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PROCUREMENT APPEALS

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7 **OFFICE OF PUBLIC ACCOUNTABILITY**
8 **PROCUREMENT APPEALS**

9) Docket No. OPA-PA-10-005
10 In the Appeal of)
11 PACIFIC DATA SYSTEMS, INC.,) **APPELLANT PACIFIC DATA SYSTEMS,**
12 Appellant.) **INC.'S COMMENTS ON THE AGENCY**
13) **REPORT**

14 **I. INTRODUCTION**

15 Guam Community College ("GCC") argues that the failure of TeleGuam
16 Holdings, LLC ("TeleGuam") to disclose its major shareholders at the time it submitted
17 its bid relates to responsibility and not responsiveness. However, Guam law
18 specifically requires a bidder to disclose its major stockholders as a condition of
19 bidding. As a result, any bidder which fails to disclose its major stockholders at the
20 time of bidding must be disqualified and its bid rejected.

21 **II. A STATUTORY CONDITION OF BIDDING**
22 **IS A MATTER OF RESPONSIVENESS**

23 The Public Auditor considered the distinction between responsiveness and
24 responsibility in In the Appeal of Jones & Guerrero Co., Inc. dba J&G Construction,
25 OPA-PA-07-005. That case involved an IFB issued by Guam Memorial Hospital
26 Authority ("GMHA") for a construction project. The IFB required that bidders submit a
27 Bidder's Qualification Statement ("BQS"). One of the bidders, J&G Construction did
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2 submit a BQS, but it was incomplete. Because the BQS was required by the IFB, GMHA
3 rejected J&G's bid as non-responsive.

4 J&G appealed, and argued that the BQS related to an issue of responsibility as
5 opposed to responsiveness. The Public Auditor concluded that the information
6 required by the BQS did relate to a bidder's responsibility. As to the fact that the IFB
7 required the BQS, the Public Auditor stated that "... [s]ubject matter dealing with
8 bidder responsibility cannot be metamorphosed into an issue of responsiveness
9 simply by inserting a provision in the IFB requiring rejection of bids that do not comply
10 ...". The case was remanded to GMHA to make a determination regarding the
11 responsibility or non-responsibility of J&G.

12 Just as the IFB in the J&G case required a BQS, GCC's IFB in this case clearly
13 required that bidders submit a Major Shareholder Affidavit, and that failure to do so
14 would result in rejection of the bid. However, there is a major difference between the
15 J&G case and the present appeal. In the J&G case, there was no statutory requirement
16 that a bidder submit a BQS, which explains why the Public Auditor determined that
17 GMHA could not convert a matter dealing with bidder responsibility into an issue of
18 responsiveness merely by inserting a provision in the IFB. However, the disclosure of
19 major shareholders is a statutory requirement set forth at 5 G.C.A. § 5233, which
20 requires:

21 **§ 5233. Disclosure of Major Shareholders.**

22 As a condition of bidding, any partnership, sole
23 proprietorship or corporation doing business with the
24 government of Guam shall submit an affidavit executed
25 under oath that lists the name and address of any person
26 who has held more than ten percent (10%) of the
27 outstanding interest or shares in said partnership, sole
28 proprietorship or corporation at any time during the twelve
(12) month period immediately preceding submission of a
bid. The affidavit shall contain the number of shares or the
percentage of all assets of such partnership, sole

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2 proprietorship or corporation which have held by each
3 person during the twelve (12) month period. In addition, the
4 affidavit shall contain the name and address of any person
5 who has received or is entitled to receive a commission,
6 gratuity or other compensation for procuring or assisting in
obtaining business related to the bid for the bidder and shall
also contain the amounts of any such commission, gratuity
or other compensation. The affidavit shall be open and
available to the public for inspection and copying.
(emphasis added).

7 In the J&G case, responsiveness was characterized as the question of whether the
8 bidder promised to perform the contract. That characterization was adequate for the
9 J&G case since there was no statutory requirement mandating that the BQS be part of
10 the bid package. However, it is important to note that responsiveness is defined by
11 statute, namely 5 G.C.A. § 5201(g), which defines "responsive bidder" as "... a person
12 who has submitted a bid which conforms in all material respects to the Invitation for
13 Bids". Because 5 G.C.A. § 5233 requires the disclosure of major stockholders as a
14 condition of bidding, this disclosure is a mandatory part of any IFB on Guam, and any
15 debate as to whether the identity of major stockholders is a matter of responsiveness or
16 responsibility is irrelevant. A materially false major shareholders affidavit simply does
17 not comply with the statutory requirement that it be provided as a condition of bidding,
18 namely in the bid package. To rule otherwise would be to read 5 G.C.A. § 5233 out of
19 the statute books.

20 It is clear that the Major Shareholder Affidavit submitted by TeleGuam was
21 materially false. For TeleGuam Holdings, LLC to state that one hundred percent of its
22 shares are held by TeleGuam Holdings, LLC is basically to make a joke out of the
23 statute requiring the disclosure of major shareholders. It was certainly feasible for
24 TeleGuam to comply with the statute by disclosing its major shareholders in its bid, but
25 for whatever reason it chose not to. TeleGuam's submission of a corrected Shareholder
26 Affidavit almost four months after bid opening does not assist TeleGuam. See In the

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2 Appeal of O&M Energy, S.A., OPA-PA-08-0004 (“... There is no question that a public
3 contract based on a materially non-responsive bid revised after bid opening is void.”)
4 TeleGuam’s bid was materially non-responsive and therefore cannot be revised after
5 bid opening. Its bid must be rejected.

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7 **III. RELIEF REQUESTED**

8 In its Agency Report, GCC reveals that the Notice of Bid Award was issued by
9 GCC to TeleGuam on October 7, 2010. That was two days after PDS’ protest was
10 denied on October 5, 2010. PDS filed this appeal on October 12, 2010. GCC will no
11 doubt argue that its unilateral act in issuing the Notice of Award changes the remedies
12 available to PDS from those remedies available prior to award set forth in 5 G.C.A. §
13 5451 to those remedies available after an award set forth in 5 G.C.A. § 5452. This is a
14 most unfair loophole in the procurement law, since an agency can always unilaterally
15 issue a Notice of Award immediately after the denial of a protest, and before the
16 protestor can possibly file an appeal. However, the Public Auditor has closed this
17 loophole previously, and should do so again in this case. In In the Appeal of Guam
18 Publications, Inc., OPA-PA-08-007, it was determined that the bid of Marianas Variety
19 should have been rejected by GSA as non-responsive, but was not. Guam Publications,
20 Inc. (“PDN”) had filed a protest, which was denied by GSA on May 1, 2008. GSA then
21 completed the award of the bid by issuing a Purchase Order to Marianas Variety on
22 May 9, 2008. PDN then filed an appeal to the Public Auditor on May 14, 2008. Id. at p.
23 18. However, this did not result in the contract with Marianas Variety being ratified.
24 Instead, the Public Auditor stated:

25 ... The Public Auditor finds that ratifying or affirming GSA’s
26 contract with Marianas Variety is not in the best interests of
27 the Government because GSA’s failure to evaluate the bids
28 in accordance with the express terms of the IFB, which is the

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root cause of the unlawful award to Marianas Variety, is a serious threat to the integrity of the procurement process and must not be condoned by ratification of this contract. The Public Auditor finds that the contract awarded to Marianas Variety shall be terminated as of the date of this Decision, and Marianas Variety shall be compensated for the actual expenses it reasonably incurred under the contract plus a reasonable profit, prior to the termination. (i.e. using unit prices for ad sizes specified in its Bid).

PDS submits that this approach should likewise be used in this case. Here, the root cause of the problem is GCC's failure to summarily reject TeleGuam's bid as non-responsive. GCC should not be allowed to unilaterally benefit from its wrongdoing by issuing a Notice of Award in order to alter the remedies available to PDS. This approach is consistent with 5 G.C.A. § 5452(a)(1)(i), which provides that the contract may be ratified and affirmed, provided it is determined that doing so is in the best interest of the Territory. As the above quote from the Guam Publications case demonstrates, it would not be in the best interest of Guam to allow a "... serious threat to the integrity of the procurement process ..." by ratification of the contract.

Moreover, there is another reason why 5 G.C.A. § 5452 is not applicable to this case. The primary difference between § 5451 (Remedies Prior to An Award) and § 5452 (Remedies After an Award), is that under the latter section the contract may be ratified and affirmed if it is in the best interest of Guam to do so. However, by its own terms, that section cannot apply if there is no contract in existence that may be ratified and affirmed. In the "Checklist of Procurement Record for the Office of Public Accountability", attached as Exhibit "1", which was provided by GCC as part of the procurement record on October 19, 2010, item no. 13 states "Purchase Order (Not issued as of 10/19/10)". PDS filed its appeal in this case on October 12, 2010. As of that date, the automatic stay mandated by 5 G.C.A. § 5425(g) has been in effect. No contract can exist between GCC and TeleGuam in the absence of an executed Purchase Order. As a

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2 result, at the present time, there is no contract in existence which could be ratified and
3 affirmed. Stated differently, although 5 G.C.A. § 5452 refers to remedies after an award,
4 that section can only come into effect according to its own terms when a contract has
5 come into existence, which requires the execution of a Purchase Order. PDS assumes
6 GCC has respected the automatic stay and has not issued a Purchase Order to
7 TeleGuam and, if it has, then the Purchase Order is void since it was issued during the
8 period of the automatic stay. Since 5 G.C.A. § 5452 cannot be applied in the absence of a
9 contract, 5 G.C.A. § 5451 is the applicable section.

10 Alternatively, 5 G.C.A. § 5452(a)(2) provides that if the person awarding the
11 contract has acted fraudulently or in bad faith, the contract may either be declared null
12 and void, or the contract may be ratified if such action is in the best interest of the
13 Territory. 2 GAR § 9104(3) provides that bad faith or fraud shall not be assumed, and
14 that "... [s]pecific findings showing reckless disregard of clearly applicable laws or
15 regulations must support a finding of bad faith ..." PDS submits that for TeleGuam to
16 flaunt the major stockholder disclosure statute by claiming it owns itself constitutes a
17 "... reckless disregard of clearly applicable laws ..." TeleGuam was clearly put on
18 notice by Guam law and the IFB itself that disclosure of its major stockholders was
19 mandatory and at least recklessly, if not intentionally, ignored that requirement. PDS
20 submits that it cannot be in the best interest of the Territory to reward TeleGuam's bad
21 faith by allowing the award to stand.

22 The Guam Publications case also provides what PDS believes is the appropriate
23 remedy. In that case, there were two bidders. The Public Auditor found the bid from
24 the low bidder Marianas Variety was non-responsive, determined the other bidder,
25 PDN, was the sole responsive bidder, and ordered that the remaining portion of the
26 procurement be awarded to PDN. This action was analogous to that allowed by 5
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2 G.C.A. § 5212(d), which allows the Government to procure supplies or services from the
3 next lowest bidder in the event of default of the lowest bidder under the contract. In
4 addition, it is consistent with the overall goal of any remedy, *i.e.* to put the aggrieved
5 party in the same position he or she would have been had the wrong not occurred. For
6 example, in a breach of contract case, the goal is to restore the aggrieved party to the
7 position he or she would have been in had the contract not been breached. The idea is
8 to recreate the situation that should have existed. In this case, GCC did evaluate all bids
9 as shown by the VOIP Evaluation Criteria Summary, attached as Exhibit "2".
10 TeleGuam's bid should have been rejected as non-responsive. Between the two
11 remaining bidders, PDS and IT&E, PDS was ranked higher with a score of 30 compared
12 to IT&E's score of 29. Thus PDS was the next ranked bidder, and should have been
13 awarded the contract.

14 **IV. CONCLUSION**

15 In conclusion, the Pubic Auditor should rule that the bid of TeleGuam be rejected
16 as non-responsive, and order GCC to award the contract to PDS.

17 DATED this 5th day of November, 2010.

18 Respectfully submitted,

19 **BERMAN O'CONNOR & MANN**
20 Attorneys for PACIFIC DATA SYSTEMS, INC.

21 By: 

22 **BILL R. MANN**

CHECKLIST OF PROCUREMENT RECORD
FOR THE OFFICE OF PUBLIC ACCOUNTABILITY

ACKNOWLEDGEMENT
COPY

Master File No: OPA-PA-10-005

IFB No: GCC-10-015

Bid Description: Voice over-Internet Protocol (VoIP) Telephone System Project

1. Published Notice of Invitation for Bid (IFB) May 3, 2010
2. IFB
3. Log of Distribution of IFB
4. Amendments to include acknowledgements
 - a. Amendment #1 May 12, 2010
 - b. Amendment #2 May 13, 2010
 - c. Amendment #3 May 20, 2010
 - d. Amendment #4 May 24, 2010
 - e. Amendment #5 May 25, 2010
 - f. Amendment #6 May 28, 2010
5. Log of Bids Received – Bid Opening March 31, 2010
6. Bid Abstract
7. Each Bid Received
8. Bid Evaluation
9. Notice of Intent to Award
10. Documents requested in the Notice of Intent to Award
11. Notice of Non-Awards
12. Notice of Bid Award
13. Purchase Order (Not issued as of 10/19/10)
14. Certification of Record

EXHIBIT 1

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VoIP Evaluation Criteria Summary Price Estimate is based on vendor's least expensive IP Phones at 200 units

IT&E	PDS	GTA	GTA*	GTA	PDS	IT&E	Comments*
IT&E Mitel \$176,015.76 = \$226,281.26 - \$66,799.50 + \$16,534.00 GTA AVAYA \$127,910 = \$111,110 + \$16,800* GTA CISCO \$213,557 = \$188,357 + \$25,200 PDS Shortel \$304,464.40 = \$307,880.50 - \$4,403 - \$1,016.60 - \$1,551.25 - \$364.65 - \$23,110.65 + \$27,030.00			AVAYA	CISCO			
1. Cost (Clear and simple to understand breakdown of all costs in US\$ must be provided)		X	X	X	X	X	ITE est. IP phones
2. Level of IP-based voice capabilities, intelligence/use of existing network infrastructure, voice Quality, QoS, VLANs, and Codec Support		X	X	X	X	X	ITE incomplete
3. Vendor experience, authorization, support, service capabilities, warranty and clear identification of product (Product Brochures, Manufacturer Details, Customer Testimonials, Hardware/Software compatibility, etc.)		X	X	X	X	X	
4. Reliability of system		X	X	X	X	X	
5. Approach and level of proposed use of existing and new Internet connections / lines, and if necessary, approach to GTA, MCV, and other third party service orders		X	X	X	X	X	
6. Level of survivability and support for failover, redundancy, backup, recovery, and replacement for equipment, drives, power supply, etc.		X	X	X	X	X	
7. Capacity of system to support midsize to large enterprises market		X	X	X	X	X	
8. Capacity of system and flexibility for number of users supported		X	X	X	X	X	
9. Vendor support for open system standards, interoperability, gateways, and hardware/software platform compatibility level to GCC's environment and in-house resources		X	X	X	X	X	
10. Capacity to support remote offices in multisite deployments		X	X	X	X	X	
11. Capacity and level of support for current, common, and future industry trend protocols		X	X	X	X	X	
12. Support for Integrated Automated Call Distribution (ACD), Traffic Control, Bandwidth, CAC (Call Admission Control), and 3/4 Digit Dialing		X	X	X	X	X	
13. Support for Interactive Voice Response (IVR)		X	X	X	X	X	
14. Unified messaging/communications support and level of compatibility to GCC's hardware and software technology environment		X	X	X	X	X	
15. Support for additional, alternate, or optional messaging applications (integrated or non-integrated)		X	X	X	X	X	
16. Support for and calling/receiving features for a variety of telephone instruments inclusive of IP, analog, and USB devices		X	X	X	X	X	
17. Support, features, and level of communications mobility inclusive of Free-Desk, Hotelling, Multimedia and Presence Support		X	X	X	X	X	
18. Level, type and features of security		X	X	X	X	X	
19. Ability and ease of rerouting to PSTN (public switched telephone network) on failure		X	X	X	X	X	
20. Ease of system management and administration		X	X	X	X	X	
21. Basic features, subsystems, add-on options, and capacity of telephony features supported		X	X	X	X	X	
22. Support for emergency services or 911 calling feature and compatibility level		X	X	X	X	X	
23. Availability and simplicity of management tools for end users inclusive of PC-based call managing		X	X	X	X	X	
24. Support for end-user language		X	X	X	X	X	
25. Support for third-party applications		X	X	X	X	X	
26. Extensibility, ease of application integration, and availability of software developers kit (SDK)		X	X	X	X	X	
27. Simplicity or ease and timeframe of delivery, system installation, campus-wide to end-user implementation, inclusive of site feasibility assessment, any and all additional inside wiring, training and usage		X	X	X	X	X	
28. Support for incremental migration to IP-based system		X	X	X	X	X	
29. Level and ease of scalability feature		X	X	X	X	X	
30. Productivity enhancement and support for conferencing		X	X	X	X	X	
Totals:		30*	Tie	30	Tie	29	*Based on price, I recommend GTA

Instructions: Put a check mark on the column immediately below the vendor name if the specification(s) is/are addressed. If not, leave the box blank. Total the number of checked boxes. The vendor with the highest number of checked boxes is given "1" to indicate 1st place, then in decreasing order of totaled checked boxes, "2" to indicate 2nd place, and 3rd for last place. If vendors have equal number of checked boxes, then write "Tie" in the rating boxes.

Francisco C. Larraco 6/23/2011

EXHIBIT 2