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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

IN THE MATTER OF

TELEGUAM HOLDINGS, LLC,

Appellant,

And

GENERAL SERVICES AGENCY,

Purchasing Agency.

Docket No. OPA-PA-18-004

**TELEGUAM HOLDINGS, LLC'S
HEARING BRIEF**

I. INTRODUCTION

Teleguam Holdings, LLC and its wholly owned subsidiaries, GTA Telecom, LLC, GTA Services, LLC, and Pulse Mobile LLC (collectively "GTA") appeal Guam Services Agency's ("GSA") July 11, 2018 denial of GTA's written protest of proposed awards. At the Pre-Hearing Conference on October 30, 2018, the parties agreed, and the Hearing Officer accepted, that a hearing was unnecessary and that the parties would rely solely on the record and their respective briefs.

ORIGINAL

II. FACTUAL BACKGROUND

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 availability of funds, with the option of two (2) one (1) year renewals, also subject to availability of funds.

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. GTA filed a protest and GSA denied it. GTA subsequently filed an appeal and the Public Auditor sustained GSA's protest. GTA sought judicial review in of the Public Auditor's decision in the Superior Court of Guam (CV0334-13).

During the civil case, GTA requested and the Court granted limited discovery. GTA deposed Dr. Norman Okamura, the expert hired by the Government to assist in this procurement process. Dr. Okamura testified that GSA failed to keep proper records of minutes of meetings he had with the Government, records of communications he had with the Government, drafts of the Invitation for Bids he had prepared, and other paper and materials he utilized in the development of specifications. 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 as

required by the Guam Procurement Law. On that ground, the Superior Court cancelled *the entirety* of the Bid. On review, the Supreme Court of Guam affirmed part of the cancellation holding that GSA maintained a materially incomplete record. Teleguam Holdings LLC v. Guam, 2018 Guam 5 ¶¶ 39-44. Notwithstanding the deficiencies in the record, GSA now seeks to award contracts under Bid No. 064-11 through its Revised Bid Status issued on June 28, 2018.¹

GTA submitted a written protest of this award to the Chief Procurement Officer on July 9, 2018. After the Chief Procurement Officer denied this protest on July 11, 2018, GTA filed its Notice of Procurement Appeal on July 26, 2018.

III. ISSUES OF LAW

GTA appeals GSA's denial of GTA's written protest on two main grounds. First, GTA's protest was timely. Second, GSA failed to properly compile and maintain the statutorily mandated record with respect to the procurement process, and thus, made awards in violation of Guam law. GTA discusses these issues in turn.

A. GTA's Protest was Timely.

On July 9, 2018, GTA filed a timely protest to the Revised Bid Status issued by GSA on June 28, 2018. Guam Procurement Law provides:

(a) Right to Protest. Any actual or prospective bidder, offereor, 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). An aggrieved party must have knowledge of some action made by the purchasing agency that could form the basis of a protest in order for the fourteen-day clock to

¹ See Supplemental Procurement Record, Tab 8, submitted by GSA on September 27, 2018.

begin. See Guam Imaging Consultants, Inc. v. Guam Memorial Hosp. Auth., 2004 Guam 15 ¶ 33.

It is this knowledge that triggers the time in which to file a protest.

In Guam Imaging, the purchasing agency (“GMH”) issued a Request for Proposals (“RFP”) on February 4, 2003. Id. ¶ 3. On March 21, 2003, GMH announced that offeror GRC was the most qualified among those that submitted proposals. Id. ¶ 4. Thereafter, on May 14, 2003, GMH issued a memorandum “discussing a sole source interim agreement it had entered into” with GRC. Id. ¶ 6. After receiving the memorandum, RADS filed a protest² on May 16, 2003. Id. ¶ 7. RADS also filed a motion asking the trial court to enforce the automatic stay provision of the procurement law. The motion was denied, resulting in an appeal to the Supreme Court. Id. ¶ 13.

In deciding that case, Supreme Court of Guam held that an announcement stating that the purchasing agency has identified the most qualified offeror does not amount to the purchasing agency actually awarding a contract to the offeror. Id. ¶¶ 30-31. The Court reasoned that “there may be multiple events in any given solicitation that could legitimately trigger protests. Id. ¶ 28. However, the announcement on March 21, 2003 that GRC was the most qualified offeror was not a triggering event as the terms and conditions of the radiology services contract were still ongoing. Id. ¶ 29. The Court ultimately found that it was actually GMH’s announcement on May 14, 2003 that it had awarded the contract to GRC that entitled RADS to protest. Id. ¶ 31. The Court reasoned that even if a contract is awarded, an aggrieved party cannot file a protest until that party has knowledge of sufficient facts to form its protest. Id.

² Both the Guam Procurement Law and GMH’s Procurement Regulations contain automatic stay provisions that are activated by timely protest. Id. ¶ 23.

Based on the factual similarities, Guam Imaging is dispositive to the present case. Like the purchasing agency in Guam Imaging, GSA issued an RFP on June 22, 2011 seeking proposals for telecommunications services. This procurement process was stayed at various times due to several protests and appeals to the Supreme Court of Guam. On May 14, 2018, the Supreme Court issued an Opinion affirming the Superior Court's cancellation of GSA's award of Part E of the RFP because it found that GSA failed to maintain the statutorily mandated complete record of the procurement process. Interestingly, while the materially incomplete record affected the *entirety* of the RFP at issue, the Supreme Court reversed the Superior Court's cancellation of the entire bid award *solely* on jurisdictional grounds.³

In denying GTA's protest, GSA seems to argue that GTA had knowledge of facts to form its protest when the Supreme Court of Guam affirmed only the cancellation of Part E and reversed the cancellation of all other awards. This argument, however, misses the mark and fails to adhere to the Supreme Court's holding in Guam Imaging. While the Supreme Court did reverse the cancellation of awards, GSA took no further action which would have triggered a protest until it released the Revised Bid Status on June 28, 2018.

More specifically, GTA had absolutely no knowledge or reason to believe that GSA would continue to rely on a deficient procurement record, which was in contravention to Guam law. Therefore, the catalyst that triggered the time to protest is when GSA took official action and released the Revised Bid Status on June 28, 2018. GTA immediately filed its written protest on

³ In support of its denial of GTA's protest, GSA specifically stated that the "revised bid award is based upon the Supreme Court decision" in Teleguam Holdings, LLC v. Guam, 2018 Guam 5. However, it should be made clear that the Teleguam Opinion did not give GSA the authority to grant awards based on an incomplete record, nor did the Opinion serve to affirm or approve any previous awards.

July 9, 2019, which was within the fourteen day time period. Accordingly, GTA's protest is timely.

B. The Entirety Of GSA's Award Is Based On An Incomplete Record And Should Be Vacated.

Each award granted by GSA in this procurement process was based on a materially incomplete record in violation of Guam law. In any procurement process, 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. The plain language of Guam law makes it unequivocally clear that “[n]o procurement award shall be made” without the complete record required by statute. Id. § 5250.

In affirming part of the Superior Court's cancellation of GSA's awards in this procurement process, the Supreme Court held that the procurement record was materially incomplete and that the Superior Court properly exercised its authority to cancel the award. Teleguam Holdings, LLC v. Guam, 2018 Guam 5 ¶ 42. The Supreme Court found that the procurement record maintained for this process was incomplete to such an extent that it “thwart[ed] judicial review of the matter.” Id. ¶ 40.

Similarly, the Superior Court also concluded that the procurement record was materially incomplete. Decision and Order 13-14 (Aug. 8, 2014). Specifically, the Superior Court determined

that GSA violated the statutory requirement to maintain a complete record by (i) failing to ensure that all required documentation was created, retained, and transmitted to GSA; (ii) failing to maintain a complete communications log; (iii) failing to include all drafts properly signed and dated by the draftsman; and (iv) failing keep records of the research documents regarding the needs of the government and the capabilities of the telecommunications service providers in Guam necessary to develop the Invitation for Bids. *Id.* Most importantly, the Superior Court found that the materially incomplete procurement record affected all proposed awards and that all awards must be cancelled. Decision and Order, 8 (Aug. 18, 2016).

The Superior Court's determination was supported by the testimonies of various actors who participated in the procurement process. As indicated above, Dr. Norman Okamura, the government's expert, testified that GSA did not keep proper records of communications and minutes of the meetings he had with the government, and did not maintain records of his drafts for the Invitation for Bids or the information and material used to develop the specifications. Additionally, at the November 20, 2014 hearing on a previous procurement appeal on the same matter, Deputy Attorney General Fred Nishihira admitted on several occasions that the procurement record was incomplete and that "there's no way to make the procurement record complete" as missing records of communications and meetings could not be located.

While the Supreme Court affirmed only part of the Superior Court's cancellation of the awards in this matter, it is clear that the *entire* procurement record was materially incomplete and violated Guam's Procurement Law. Accordingly, each subsequently proposed award listed in the June 28, 2018 Revised Bid Status is based on a significantly flawed procurement record and must be cancelled.

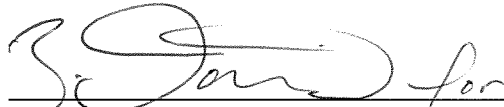
IV. CONCLUSION

The issuance of the Revised Bid Status was a turning point in the chain of events that have occurred in this case as this was the first instance wherein GTA became aware of facts sufficient to form its protest. Accordingly, when GTA immediately submitted its written protest to GSA's action, its response was timely.

Further, when analyzing this protest, great weight must be placed on one of the most basic and fundamental requirements of the procurement process – a complete record. Without having this adequate foundation in place, anything built upon it cannot stand. Since it is evident that the proposed awards under the Revised Bid Status are not only based on a defective procurement record, but are also unsupported by the law, GSA must not be allowed to proceed forward and the awards must be cancelled.

DATED: Hagåtña, GU, December 14, 2018.

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TELEGUAM HOLDINGS LLC AND Its
Wholly Owned Subsidiaries.