

**LAW OFFICES
CUNLIFFE & COOK**
210 Archbishop F.C. Flores Street
Hagåtña, Guam 96910
Telephone: (671) 472-1824
Telecopier: (671) 472-2422

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Attorneys for: Appellant

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEAL**

IN THE MATTER OF THE APPEAL OF)	DOCKET NO. OPA-PA 10-002
TELEGUAM HOLDINGS, LLC)	
)	
d/b/a GTA TELECOM,)	TELEGUAM HOLDINGS, LLC'S
)	COMMENTS ON AGENCY REPORT
Appellant.)	
_____)	

Appellant TeleGuam Holdings, LLC dba GTA Telecom (hereinafter referred to as "GTA"), through counsel, Cunliffe & Cook, by Jeffrey A. Cook, Esq., hereby submits these comments to the Agency Report submitted by the Office of the Attorney General (hereinafter referred to as "AG"), attorneys for the General Services Agency, Department of Administration, Government of Guam (hereinafter referred to as "GSA"). These comments are submitted pursuant to 2 GAR §12104(c)(4).

As the record reflects, on November 13, 2009, the date the bids were opened in Invitation for Bid No. GSA-004-010, GSA sent a Memorandum to the director of Bureau of Statistics and Planning (hereinafter referred to as "BSP") asking it to review and evaluate the bid provided by Pacific Data Systems (herein after referred to as "PDS") and concur if all requirements specifications in the bid were met. From this Memorandum, it is safe to conclude that on November 13, 2009, GSA questioned whether the PDS bid met the specifications in the Invitation for Bid. Attached thereto was a copy of the bid from PDS. Item No. 2.1 of the bid request states: "Digital business phone systems," and PDS put in "AASTRA 480 with personal call manager." See, Tab No. 7 of the Procurement Record.

As GTA has already pointed out in its protest and in its appeal, the AASTRA 480 with personal call manager is an analog telephone system, not digital. Why BSP would concur that this equipment met the bid specifications is unclear. But there is absolutely no question that the equipment offered by PDS did not meet the specifications set forth in the Invitation for Bid.

The analysis prepared by GSA was clearly flawed as it accepted the findings of BSP that the PDS bid met the specifications set forth in the Invitation for Bid. As already noted, this was clearly an error since the equipment PDS was offering did not meet the bid specifications.

On December 16, 2009, GTA filed its protest of the award of Bid No. GSA-004-010 to PDS. The protest clearly pointed out to GSA that the specifications set forth in the Invitation for Bid were not met by the equipment offered by PDS in its bid.

In the Memorandum from BSP to GSA dated January 8, 2010, BSP unilaterally changed the specifications of the bid. It stated:

The LCO telephone system should be digitally based. It was our impression that a digitally based system would require digital handsets. For obvious reasons, the vendor selected telephone system and handsets must be interoperable. The latter, however, need not be digital if the telephone system and handsets will functions properly together.

See, Tab No. 15 of the Procurement Record.

This statement is in direct contradiction to the bid specifications set forth in the original Invitation for Bid. The Invitation for Bid included the following specifications: "Telephone Services: PDX-base service VOIP is strictly prohibited from this implementation; digital business phone systems quantity 35; digital business conference

(speaker) system quantity 1; operator console digital business phone system with appropriate expansion units quantity 1.” The schedule and scalability considerations included in the Invitation for Bid states: “analog lines supporting 12 digital business phone systems; ISDN/PRI for trunking supporting 24 digital business phone systems; ISDN/PRI for trunking supporting 35 digital business phone systems; ISDN/PRI for trunking supporting 24 digital business phone systems; and, 5 analog lines supporting 12 digital business phone systems.” (Emphasis Added).

In making its report, the AG fails to point out a section in the Procurement Law that is directly on point in this bid protest and totally supports GTA’s position. 2 GAR §3109(n)(3), and also found at GSA Rules and Regulations 3-2-2.14.3, states:

Product acceptability. The invitation for bid shall set forth any evaluation criteria to be used in determining product acceptability. It may require submission of bid samples, descriptive literature, technical data or other material. It may also provide for accomplishing any of the following prior to award; ...

(c) other examinations to determine whether it conforms with any other purchase description requirements.

The acceptability evaluation is not conducted for the purpose of determining whether one bidder’s item is superior to another, but only to determine that a bidder’s offering is acceptable as set forth in the invitation for bids. Any bidders offering which does not meet the acceptability requirements shall be rejected as non responsive.

As already stated in GTA’s bid protest, Appeal to the Office of the Public Auditor, and in these comments, the equipment offered by PDS did not meet the bid specifications set for in the Invitation for Bid. The bid specifications clearly called for digital telecommunication equipment. The AASTRA 480 offered by PDS is analog telecommunication equipment.

In the Procurement Record at Tab No. 14 are statements by Department of Administration employees Ben Camacho, Jim Lacson and Michael S. Cruz giving their opinions as to whether or not the telephones proposed by PDS met the requirements as set forth in the Invitation for Bid. Mr. Lacson and Mr. Cruz gave sort of hedged positive answers that the PDS equipment met the requirements. However, both of these individuals made it clear through disclaimers that they were not telecommunication experts and their opinion should be taken with that in mind. Mr. Camacho who did not give any disclaimer about his telecommunication expertise clearly stated that the specifications were not met stating that the vendor proposed analog telephones, not digital per spec. Even with this information internally, GSA still took the position that the PDS's bid met the specifications and awarded the bid to PDS.

If GSA and BSP determined that analog equipment was acceptable, the only appropriate legal action for them to take was to cancel the bid in its form as it was issued in October 2009, and put out a new bid listing the specifications as analog telecommunication equipment. Then, GTA, PDS and any other company that wanted to, could have bid on the revised specifications.

The Product Acceptability section cited herein makes it clear that if a bidder's offering does not meet acceptability requirements, it shall be rejected as non responsive. But in this case, instead of rejecting PDS's bid as non responsive, BSP and GSA made the unilateral changes in what the specifications were and approved PDS's bid over GTA's bid because GTA's bid was too costly. Obviously, GTA's bid was too costly because it was responding to the specifications in the bid which requested digital equipment which costs more than analog equipment. If the agencies wanted to change to analog, they should have put the matter out for a new bid. That is the requirement of the procurement

law and is intended to protect the tax payers, as well as the procurement system in the Government of Guam.

These agencies' actions are clearly a violation of the procurement law and the rules and regulations implementing that law. The AG claims GSA exercised due diligence. But GSA relied on self serving statements of PDS that the equipment met the specifications even though simply looking at the webpage for AASTRA reveals that the equipment PDS was offering was analog, not digital. Its other due diligence was asking three (3) Department of Administration staff their opinion. As already noted herein, one of those individuals who did not disclaim his expertise clearly stated the PDS bid was not in conformance to the specifications in the Invitation for Bid. The other two (2) individuals who made disclaimers as to not having telecommunication expertise made vague statements that the specs were met, but couched those statements in such a way as to not be very strong support for the GSA determination that PDS's bid met the specifications in the Invitation for Bid. This is not the kind of due diligence that the bidders for government contracts should expect from government agencies.

Although there is not currently an automatic stay in place since the contract was let to PDS prior to GTA's filing its protest, GTA respectfully asks the Office of the Public Auditor to issue a stay of any further action regarding this obviously unlawful contract. The facts of this case clearly demonstrate the total failure of GSA to follow the procurement law it is supposed to oversee. If GSA is allowed to ignore specifications it places in the bids it prepares, and unilaterally alter the playing field for bidders in the middle of the process, procurement is doomed to never provide the protection the legislation intended it should give to the tax payers of Guam, as well as the business people of Guam attempting to do business with the Government of Guam.

This contract must be canceled. The contract should be given to GTA as the only bidder meeting the specifications set forth in the Invitation for Bid.

Respectfully submitted this 25th day of February, 2010.

CUNLIFFE & COOK
A Professional Corporation
Attorneys for *Appellant*

By



JEFFREY A. COOK, ESQ.