



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

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

IN THE APPEAL OF

GUAM PACIFIC ENTERPRISES, INC.

Appellant

Docket No. OPA-PA 15-010

DECISION

I. INTRODUCTION

This is the Decision of the Public Auditor for an appeal filed on September 17, 2015 by Guam Pacific Enterprises, Inc. (“GPE”). The appeal is made from a decision on protest of method, solicitation or award by General Services Agency, Government of Guam (“GSA”) to Sunleader Guam Co. dba Guam Modern Office Supply (“Sunleader”). GPE raises the following issues on appeal:

1. GPE was the lowest bidder that met the bid specifications;
2. It is in the public interest that award be made to the lowest bidder since there is no adverse effect to the Government of Guam; and
3. Although GPE’s proposed delivery date was twelve (12) days longer than the delivery period prescribed by the IFB, the GSA Chief Procurement Officer should have waived any defects or irregularities in GPE’s bid since it is in the public interest.

On November 3, 2015, GSA filed a Motion to Dismiss, which was taken under advisement. A hearing on the appeal was held on November 24, 2015 before Doris Flores Brooks, CPA, CGFM,

1 Public Auditor and Peter C. Perez, Esq., Hearing Officer. Sedfrey M. Linsangan, GPE President
2 appeared on behalf of GPE. Nicolas Toft, Esq. appeared on behalf of GSA.

3 **II. FINDINGS OF FACT**

4 The Public Auditor issues this Decision based upon the procurement record, the documents
5 submitted by the parties, and the testimony, evidence, and arguments presented at the appeal
6 hearing, and makes the following findings of fact:
7

- 8 1. On August 14, 2015, GSA advertised and issued Invitation for Bid No. GSA-106-15
9 (“IFB”) for interested parties to submit bids for the procurement of six (6) four-drawer, fire
10 proof, filing cabinets for the Guam Police Department (GPD). [Agency Procurement
11 Record (APR), Tabs 7 and 13]
- 12 2. The IFB provided a 30 days, upon receipt of Purchase Order Required Delivery Date. [APR
13 7, page 3]. The IFB further provided:
 - 14 • Bidders shall comply with all specifications and other requirements of the Solicitation
15 [IFB, General Terms and Conditions, §6]
 - 16 • Bidders who are awarded a contract under this solicitation, guarantee that goods will be
17 delivered...within the time required [§12]
 - 18 • In determining the lowest responsible offer, the Chief Procurement Officer shall be
19 guided by the following: (a) Price of items offered...(c) Whether the bidder can
20 perform...within the specified time... [§16]
 - 21 • Award shall be made to the lowest responsible and responsive bidder, whose bid is
22 determined to be the most advantageous to the Government, taking into consideration
23 the evaluation factors set forth in the solicitation. [§22]
 - 24 • The right is reserved as the interest of the Government may require to waive any minor
25 irregularity in bid received. The Chief Procurement Officer shall have the authority to
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1 award, cancel or reject bids, in whole or in part for any one or more items if he
2 determines it is in the public interest. [*Id.*]

3 • It is hereby understood and mutually agreed by and between the contractor and the
4 Government that the time for delivery to final destination or the timely performance of
5 certain services is an essential condition of this contract. If the contractor refuses or fails
6 to perform...within the time specified in the Purchase Order...then the contractor is in
7 default. Defaults will be treated subject to and in accordance with the provisions of 2
8 GAR, Div. 4 §6101(8). [§38]

9
10 • Bidders who are awarded contracts under this Solicitation guarantee that the goods will
11 be delivered to their destination or required services rendered within the time specified.
12 [§39]

13
14 • Contractors who fail to perform shall be liable for damages caused by delay or any other
15 factors. [§41]

16 3. GPE, Sunleader, Westsource, and Hanssem LLC submitted bids which GSA opened and
17 read on August 28, 2015. [APR, Tabs 3, 4, 5, 6, and 8]

18 4. On August 28, 2015, GSA conducted a bid analysis and determined that Sunleader's bid
19 proposed a delivery date as specified in the IFB and a bid price of \$17,730; and GPE's bid
20 proposed a delivery date of 6 to 7 weeks and a bid price of \$17,279.94. GSA recommended
21 that the bid be awarded to Sunleader. [APR, Tabs 8 and 10]

22
23 5. On or about September 11, 2015, GSA sent a Bid Status to GPE rejecting GPE's bid for
24 "Not meeting the delivery requirement as stated in the IFB." The Bid Status remarked that
25 the delivery offered by GPE was 6 to 7 weeks and the required delivery was 30 days upon
26 receipt of Purchase Order. [APR, Tab 9]

- 1 6. GSA similarly rejected the Westsource and Hanssem LLC bids for noncompliance with the
- 2 IFB bid delivery requirements. [*Id.*]
- 3 7. On or about September 11, 2015, GSA sent a Notice of Intent of Possible Award to
- 4 Sunleader. [APR, Tab 9]
- 5 8. On September 16, 2015, GPE transmitted a facsimile to GSA advising that it would be
- 6 making an appeal to the Office of Public Accountability or Auditor. [APR, Tab 1].
- 7 9. On September 17, 2015, GSA denied GPE's Protest. [APR, Tab 2]. On this same day, GPE
- 8 filed this appeal.
- 9 10. To date, no formal award has been issued by GSA in this procurement.
- 10 11. GPE's bid did not meet the IFB 30-day delivery requirements.¹
- 11 12. GPE was not the lowest responsible bidder.
- 12 13. GSA reserved the right to waive any minor irregularity in bids received. GSA did not
- 13 consider GPE's failure to meet the IFB delivery requirement as a minor irregularity that
- 14 should have been waived.
- 15 14. GSA, through the Chief Procurement Officer, maintained the authority to award, cancel or
- 16 reject bids, in whole or in part for any one or more items if he determines it is in the public
- 17 interest, taking into consideration the evaluation factors set forth in the solicitation. GSA
- 18 did not determine that award to GPE was in the public interest in consideration of the
- 19 evaluation factors in the IFB.
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24 ¹ GPE raised concerns about the IFB 30-day delivery requirement. GPE provided testimony and argument of whether

25 any of the bidders could comply with the 30-day delivery date as the goods are ordered off-island and shipped to Guam.

26 GPE noted that the prolonged time period for the IFB procurement indicated the 30-day delivery period was not a

27 critical term for the government. Citing various procurement statutes, GPE argued that the delivery requirement did

28 not conform to Guam procurement statutes established to promote fair and healthy competition and good faith in the

bidding process. GPE Exhibits E-O. GPE also referred the Public Auditor to other procurements where GPE argued

IFB delivery requirements were unduly restrictive, harmed GPE, and/or were otherwise not conducive to competition.

GPE Exhibits E-1 through E-15.

1 **III. ANALYSIS**

2 Pursuant to 5 G.C.A. §5703, the Public Auditor reviews GSA’s denial of GPE’s protest *de novo*.
3 The IFB, General Terms and Conditions, Section 16 sets forth the criteria for determining
4 the lowest responsible bidder, which included: (a) total price of the items offered; (b) the ability,
5 capacity, and the skill of the bidder to perform; (c) whether the bidder can perform promptly or
6 within the specified time; (d) the quality of performance of the bidder with regard to awards
7 previously made to it; (e) the previous and existing compliance by the bidder with laws and
8 regulations relative to procurement; (f) the sufficiency of financial resources and ability of the
9 bidder to perform; (g) the ability of the bidder to provide future maintenance and services for the
10 subject award; and (h) the compliance with all the conditions to the IFB. [APR, Tab 7, pages 21-
11 22]
12

13
14 Section 22, states, “[a]ward shall be made to the lowest responsible and responsive bidder,
15 whose bid is determined to be the most advantageous to the Government, taking into consideration
16 the evaluation factors set forth in this solicitation.” [APR, Tab 7, page 22]

17 5 G.C.A. §5211. Competitive Sealed Bidding provides:

18 (e) Bid Acceptance and Bid Evaluation. Bids shall be unconditionally
19 accepted without alteration or correction, except as authorized in this
20 Chapter. Bids shall be evaluated based on the requirements set forth in the
21 Invitation for Bids, which may include criteria to determine acceptability
22 such as inspection, testing, quality, workmanship, delivery and suitability for
23 a particular purpose. Those criteria that will affect the bid price and be
24 considered in evaluation for award shall be objectively measurable, such as
25 discounts, transportation costs, and total or life cycle costs. The Invitation
26 for Bids shall set forth the evaluation criteria to be used. No criteria may be
27 used in bid evaluation that are not set forth in the Invitation for Bids.

28 5 G.C.A. §5211(g) provides: “Award. The contract shall be awarded with reasonable
promptness by written notice to the lowest responsible bidder whose bid meets the requirements
and criteria set forth in the Invitation for Bids...”

1 GPE was not the lowest responsible bidder as their bid did not offer the lowest bid price and
2 did not meet the 30-day IFB delivery requirement. The IFB provided “It is hereby understood and
3 mutually agreed by and between the contractor and the Government that the time for delivery to
4 final destination or the timely performance of certain services is an essential condition of this
5 contract.” [IFB, §38]. It further provided, “Bidders who are awarded contracts under this
6 Solicitation guarantee that the goods will be delivered to their destination or required services
7 rendered within the time specified.” [§39].

9 GPE’s arguments regarding the purportedly unduly restrictive and impossible delivery
10 requirements raise legitimate procurement concerns as only one (1) out of the four (4) bidders who
11 submitted bids could comply with the IFB’s 30-day delivery requirement. Although their bid price
12 was the third highest, Sunleader was the only bidder to comply by noting “As Specified” while the
13 other bidders noted specific delivery dates. For this reason, the Public Auditor requires GSA to
14 hold Sunleader to the 30-day delivery requirement.

16 GSA and GPD should have considered the reasonable time it would take to deliver the filing
17 cabinets to the IFB’s specifications when they issued the IFB. In the instant appeal, no evidence
18 was presented to establish that the successful bidder would not comply with the delivery
19 requirements. Under the IFB, the successful bidder guarantees compliance with delivery
20 requirements.² Should Sunleader fail to meet the IFB delivery requirements, GSA and GPD should
21 assess liquidated and other damages, or pursue other remedies.³

23 GPE is aware from its experience in an unrelated procurement that the government does assess
24 liquidated damages for late deliveries. In the *Appeal of Guam Pacific Enterprises, Inc. v. Guam*
25 *Power Authority* OPA-PA-09-003 Decision (November 13, 2009), the Public Auditor found that
26

27 ² See IFB §§ 6, 12, 38.

28 ³ See 2 GAR, Div. 4 §6101(8); IFB sections 38, 39, 41.

1 there was a history of liquidated damages assessed by GPA eight times against GPE for late
2 deliveries from 2002 to 2009. GPA demonstrated by its prior actions that the contractor would not
3 be allowed to perform at variance with the explicit terms of the contract. Therefore, appellant, an
4 experienced businessman, was on notice that the liquidated provisions would continue to be
5 enforced. Decision, 9:24-10:2.

7 GSA's denial of GPE's Protest was not in error.

8 **IV. CONCLUSION**

- 9 1. GSA's denial of GPE's Protest is AFFIRMED.
10 2. GSA's Motion to Dismiss is DENIED.
11 3. GPE's appeal is DENIED.
12 4. The parties shall bear their respective costs and attorneys' fees.

13 This is a Final Administrative Decision. The Parties are hereby informed of their right to appeal
14 from a Decision of the Public Auditor to the Superior Court of Guam in accordance with Part D of
15 Article 9 of 5 G.C.A. §5481(a) within fourteen (14) days after receipt of a Final Administrative
16 Decision. A copy of this Decision shall be provided to the Parties and their respective attorneys, in
17 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA website at
18 www.opaguam.org.

21 **DATED** this 23rd day of December 2015.

22 

23 _____
24 **DORIS FLORES BROOKS, CPA, CGFM**
25 **Public Auditor of Guam**

Suite 401 DNA Building
238 Archbishop Flores St.
Hagåtña, Guam 96910



FAX

To:	Nicolas Toft, Esq. Attorney for GSA Office of the Attorney General	From:	Doris Flores Brooks Guam Public Auditor Office of Public Accountability
Phone: Fax:	(671) 475-3324 (671) 472-2493	Pages:	8 (including cover page)
CC:	Sedfrey Linsangan, Sr. President Guam Pacific Enterprises, Inc.	Date:	December 23, 2015
Phone: Fax:	(671) 649-6997 (671) 649-6988	Phone: Fax:	475-0390 x. 206 472-7951

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Ashley Gaerlan

From: Nicolas E. Toft <ntoft@guamag.org>
Sent: Wednesday, December 23, 2015 10:59 AM
To: Ashley Gaerlan
Subject: RE: OPA-PA-15-010 Decision

Received, thank you!

-Nick

From: Ashley Gaerlan [mailto:agaerlan@guamopa.org]
Sent: Wednesday, December 23, 2015 10:46 AM
To: Nicolas E. Toft
Cc: Llewelyn Terlaje; Clariza Roque
Subject: OPA-PA-15-010 Decision

Hafa Adai Attorney Toft,

Please see attached document for the decision of OPA-PA-15-010. Kindly acknowledge receipt.

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