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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

TELEGUAM HOLDINGS, LLC,

Appellant.

Docket No. OPA-PA- 18-004

NOTICE OF PROCUREMENT APPEAL

Teleguam Holdings, LLC and its wholly owned subsidiaries bring this appeal of a procurement controversy against the General Services Agency of the Department of Administration.

APPELLANT INFORMATION

Name: Teleguam Holdings, LLC and its wholly owned subsidiaries GTA Telecom LLC, GTA Services LLC, Pulse Mobile LLC, herein collectively referred to as "GTA."

Mailing Address: 624 N. Marine Corps Drive, Tamuning, GU 96913. For the purposes of this Appeal, please direct filings and correspondence to GTA's legal counsel: Camacho Calvo Law Group LLC, Attn: Vincent C. Camacho, Esq., 134 W. Soledad Ave. Ste. 401, Hagåtña, GU 96910.

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APPEAL INFORMATION

- A) PURCHASING AGENCY:** General Services Agency
- B) IDENTIFICATION OF CONTRACT:** GSA Bid No. 064-11
- C) DECISION DATE:** Decision being appealed was made on July 11, 2018 by the Chief Procurement Officer Claudia S. Acfalle.
- D) APPEAL ORIGIN:** Appeal is made from the Decision denying GTA's protest of contracts awarded by GSA based on a materially incomplete procurement record.
- E) NAMES OF COMPETING BIDDERS, OFFERORS, OR CONTRACTORS KNOWN TO APPELLANT:**
1. Pacific Data Systems;
 2. PTI Pacific Inc. dba IT&E;
 3. Docomo Pacific; and
 4. Guam Telecom, LLC.

STATEMENT SUPPORTING THE APPEAL

Under Guam Procurement Law, the Office of Public Accountability has jurisdiction over appeals from decisions rendered by the Chief Procurement Officer on protests of method of source selection, solicitation or award of a contract. 5 G.C.A. § 5425(e).

On June 22, 2011, GSA issued an Invitation for GSA Bid 064-11 (the "Bid") for Telecommunication Services, Mobile Telephone Services, Integrated Service Digital Networking (ISDN), Primary Rate Interface (PRI), Basic Rate Interface (BRI), Session Initiation Protocol (SIP) Trunks, GGWAN Data Communication Services, Broadband Internet Access, DSL/Cable or Wireless Internet Services, Television Services, Routers, Managed Switches, and Network Equipment and Direct Inward Dialing (DID) Numbers. The contract terms were for five (5) years, subject to fund availability, with the government's option of two separate renewals of one year each, also subject to fund availability.

Part E of the Bid contained two components: services for 1 gbps and 10 gbps. GTA submitted the lowest bid for the 1 gbps services. However, GSA awarded the contract to Pacific Data Systems (PDS) after finding that PDS offered a lower aggregate bid price for both components.

Through earlier protests, appeals, and an action in the Superior Court of Guam (CV0334-13), the Superior Court concluded that GSA failed to keep the complete record mandated by the Guam Procurement Law. On that ground, the Superior Court cancelled the award of Part E. On review, the Supreme Court of Guam affirmed the cancellation holding that GSA maintained a materially incomplete record. Teleguam Holdings LLC v. Guam, 2018 Guam 5 ¶¶ 39-44. Notwithstanding the materially incomplete record, GSA subsequently issued proposed awards of contracts under Bid No. 064-11 through its Revised Bid Status issued on June 28, 2018.

GTA submitted a written protest of these proposed awards to the Chief Procurement Officer on July 9, 2018. The Chief Procurement Officer denied this protest on July 11, 2018. GTA files this appeal within fifteen (15) days of receiving the notice of decision.

LEGAL ARGUMENT

I. GTA's Protest to GSA was Timely

GTA filed a timely protest to the Revised Bid Status issued by GSA on June 28, 2018. The Guam Procurement Law provides,

- (a) Right to Protest. Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation, or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency. The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.

5 G.C.A. § 5245(a). GTA became aware of GSA's awards for Bid No. 064-11 on June 28, 2018. On July 9, 2018, within fourteen days of receiving the Revised Bid Status, GTA filed its appeal to the Chief Procurement Officer.

In its decision denying GTA's protest, GSA asserts that GTA knew the factual basis for its protest when the Supreme Court of Guam rejected the award for Part E in Teleguam Holdings LLC v. Guam, 2018 Guam 5. Thus, GSA argues, GTA's protest is untimely because GTA knew of the factual basis for the protest fourteen days before it was filed. GSA's claim that GTA's protest was untimely and supporting explanation must fail.

While an actual bidder may be aware of possible facts that could form the basis of a protest, the time for filing a protest does not begin until the bidder has sufficient knowledge that it has been aggrieved. *See* Guam Imaging Consultants, Inc. v. Guam Memorial Hosp. Auth., 2004 Guam 15 ¶ 36. In Guam Imaging, RADS and Guam Imaging Consultants, Inc. (GIC) filed a protest two days after receiving a Guam Memorial Hospital Authority (GMH) memorandum stating that GMH was finalizing an exclusive contract with another bidding entity. *Id.* ¶¶ 6-7. GMH argued that RADS and GIC knew of the facts supporting their protest long before it was formally filed. *Id.* ¶ 36. The Supreme Court of Guam, however, agreed with RADS and GIC's position that even if they were aware that GMH might have negotiated an exclusive contract, they did not have knowledge of the specific circumstances surrounding the negotiations or contract until GMH issued its memorandum. *Id.* The Court held that RADS and GIC's protest was timely because they based their protest on the specific circumstances of the negotiations and contract that they discovered only after GMH issued its memorandum. *Id.*

GTA's circumstances are very similar to those of RADS and GIC. GTA learned that GSA failed to keep a complete record as mandated by Guam Procurement Law when the Supreme Court

of Guam held that the record GSA maintained was materially incomplete in Teleguam Holdings LLC v. Guam, 2018 Guam 5. When the Court issued this Opinion, GTA was aware of possible facts that could form the basis of its protest. Like the protestors in Guam Imaging, however, GTA did not have sufficient knowledge that it was aggrieved until GSA issued a written Revised Bid Status on June 28, 2018. When GTA received the Revised Bid Status, it learned that GSA had made proposed awards of contracts for Bid No. 064-11 notwithstanding the materially incomplete record in violation of Guam Procurement Law. Thus, GTA had knowledge of the facts that formed its protest when GSA issued the Revised Bid Status on June 28, 2018. As GTA filed its protest on July 9, 2018, its protest was timely.

II. GSA's Proposed Awards for Bid No. 064-11 were based on a Materially Incomplete Record and Contrary to Guam Law.

The primary basis for GTA's protest and present appeal is that GSA made proposed awards of contracts without maintaining a complete record in violation of Guam Procurement Law. Guam law mandates that a procurement officer maintain a complete record that includes the following:

- (a) the date, time, subject matter and names of participants at any meeting including government employees that is in any way related to a particular procurement;
- (b) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement;
- (c) sound recordings of all pre-bid conferences; negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement;
- (d) brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications; and

(e) the requesting agency's determination of need.

5 G.C.A. § 5249. Without a complete record certified in writing by the responsible procurement officer, “[n]o procurement award shall be made.” *Id.* at § 5250.

During discovery, GTA learned that GSA failed to abide by Guam law. Through the deposition of Dr. Norman Okamura – the expert hired by the Government to assist in this procurement process – GTA discovered that GSA failed to keep proper records of minutes of meetings with Dr. Okamura and the Government, records of communications between Dr. Okamura and the Government, drafts of the Invitation for Bids worked on by Dr. Okamura, and other paper and materials used by Dr. Okamura in the development of specifications. Further, other government employees provided sworn statements confirming GSA's faulty and incomplete recordkeeping. Accordingly, GSA failed to follow the Procurement Law's mandate of maintaining a proper and complete record.

The Superior Court concluded that the procurement record GSA maintained for Bid No. 064-11 was materially incomplete. In its August 8, 2014 Decision & Order, the Superior Court determined that the testimony of government employees involved in the procurement process demonstrated that GSA failed to comply with the requirements of the Procurement Law. The Superior Court found the following as GSA's statutory shortcomings: (1) GSA failed to provide records of meetings related to the procurement; (2) GSA failed to create and maintain a communications log; (3) GSA failed to include all drafts and research documents used in the development of specifications. (Dec. & Order, 10-13 (Aug. 8, 2014)). Based on these findings, the Superior Court cancelled the entirety of IFB GSA064-11. (Dec. & Order, 9 (Aug. 18, 2016)).

As further support for GTA's protest and appeal, the Supreme Court of Guam found that the Superior Court's cancellation of Part E of the IFB was proper based on the materially

incomplete record. Teleguam Holdings LLC v .Guam, 2018 Guam 5 ¶ 41. Notwithstanding the Supreme Court of Guam's holding, GSA made proposed awards of contracts through its Revised Bid Status issued on June 28, 2018 without curing the materially incomplete record. It is GTA's position that a complete record is necessary for a transparent, accurate, and proper procurement process. Additionally, GTA asserts that any award proposed or granted without a complete record is arbitrary and capricious, and invalid under Guam law. Finally, as a matter of public policy, no government agency should be allowed to award government-funded contracts once it is found that a complete record was not maintained as mandated by Guam law. Some of the purposes and policies underlying the Procurement Law include,

(3) to provide for increased public confidence in the procedures followed in public procurement;

(4) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory;

(7) to provide safeguards for the maintenance of a procurement system of quality and integrity; and

(8) to require public access to all aspects of procurement consistent with the sealed bid procedure and the integrity of the procurement process.

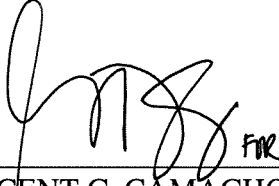
5 G.C.A. § 5001(b). Disregarding the clear instructions of Guam law greatly undermines the purposes and policies of the Procurement Law. Allowing awards of government contracts made in violation of Guam law is detrimental to the quality and integrity of the public's confidence in the procurement system.

REQUESTED RELIEF

GTA requests that the Office of Public Accountability cancel all proposed awards under the Revised Bid Status issued on June 28, 2018 as GSA cannot validly make an award due to the materially incomplete record of this procurement process. See 5 G.C.A. §§ 5249, 5250, 5451. While GSA cancelled Part E of Bid No. 064-11, the materially incomplete record affects all parts of Bid No. 064-11 and the entire procurement process. Accordingly, GTA requests that all proposed awards be cancelled and GSA carry out the Invitation for Bids in conformity with Guam law. Further, GTA requests an award of reasonable attorney's fees and costs incurred in raising this appeal.

DATED: Hagåtña, GU, July 26, 2018

CAMACHO CALVO LAW GROUP LLC




VINCENT C. CAMACHO
Attorneys for Appellant
TELEGUAM HOLDINGS, LLC

VERIFICATION

I, JOSEPH SHINOHARA, am the EVP OF FINANCE of TELEGUAM HOLDINGS, LLC and I am authorized to make this verification. I have read the foregoing **NOTICE OF PROCUREMENT APPEAL** and, to the best of my knowledge, the information stated therein is true and correct.

I declare under penalty of perjury that the foregoing is true and correct. This verification was executed on this 26th day of July, 2018.



JOSEPH SHINOHARA

SUBSCRIBED AND SWORN to before me, a Notary Public, in and for Guam U.S.A., by JOSEPH SHINOHARA, this 26th day of July, 2018.





NOTARY PUBLIC

NACRINA F. MENDIOLA
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: APR. 06, 2019
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