



Jerrick Hernandez <jhernandez@guamopa.com>

In the Appeal of Track Me Guam LLC; OPA-PA-21-002

Claire Pollard <cpollard@rwtguam.com>

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To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Edwin J. Torres" <etorres@rwtguam.com>

Dear Mr. Hernandez:

Please see the attached *Trial Brief* below in regards to the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,
Claire Pollard

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**9.3.21 Appellant's Trial Brief.pdf**

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**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

Track Me Guam, LLC

Appellant.

DOCKET NO. OPA-PA-21-002

TRIAL BRIEF

I. INTRODUCTION

Appellant Track Me Guam, LLC. (“TrackMe” or “Appellant”) has protested the notice of award in GPA-024-21 seeking Fleet and Fuel Management Software Services by Guam Power Authority (“GPA”) to PTI Pacifica, Inc. dba: IT&E (“IT&E”). TrackMe asserts that IT&E's submission to GPA could not meet certain fundamental specifications of the IFB, and that GPA's selection of IT&E therefore violated procurement law. Appellant's Exhibit Binder, (“AEB”), 10-014; 10-017. When GPA, in its protest denial, failed to substantively engage with the issues raised by TrackMe's protest and simply accepted IT&E's averments that it was responsive, TrackMe was compelled to bring this appeal. AEB, Exhibit 10.

TrackMe submits this Trial Brief in conformance with the Order of the Office of Public Accountability (“OPA”) issued on August 9, 2021. This Trial Brief

will assist the OPA in addressing the following list of issues to be resolved in this consolidated Appeal:

- (1) Did the Guam Power Authority (GPA) substantially engage with the merits of TrackMe's protest as required by Guam procurement law?
- (2) Did GPA violate Guam procurement law by allowing Pacifica, Inc. dba IT&E ("IT&E") to answer the question of responsiveness by simply stating "comply" to all the specifications?
- (3) Did GPA violate Guam procurement law by allowing IT&E to supplement its bid response?
- (4) Is IT&E's bid responsive to all specifications of the IFB?
- (5) Does IT&E's bid comply with specification C.1-17 of the IFB?
- (6) Does IT&E's bid comply with specification B.6 of the IFB?
- (7) Does IT&E's bid comply with specification C.1-13 of the IFB?
- (8) Does IT&E's bid comply with specification C.2 of the IFB?

II. GPA AND TRACKING SERVICES UNDER THIS PROCUREMENT

The Guam Power Authority issued Bid Invitation GPA-024-21 seeking Fleet and Fuel Management Software Services for GPA's fleet. AEB, 8-004. The procurement was established "to provide the Guam Power Authority, Transportation Division with Fleet and Fuel Management Services for 200 vehicles to include web-based software, technical assistance, devices, installation,

replacement and/or removal of devices for the Authority's fleet. AEB, 8-004. The procurement requires the winning offeror to provide various fleet management devices, software services, and continuing product support. AEB, 8-004-006.

III. PROTEST AND APPEAL

Bids were opened on January 28, 2021, and TrackMe was informed on March 8, 2021, that an award was recommended for IT&E. AEB, 10-012. TrackMe initiated an agency level protest on March 12, 2021, as the selection of IT&E under the IFB would mean that GPA would be selecting a non-responsive and ultimately non-responsible bidder, since IT&E's proposed tracking solution for GPA cannot comply with requirement C.1-17 Fuel dispense tracking as specified in the IFB. AEB, 10-014.

Following that initial protest, TrackMe obtained new information discovered on March 29, 2021, following GPA's production of documents to TrackMe, pursuant to a Sunshine Request submitted to GPA with TrackMe's first protest. From the documents produced, TrackMe identified four (4) issues with IT&E's bid that render the bid non-responsive and IT&E non-responsible: (1) inability to comply with requirement C.1-17 of the IFB; (2) inability to comply with requirement B.6 of the IFB; (3) inability to comply with requirement C.1-13; and (4) inability to comply with requirement C.2. Those failures were identified to GPA in TrackMe's correspondence of April 6, 2021. AEB, 10-017. On June 16, 2021, TrackMe received

correspondence from GPA Denying its Protests of March 21 and April 6, 2021. AEB, 10-021. This Notice of Appeal to the OPA followed.

IV. TRACKME'S THEORY OF THE CASE ON APPEAL.

GPA's June 16, 2021, denial of TrackMe's protests did not substantively address the allegations that IT&E's proposal was non-responsive to the IFB. Rather than conduct its own inquiry into the responsiveness of IT&E's submitted bid, GPA instead "requested that IT&E respond to each of the allegations raised" in the protests. AEB, 10-021. GPA then accepted those responses, and denied the protest in a 1 ½ page letter that addressed none to the technical deficiencies raised by the protests. This constituted error by the agency, in that GPA (1) did not conduct its own examination of the merits of TrackMe's protests and instead simply asked IT&E to confirm if IT&E were indeed responsive, and (2) IT&E's supplemental responses to GPA to demonstrate responsiveness constituted an impermissible supplementation of its bid package opened on January 28, 2021. Furthermore, beyond addressing IT&E's failure to comply with IFB requirement C.1-17, GPA did not address the other material failings that formed the basis of TrackMe's April 6, 2021, Protest. GPA's failure to address those issues in its protest decision violates procurement law, and leaves the technical failings of IT&E's submission as further grounds for appeal.

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V. THE REQUIREMENTS OF THE IFB RELEVANT TO THIS APPEAL

a. FAILURE TO COMPLY WITH REQUIREMENT C.1-17.

IT&E is supplying GPA with “DFM 500D CAN,” a differential fuel flow meter with associated software. Procurement Record (“PR”) 1119. Requirement C.1-17 mandates that the bidder provide a product that will supply data to include “date and time fuel dispense, amount of fuel dispensed in gallon, vehicle and/or equipment fueled, and personnel who dispensed the fuel.” AEB, 8-006. The DFM 500D CAN, however, does not have the capability of identifying what vehicle is being fueled nor the personnel who dispenses the fuel from the vehicle as required by GPA. AEB, 10-024. GPA’s IFB specifies a system that can monitor fuel dispensing, but the Wialon branded technology is only for fuel *consumption*, not fuel *dispensing*. AEB, 7-017. More, the fact remains that IT&E’s solution can only fulfill the requirements of the IFB by integrating the software proposed by IT&E with a Russian partner hardware solution from a Russian partner unprepared to do work in the United States market. PR 939-940.

The DFM 500D CAN also cannot identify who the specific individual is dispensing the fuel. This system requires that the driver of the vehicle is the same person that should fuel the vehicle — a requirement not specified by GPA and contrary to actual practice. IT&E is non-responsive because it requires steps not identified in the IFB. Documents provided by the Agency also shows that the “iButton Key Fob” accessory offered by IT&E provides data on the person

dispensing the fuel. AEB, 7-050-51. The iButton, however, only provides the identity of the driver operating the vehicle. It does not identify the vehicle being fueled nor does it identify the personnel who specifically dispensed the fuel, both of which are key to successfully monitoring the data points set out in C.1-17. Thus, this accessory will not meet the C.1-17 requirement.

Additionally, the DFM 500D CAN only work with vehicles that have diesel fuel engines, not gasoline engines. AEB, 4-019. The manual for the item states the DFM only works for diesel fuel, heating oil, burner oil, motor fuel, biofuel, and other liquid fuels and mineral oils with kinematic viscosity of 1.5 to 6 mm²/s. GPA's vehicle listing identifies only vehicles that use gasoline engines. Installing the DFM 500D CAN will lead to problems that make IT&E a non-responsible bidder. First, installing this onto GPA's gasoline vehicles may void the warranty for the vehicles. Second, gasoline is highly flammable, and installing this device would be very dangerous.

b. FAILURE TO COMPLY WITH REQUIREMENT B.6.

The IFB requires that the awardee be able to install the product within one (1) hour starting upon scheduled time of installation and/or replacement. AEB, 8-004. TrackMe's investigation, however, of the DFM 500D CAN identified in IT&E's proposal, has revealed that the installation time for the DFM 500D CAN is approximately four (4) hours. PR254. According to a third-party fleet management provider utilizing the DFM 500D CAN, the DFM 500D CAN requires at least four

(4) hours to install the product and software. This is clearly more than the one (1) hour mandated by GPA. IT&E's use of the DFM 500D CAN is non-responsive to the B.6 requirement, and the Agency protest denial does not address this issue.

c. FAILURE TO COMPLY WITH REQUIREMENT C.1-13.

C.1-13 requires that the bidder provide a system that can produce reports exportable to MX EXCEL, MS Word, CSV, and PDF file formats. AEB, 8-006. MiFleet, IT&E's software, however, can only export to html, PDF, EXCEL, XML, and CSV. PR 253. The exportable formats do not include MS Word. Therefore, IT&E does not comply with C.1-13. IT&E is non-responsive to this requirement, and the Agency protest denial does not address this issue.

d. FAILURE TO COMPLY WITH REQUIREMENT C.2.

C.2 requires the bidder provide a system that allows for remote disabling of a vehicle, unlocking of vehicle doors, and issuing of software updates. AEB, 8-006. IT&E notified GPA that it would comply, but GPA must "deliver the requirement i.e. older vehicle models may not be able to support fleet tracking application." PR 1084. IT&E's further response supplied by GPA's sunshine request stated, "Doing door lock/unlock feature that is controllable through the Electronic Control Unit (ECU) will only be possible with manufacturer's Programming Guide for the Lock/Unlock for the specific vehicle models provided to IT&E by the Guam Power Authority." This is not compliant with the C.2 requirement because IT&E is requesting GPA provide an accommodation not specified in the IFB. Nowhere in the

IFB does it state GPA will provide access to the ECU if necessary. IT&E is simply non-responsive to this requirement because it requires an extra step not identified in the IFB, and the Agency protest denial does not address this issue.

VI. GPA HAS A DUTY TO PROCURE IN A THOROUGH, FAIR, AND UNAMBIGUOUS MANNER

Once the proposals of the offerors were received, GPA should have substantively engaged in a review of the bids in order to make its own determination that all offerors were responsive to the specifications of the bid. Once the proposals of the offerors were received, GPA should have substantively engaged in a review of the bids in order to make its own determination that all offerors were responsive to the specifications of the bid. *See* 5 G.C.A. 5201(g) (“Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.”). Rather than determine if IT&E’s proposal was actually compliant with the specifications, GPA instead left the matter to IT&E to confirm its responsiveness. The law does not allow such a derogation of duty. *See, e.g., Tel-Instrument Electronics Corp. v. U.S.*, 56 Fed. Cl. 174 (2003), *aff’d*, 87 Fed. Appx. 752 (Fed. Cir. 2004). (Clarifications or corrections after the bids are opened do not convert a nonresponsive bid into a responsive one); *Aqua-Tech, Inc. v. U.S. Army Corps of Engineers*, 564 F. Supp. 773, 31 Cont. Cas. Fed. (CCH) P 71243 (D.D.C. 1983). (“to allow supplementation after opening would invite mischief and unduly delay award determinations.”) Instead of doing a substantive review of the bid offers, it appears now, given GPA's acceptance and defense of ITE's bid despite the

procurement record being silent on any such review, that rather than engage in a meaningful technical review of price held up against those technical specifications, GPA has simply thrown up its hands and selected the lowest number on the page.

VII. COMPELLING REASONS TO JUSTIFY A REBID OF THE IFB.

At worst, GPA has intentionally chosen to accept a non-responsive bid that is based upon a pricing structure that, because of its non-responsiveness, other bidders could not take advantage of. At best, GPA did not understand its various technical specifications, and the award to IT&E is the result of a non-competitive procurement where apples and oranges were compared to each other. In either scenario, the ratepayers of Guam have been prejudiced.

VIII. ANTICIPATED EVIDENTIARY ISSUES

It is anticipated that the following evidentiary issues may arise:

- (1) The ability of IT&E to advance positions in defense of a procurement that the procuring agency has neither articulated nor advanced on its own.
- (2) The taking of evidence in accordance with COVID-19 protocols.

IX. CONCLUSION

GPA issued an IFB for a tracking system that contained several technical specifications that the winning offeror simply cannot comply with. Rather than review the non-responsiveness in a substantive way, GPA has instead ceded

that responsiveness to IT&E. TrackMe respectfully requests that the Office of Public Accountability Order the following:

- (1) That GPA disqualify IT&E from eligibility for Award under this IFB, as IT&E's proposal was non-responsive and did not materially comply with the technical requirements of the IFB established by GPA;
- (2) That GPA determine IT&E to be a non-responsible offeror given the inability of its proposed solutions to the IFB to safely and efficiently perform as specified by GPA; and
- (3) That GPA award GPA-IFB-024-21, to TrackMe as the next lowest price responsive bidder to the IFB

Submitted this 3rd day of September, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

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EDWIN J. TORRES

Attorneys for Appellant