE risks a lapse in service should an offeror require a prolonged transition period before the offeror can perform. *Id.* There is a simple resolution to GDOE’s concerns. GDOE can extend the current A & M TPGA for as long as A & M’s appeal is pending, during the period in which USDOE must approve the winning offeror, and in the event there is a prolonged transition period before the offeror can perform. This is not unusual or unprecedented and has been done in other jurisdictions.

For example, a similar situation occurred in the U.S. Virgin Islands. A & M had been the Third Party Fiduciary Agent in U.S.V.I. since August 25, 2006. T. Meighan Decl. In November 2008, when a new TPGA agreement with U.S.V.I. was out for bid, A & M lost the bid. *Id.* Although A & M’s TPGA was due to expire in March 2009, the U.S.V.I. Government amended and extended A & M’s TPGA a total of six (6) times in order to

allow for contract negotiations between the winning bidder, Thompson, Cobb, Bazilio and Associates (“TCBA”) and the U.S.V.I. Government and to allow for a sufficient transition period for A & M to assist TCBA in taking over the TPF services. *Id.* The extensions and amendments to A & M’s TPFA in the U.S.V.I. eventually expired on October 31, 2010. *Id.* TCBA ended up hiring A & M to train them and to assist them in fulfilling their obligations under their TPFA. *Id.*

There need be no lapse in services or in access to USDOE monies. None of the USDOE grant funds, employee salaries, and other services are in jeopardy if GDOE obtains an extension and amendment of the A & M TPFA. For these reasons, GDOE’s motion for expedited appeal should be denied.

II. ANY DELAYS IN THE RFP 005-2016 PROCESS RESULTED FROM GDOE’S OWN ACTS AND OMISSIONS.

GDOE knew that A & M’s TPFA expired on October 31, 2016. Despite USDOE’s admonition to GDOE to commence the RFP process for the TPFA early, GDOE waited until March 2016 to issue RFP 05-2016. Although the deadline for the RFP was originally scheduled for May 5, 2016 at 4 p.m., at the eleventh hour GDOE extended the deadline to May 11, 2016. Further, while the RFP documents stated an intent to have in place a contract by July 15, 2016, GDOE did not select the most qualified offeror until July 5, 2016. Even if A & M had not filed its timely protest, there would not have been sufficient time for GDOE and the selected most qualified offeror to execute a contract by July 15, 2016. GDOE cannot now complain that A & M’s appeal must be expedited when the delays in the RFP process were entirely of GDOE’s own making.

III. GDOE’S UNJUSTIFIED REFUSAL TO PROVIDE THE DOCUMENTS REQUESTED BY A & M WILL LEAD TO FURTHER DELAYS IN THIS APPEAL.

GDOE has responded to A & M's Sunshine Act request by asserting that all requested documents "are being withheld from disclosure" pursuant to 5 G.C.A. § 10108(i), 2 GAR § 3114 (i)(2) and 2 GAR § 3114(h)(1). These authorities do not support GDOE's withholding of documents.

5 G.C.A. § 10108(i) states that "[a]ll existing privileges and confidential records of other information expressly protected under the law shall *not* be abrogated by this Act." (Emphasis in original). GDOE does not specify any particular privilege under which the requested documents are exempt from disclosure, but cites two regulations which purportedly justify GDOE's refusal to provide the requested documents. 2 GAR § 3114(h)(1) requires GDOE to establish a Register of Proposals, which shall include all proposals, the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the services offered. Under section 3114(h)(1), the Register of Proposals shall be opened to public inspection only after the award of the contract. However, 5 G.C.A. § 10103(b) states that "[a]ny segregable portion of a record shall be available for inspection by any person requesting the record *after deletion of the portions that are exempted by law.*" (Emphasis added). GDOE has an obligation to produce all requested documents and to delete those portions that are exempted by law. It does not have the right to simply withhold all of the documents requested by A & M.

GDOE also cites 2 GAR § 3114(i)(2) as a basis for withholding the requested documents. That section refers to discussions between an agency and any offeror and provides that "[*d*]iscussions shall not disclose any information derived from proposals submitted by other offerors, and the agency conducting the procurement shall not disclose

any information contained in any proposals until after the aware of the proposed contract has been made.” (Emphasis added). This section is of limited application, as it refers only to information disclosed in discussions between an agency and an offeror. A & M’s Sunshine Act request seeks different and broader types of information, not limited to discussions between GDOE and an offeror. *See, e.g.*, Exh. 1 to Notice of Appeal, Requests 1-11. A & M has also requested all emails concerning RFP 05-2016, which is explicitly recognized as evidence that may be used in this appeal pursuant to 5 G.C.A. § 5247.1. GDOE failed to produce any of these documents.

On August 29, 2016, GDOE filed a “Notice of Filing Procurement Record Under Seal”, indicating that it was filing a “complete copy of the procurement record relevant to this appeal, with the Public Auditor” but that it would furnish only a copy of its Agency Report (and not a complete copy of the procurement record) to A & M. This is contrary to 5 G.C.A. § 5249, which requires each procurement officer to maintain a complete record of each procurement, including communications, dates, times and subject matter of meetings, and other information required to be kept in each record. 5 G.C.A. § 5250 provides that the procurement record under section 5249 is a “public record” and “any person may inspect and copy any portion of the record.” GDOE’s refusal to provide the procurement record violates 5 G.C.A. §§ 5247, 5250.¹

GDOE cannot have it both ways. It cannot request an expedited appeal while at the same time refusing to provide public procurement records that A & M is entitled to obtain.

¹ The importance of the procurement record and its disclosure to a protesting offeror was confirmed recently in *Teleguam Holdings LLC v. Gov’t of Guam and Pacific Data Systems*, Civil Case CV0034-14, Decision and Order dated August 8, 2016 (finding that the procurement record in that case was “materially incomplete” and reversing the OPA’s decision based on new evidence that should have been included in procurement record).

If GDOE persists in its unlawful withholding of such documents, A & M will have no choice but to initiate proceedings with the Superior Court of Guam to enforce its right to inspect and review the requested documents, resulting in further delay in this appeal and potential fines against the public officials who refuse disclosure (5 G.C.A. § 10112(a)) and award of attorneys' fees and costs against GDOE. 5 G.C.A. § 10112(d).

CONCLUSION

For all of the foregoing reasons, Appellant Alvarez & Marsal Public Sector Services, LLC respectfully requests that the Hearing Officer deny Guam Department of Education's motion for expedited appeal.

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BY: 
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Anita Arriola

From: Anita Arriola <anitaarriola@arriolacowan.com>
Sent: Friday, August 26, 2016 5:12 PM
To: 'legal-admin@gdoe.net'
Subject: Letter of 8//26/16 received

Dear Ms. Taitano,

This is to acknowledge receipt of GDOE's response to my Sunshine Act request. The response fails to comply with the Sunshine Act, as there is no indication in the letter as to when and where I may review and inspect the documents requested and not being withheld.

You may remedy this defect by providing me with a response that complies with the Sunshine Act. Please provide one on Monday, August 29, 2016. Nothing contained in this letter constitutes a waiver of any of my client's rights, all of which are expressly reserved.

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