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		Pages:	10 (including cover page)
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Re: OPA-PA-21-003 Decision

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Jerrick Hernandez, Auditor
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BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

In the Appeal of Guahan Ventures Inc. dba Turfco, Appellant.	**Appeal No: OPA-PA-21-003** **DECISION**

I. INTRODUCTION

This is the Decision of the Public Auditor, pursuant to 2 G.A.R. § 12110, for Procurement Appeal No. OPA-PA-21-003. Appellant GUAHAN VENTURES INC. dba. TURFCO ("Turfco") filed its appeal on July 9, 2021, for review of the GENERAL SERVICES AGENCY's (the "GSA") procurement of Golf Carts (Request for Quotation (RFQ) No. 21002179). The Appeal was heard on December 16, 2021, before Public Auditor Benjamin J. F. Cruz. Joshua Walsh, Esq. appeared on behalf of Appellant Turfco. Assistant Attorney General Marlyn T. Aguilar, Esq. appeared for Respondent GSA.

The Public Auditor holds that the additional testimony from Guam Homeland Security/Office of Civil Defense (GHS/OCD) and Department of Public Health and Social Services (DPHSS) representatives supplemented the lack of Determination of Need in the procurement to justify the emergency procurement and urgent need to purchase golf carts in June 2021. GSA's untimely notification to potential bidders about the substantial change in delivery is unacceptable, but not against the law. Turfco's appeal is DENIED in its entirety.

II. JURISDICTION: STANDARD REVIEW

The decision of the Public Auditor under appeal is authorized by 5 G.C.A. § 5703. The determination of an issue, the findings of fact, and the decision of the Public Auditor are as stated in 5 G.C.A. § 5704.

III. FINDINGS OF FACT

The Public Auditor shall have the power to review and determine *de novo* any matter properly submitted. 5 G.C.A. § 5703 (a), and in reaching this Decision, has considered and incorporates herein the procurement record and all documents submitted by the parties, and has considered the testimony and arguments made during the hearing held on December 16, 2021. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

1. On June 11, 2021, GHS/OCD submitted Emergency Requisition Q210280170 for Item 1: Golf Cart-A827 Series 4 Seater (quantity of 2) and Item 2: Golf Cart-A827 Series 6 Seater (quantity of 4). The requisition was based on a June 1, 2021 quote from "suggested vendor" Auto Spot that indicated $21,990 total price for Item 1 and $51,980 total price for Item 2.
2. On June 12, 2021, GHS/OCD submitted a Memo to GSA providing Justification of Emergency Procurement. The Memo specifically indicated the following justification "1. Request approval to produce six gold carts to support transportation for individual with disabilities, mobility challenges (i.e. senior citizens), and additional mobility support in the event of inclement weather at ongoing mass vaccination sites, public health outreach sites, and rapid engagement sites. 2. Reference Executive Order 2021-12: Relative to Extending the Public Health Emergency Declared to Respond to Novel Coronavirus (COVID-19). 3. Justification fulfills prior DLAN ticket requests from the Department of Public Health and Social Services and other support agencies.

3. On June 14, 2021, at 1:22 PM, GSA issued (via e-mail) RFQ 21002179 for Requisition No. Q210280170, seeking golf carts. Specifically, the RFQ indicated Item 1: Golf Cart-A827 Series 4 Seater (quantity of 2) and Item 2: Golf Cart-A827 Series 6 Seater (quantity of 4). There was no delivery date indicated, but the RFQ email indicated "Please respond with a Quote or a No Quote as soon as possible but no later than Thursday, 06/17/2021 before close of business at 5 PM. Your soonest response is greatly appreciated!"
4. On June 14, 2021, at 3:42 PM, Turfco emailed GSA asking to "speak with someone regarding the specifications because it was too vague to provide an accurate quotation."
5. On June 14, 2021, at 4:12 PM, GSA emailed Turfco in response to their email regarding clarification on specifications indicating "Attached is the brochure that the end-user provided. You may provide us with your quote equivalent or better. Also, preferred ETA is 30 days from the date of purchase order award. Please ensure to include delivery date of this item."
6. On June 16, 2021, at 5:43 PM, GSA emailed all potential bidders an amended RFQ that indicated "this is an "Emergency Procurement" and Delivery Requirement is "IMMEDIATE". The deadline for quotes remained at "no later than 6/17/2021".
7. Quotes were received from three bidders:
    a. Guam Auto Spot submitted a quote on 6/14/2021 indicating $21,990 total price for Item 1 and $51,980 total price for Item 2 with immediate delivery.
    b. Royal Pacific Motors (Yamaha) submitted a quote on 6/16/2021 indicating $20,996 total price for Item 1 and $49,996 total price for Item 2 with a 45-60 days delivery.
    c. Turfco submitted two quotes on 6/15/2021 indicating: (1) $16,750 total price for Item 1 and $36,400 total price for Item 2 with a 30-75 days from the date of firm order

delivery; and (2) $16,200 total price for Item 1 and $35,160 total price for Item 2 with a 30-75 days from the date of firm order delivery.

8. On June 19, 2021, a purchase order was awarded to Guam Auto Spot indicating $21,990 total for Item 1 and $51,980 total for Item 2 with a total amount of $73,970.
9. On June 24, 2021, Turfco emailed their protest of the award to Guam Auto Spot, "As it appears on the surface that the vendor was not awarded on the lowest cost to the government, but based on "immediate delivery". Immediate delivery was not listed as a requirement on the original RFQ received from GSA on Mon, Jun 14, at 1:24 PM.."
10. On June 25, 2021, GSA denied Turfco's protest.
11. On July 9, 2021, Turfco filed a procurement appeal with the Office of Public Accountability (OPA).
12. In the appeal, Turfco raised the following issues: GSA's substantive change to the request for quotation a day before the bid quotation, and after all quotes had been submitted, violates Guam Procurement Law, and GSA's change to "immediate delivery" amounts to Sole Source Procurement in Violation of Guam law.

IV. ANALYSIS

This appeal concerns two main issues in that Turfco contends (1) GSA use of emergency procurement was not valid, and (2) GSA violated Guam Procurement Law by notifying bidders about a substantial change in the RFQ after working hours just the day before the deadline.

A. Testimony from GHS/OCD and DPHSS supplemented the missing Determination of Need in Procurement Record and justification for Emergency Procurement.

GSA determined that it is an emergency procurement based on the Emergency Requisition requested by GHS/OCD on June 11, 2021. However, "no emergency procurement shall be solicited or awarded without a Determination of Need for Emergency Procurement" 5 GCA § 5215 (c)[1] In the review of the procurement record, there was no Determination of Need for Emergency Procurement to justify the urgent need to purchase golf carts in June 2021 when testing and vaccination started months prior in 2020, which was acknowledged by GSA Buyer Supervisor Anita Cruz who could not find it during testimony.

The only document that comes close to a "Determination of Need" is the June 12, 2021 memo from GHS/OCD to GSA Justifying Emergency Procurement, which indicated "1. Request approval to procure six golf carts to support transportation for individual with disabilities, mobility challenges (i.e. senior citizens), and additional mobility support in the event of inclement weather at ongoing mass vaccination sites, public health outreach sites, and rapid engagement sites." GSA is of the understanding that the June 12, 2021 Memo along with the Executive Order 2020-03 Relative to Declaring a State of Emergency to Respond to Novel Coronavirus (COVID-19) issued in March 2020, which was extended in subsequent Executive Orders supports the use of Emergency

[1] 5 GCA § 5215 (c) Determination of Need for Emergency Procurement. No emergency procurement shall be solicited or awarded without a Determination of Need for Emergency Procurement, which shall: (1) state the date of its execution, and be signed under penalty of perjury by the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of either officer, conducting the emergency procurement of supplies, services, or emergency construction works; (2) describe with factual particularity, the nature and apparent cause of the condition posing an imminent threat to public health, welfare, or safety, or the health and safety of the environment, which could not have been foreseen through the use of reasonable and prudent management procedures, and which cannot be addressed by other procurement methods of source selection (3) state that the threat is imminent, and that the emergency procurement authorized by this Section is necessary, without delay, to protect the public health, welfare, or safety, or the health and safety of the environment; (4) affirm solemnly that the emergency procurement of supplies, services, or emergency construction works, in the face of the emergency described, is not being used and will not be used, directly or indirectly, to avoid other methods of source selection or the purposes and policies of this Chapter; (5) be copied and appended to its respective Declaration of Emergency or Certificate of Emergency, as described in Subsection (b) of this Section, and further attached to and made a part of any contract, or Notice of Award made or given; and (6) be a material part of the procurement record required in this Chapter.

Procurement. However, this does not explain the urgency of needing to purchase Golf carts in June 2021, when vaccination started six months prior in December 2020.

Patrick T. Leon Guerrero who was Acting Administrator for GHS/OCD in June 2021, testified that when vaccination started up in December 2020, DPHSS did request from GHS/OCD for golf carts to use. However, he noted there was no need to purchase golf carts at that time because GHS/OCD was able to get assistance from other Government of Guam agencies and local businesses to loan them golf carts. It was not until after the agencies and local businesses asked that their golf carts be returned that DPHSS requested to purchase golf carts because they still were needed with the vaccination clinics.

Chima Mbakwem, DPHSS Chief Public Health Officer, testified that at the height of the pandemic most of the island was shut down, and therefore DPHSS had access to various resources the other agencies were not using. When the vaccinations started and positive cases were low, a lot of the resources DPHSS once had were being pulled back that was initially provided from other agencies when most places were on lockdown. There then increased the need for DPHSS to quickly procure things initially borrowed to maintain operations responding to the pandemic.

Terry Aguon, DPHSS Deputy Director, testified that from May to June of 2021, DPHSS was still actively responding to the pandemic with the various testing and vaccination sites. The golf carts were instrumental in transporting people and supplies at the various sites. Back in December 2020, when the vaccination clinics started, DPHSS was borrowing golf carts and therefore they did not need to really purchase until the initially borrowed golf carts were asked to be returned.

The Public Auditor finds that although the Determination of Need that fully explained the urgent need for purchasing golf carts in June 2021 was missing from the procurement record, the

testimony from GHS/OCD and DPHSS representatives supplemented this deficiency, and provided justification for use of emergency procurement.

B. GSA's untimely notification to potential bidders about the substantial change in delivery is unacceptable, but not against the law.

GSA acknowledged that emergency procurement and the immediate delivery date were not indicated in the initial RFQ sent to potential bidders on June 14, 2021. In addition, when Turfco asked for clarification on the specifications also on June 14, 2021, GSA responded by saying "preferred ETA is 30 days from the date of purchase order award. Please ensure to include delivery date of this item." GSA noted this was an oversight, but bidders were aware it was an emergency because the RFQ email subject line indicated "Quote Request RFQ21002179 to C0098153 – Golf Cart (**Emergency**)" (Emphasis added), which GSA believed was sufficient to let potential bidders know that it was an emergency and emergency procurement means "right away".

As soon as they noticed the oversight, GSA immediately notified all potential bidders through email, albeit on June 16, 2021, at 5:43 PM (after working hours) and one day before the RFQ deadline of 5:00 pm, June 17, 2021, it was an "Emergency Procurement" with immediate delivery. The change to put immediate delivery also happened to come two days after GSA had received a quote from Guam Auto Spot on June 14, 2021, that indicated immediate delivery. GSA is of the understanding that this is not a change in specifications because it was just an oversight that the initial delivery did not indicate that it was for immediate delivery, but it was always an emergency procurement.

The Public Auditor finds that GSA's error in not giving notification it was an Emergency Procurement and that the delivery requirement would be immediate in the initial June 14, 2021 RFQ and providing the notification correcting the error on June 16, 2021, at approximately 24

hours before the RFQ deadline is unacceptable, but not against the law. GSA is admonished for this error and should be more prudent in providing potential bidders the accurate information timely so they can submit their best bid as possible.

Turfco's Juan-Carlo Pangelinan testified that he didn't see the email from GSA on June 16, 2021 because it was after hours and he was having family time. However, he also testified that on most days, he adjusts his work time to be able to respond to the last two hours of Philippine time, where he also does business at. If Guam is two hours ahead of the Philippines, then this would mean Mr. Pangilinan is still working till 7:00 pm Guam time. Mr. Pangelinan noted he wasn't checking his Guam email at the time and only focused on his Philippines email, which is also why he did not see the GSA email on June 16, 2021. The Public Auditor finds Mr. Pangelinan's explanation that he did not see the email notifying bidders that it was an Emergency Procurement with "immediate delivery" on June 16, 2021 as not persuasive.

Mr. Pangelinan also testified that after he received the RFQ on June 14, 2021, he was able to draft a bid dated June 15, 2021, which is within 24 hours. He noted that although he had the bid prepared, he did not submit it because it was before the June 17, 2021 deadline, and it is his practice not to submit bids before the deadline because he does not trust his bid information would not be shared to other potential bidders who could bid below him. Mr. Pangelinan testified that had GSA extended the deadline, Turfco would have been able to adjust their bid to be able to meet the "immediate delivery" term. He also testified that it would take more than just a day to adjust his bid. However, the Public Auditor finds this argument also as not persuasive because Mr. Pangelinan was able to draft his initial bid within 24 hours after he received the RFQ on June 14, 2021.

As it has been determined to be an emergency procurement and the golf carts were urgently needed, the Public Auditor finds that GSA awarded the procurement "to the firm with the best

offer, as determining by evaluating cost and delivery time." in accordance with 2 GAR §3113, which was Guam Auto Spot because they offered "immediate delivery". It was not a Sole Source Procurement.

V. CONCLUSION

Based on the foregoing, the Public Auditor makes the following determinations:

A. The additional testimony from GHS and DPHSS representatives supplemented the lack of Determination of Need in the procurement to justify the emergency procurement.

B. GSA's untimely notification to potential bidders about the substantial change in delivery is unacceptable, but not against the law.

C. Turfco's appeal is hereby DENIED.

D. The parties shall bear their respective costs and attorney's fees.

This is a Final Administrative Decision for Procurement Appeal No. OPA-PA-21-003. The Parties are hereby informed of their right to appeal the Public Auditor's Decision to the Superior Court of Guam in accordance with Part D of Article 9 of 5 G.C.A. §5481(a) within fourteen (14) days after receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties and their respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA website at www.opaguam.org.

DATED this 10th day of February 2022.

Benjamin J.F. Cruz
Public Auditor of Guam

Gmail

Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-21-003 Decision

Jerrick Hernandez <jhernandez@guamopa.com> Thu, Feb 10, 2022 at 10:53 AM
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Hafa Adai,

Please see attached Decision for OPA-PA-21-003. This email will serve as an official notice in lieu of a transmittal via Fax.

Please confirm receipt of this email and the attached document. Thank you.

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Regards,

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