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Attorney for Appellant  
 PTI PACIFICA INC. dba IT&E

THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Procurement Appeal of	)	NOTICE OF PROCUREMENT APPEAL
	)	
PTI PACIFICA INC. dba IT&E,	)	Docket No. OPA-PA-19-008
	)	
Appellant,	)	<b>APPELLANT'S POST HEARING BRIEF</b>
	)	

COMES NOW, PTI Pacifica Inc. dba, IT&E, by and through counsel of record, Steven Carrara, Esq. and submits its Post-Hearing Brief.

As stated in its initial filing the Guam Procurement Code sealed bidding is the statutorily mandated procurement process. Multi step sealed bidding may thus be used when it is considered desirable to invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements. Pursuant to 5 GCA §5216 Competitive Selection Procurements or Request for Proposals may only be used in limited circumstances set forth by statute: small purchase pursuant to 5 GCA § 5214; emergency procurements pursuant to 5 GCA § 5215 and the procurement of certain services set forth in 5 GCA §5121 (a). Procurements for any other goods and services must be procured using the competitive bid process.

I. The Procurement File and Testimony Does Not Support the Use of Competitive Selection Process Over the Statutorily Required Sealed Bid Process

In the instant procurement, GPA sought to acquire Data Center Co-Locations Services and the Statement of Work for such services is found at Page 393 of 467, of Tab 37 of the Procurement File. The procurement file does not contain any information explaining or justifying the use of a competitive selection process contrary to the statutory requirement to use seal bidding. Both GPA procurement officers who testified at the hearing stated they made no determination in regard to the procurement methodology selected and offered no opinion the methodology selected.

At the hearing the GPA the chief technical evaluator described the services to be procured. Basically, the selected contractor will host GPA data servers at the contractor facility and provide a platform for the servers which includes security and power. The chief evaluator also testified that contractor selected for award does not access to information stored on the GPA servers in the servers and performs no programming type services. Hence the selected contractor does to provide information technology services as part of the procurement. Essentially, this is procurement for storage of computer equipment with no or very little technical IT interaction by the contractor with respect to the services provided.

The SOW identified the salient characteristics and both IT&E and Docomo Pacific (“DPAC”) were found to meet the technical specifications. Tab 17, page 105. Again, there is nothing in the procurement file or testimony supporting the advanced technical nature of the services or that they are indeed one of the statutorily defined exceptions enabling GPA to use the competitive selection process as opposed to sealed bidding.

## **II. The OPA May Timely Consider the Protest Prior to Award**

At the onset of the hearing the Public Auditor requested briefing on the issue as to whether the protest was timely as it was filed more than 14 days after the closing date of

proposals. IT&E submits that a protest based on a statutory organic authority is timely as GPA has not authority in contrary to its statutory authority to use sealed bidding unless statutorily authorized. In *Fleet Services Inc. v. Dept. of Administration*, 2001 Guam 6, the Supreme Court of Guam provided a detailed analysis of the Government's use of a competitive procurement process over the statutorily mandated sealed bid process and found that a protest based on such a challenge was timely even though it was filed well after the submission of proposals. In *Fleet Services, Inc.*, the Court found that since sealed bidding was statutorily required, that a subsequent challenge and protest on whether the exception to its use applied was timely after the submissions of proposals. Similarly, IT&E's protest challenging whether the instant services fall within in enumerated exceptions is clearly timely which it clearly does not.

### **III. DPAC'S Compliance With the Technical Requirements Is Unknown**

One of the identified GPA technical requirements was for a carrier neutral facility. It is unclear whether DPAC meets this requirement. The GPA chief technical evaluator testified that in addition to instant data center services there would be a follow on procurement for connectivity between the proposed data center to existing GPA facilities. The technically evaluation testified that he did not know whether DPAC would charge other proposed providers entrance facilities to the proposed data center. Thus, there is a significant unknown issue of whether the proposed facility is actually competitively neutral and whether other competitors could effectively bid on the follow procurements because they would have to pay an unknown and unregulated entrance fee. While perhaps overlooked, this is critically important to GPA costs and rate payers and impacts the instant procurement.

The DPAC proposal found at TAB 15, pages 81 and 82 of 467 and of the Procurement file underscores the importance of this issue. In its proposal DPAC offered a 10 G

interconnection option priced at \$6,750 per month, which is much higher than the proposed \$1,800 rate of data center co-location. Moreover, the procurement file states that GPA expects to by multiple 10G circuits to support the Data Center. Tab 9, page 69 of 467. Unless the data center is truly competitive neutral and without entrance fee, there is no assurance that other telecommunication providers would be able to effectively provide competitive pricing. This is truly a trap for the weary and represents and a great unknown.

#### **IV. DPAC'S Pricing Exceeds GPA's Budgetary Estimate.**

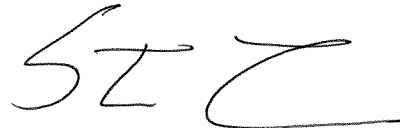
As further confirmation of the importance of the significant pricing issues raised above, the chief technical evaluator noted that DPAC's proposed pricing exceeded the budgetary estimate. This alone raises a significant question of the validity of the process, and supports IT&E position that GPA should have either conducted as a multistep bid or solicited pricing proposals from the 2 qualified offers so that GPA could have comparative price comparison.



V. Conclusion

The Guam Code statutorily requires the use of sealed bidding procedures. There is no documentary or testimonial evidence supporting why this services fall within one of the statutorily enumerated exemptions for use of sealed bidding. As supported by findings in the Court's finding in Fleet Services, the protest is timely and violates Guam procurement code. The proposed pricing is in excess of the budgetary estimate and there is substantial issue relating to the higher dollar value procurements with respect interconnectivity. Accordingly, GPA should be either required to engage in negotiations with IT&E as the next in line qualified offeror or re-procure the data center requirements in accordance with the Guam procurement code.

Respectfully submitted.

A handwritten signature in black ink, appearing to read 'SZC', is written over a horizontal line.

Steven Carrara  
General Counsel

cc: Graham Botha