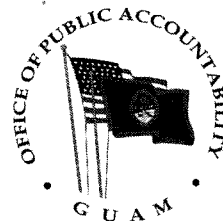


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Phone: Fax:	475-3324 472-2493	Pages:	8 (including cover page)
CC:	John Day President Pacific Data Systems	Date:	Wednesday, September 5, 2012
Phone: Fax:	300-0202 300-0265	Phone: Fax:	475-0390 x. 216 472-7951
CC:	Teleguam Holdings, LLC C/O Elyze M. Iriarte Carlsmith Ball, LLP		
Phone: Fax:	472-6813 477-4375		

Re: OPA-PA-12-011 DECISION

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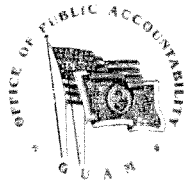
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OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

In the Appeal of

PACIFIC DATA SYSTEMS,

Appellant.

APPEAL NO: OPA-PA-12-011

DECISION

I. INTRODUCTION

This is a Decision of the Public Auditor for an Appeal filed on May 17, 2012 by Pacific Data Systems (hereinafter referred to as “PDS”) regarding the Invitation for Bid No. GSA-064-11 (“IFB”), issued by the General Services Agency (“GSA”) on June 22, 2011 seeking, amongst other things, Telecommunication Services, Mobile Telephone Services, Integrated Services Digital Networking (ISDN) and Primary Rate Interface (PRI). Attorney Phillip Torres served as the Hearing Officer in this appeal. The Public Auditor holds that GSA correctly found PDS’s protest concerning the local procurement preference in IFB Bid Form 10 had no merit because all of the businesses that submitted a bid were local businesses known to GSA. In addition, the Public Auditor finds that there is no merit in PDS’s claim that the IFB required the submission of a Local Procurement Preference Application. Accordingly, PDS’s Appeal is hereby DENIED.

II. FINDINGS OF FACT

The Public Auditor, in reaching this Decision, has considered and incorporated herein the procurement record and all documents submitted by the parties. Based on the aforementioned procedural and substantive record in this matter, the Public Auditor makes the following Findings of Fact:

1 1. On or about June 22, 2011, GSA issued Invitation for Bid No. GSA-064-11.¹
2 The IFB stated in relevant part that:

- 3 a. Documents required to be submitted in the Bid envelope, included: Bid
4 Guarantee of fifteen percent (15%) of the Bid amount, Statement of
5 Qualifications, Brochure Descriptive Literature, Affidavit Disclosing
6 Ownership and Commission, Non-Collusion Affidavit, DOL Wage
7 Determination Affidavit, Restriction Against Sexual Offenders Affidavit,
8 No Kick Back Gratuities Affidavit and Ethical Standards Affidavit, and
9 Affidavit regarding Prohibition of Contingent Fees.²
10 b. All procurement of supplies and services where possible, will be made
11 from among businesses licensed to do business on Guam in accordance
12 with section 5008 of the Guam Procurement Act (5 G.C.A., Chapter 5).³

13 2. Eight amendments to the IFB were issued between July 6, 2011 and November
14 23, 2011. The bid opening date was extended seven times from the originally stated July 20,
15 2011 to December 9, 2011.⁴

16 3. The Bid was opened by GSA on December 9, 2011.⁵

17 4. On April 27, 2012, the Bid status form was sent to PDS informing it that its Bid
18 had been rejected, in part, for various reasons but also recommending it for award of certain
19 items and services along with awards to Teleguam Holdings, LLC (“GTA”) and PTI Pacifica,
20 Inc. (“IT&E”).⁶

21 5. On April 30, 2012, PDS protested to GSA on six areas, one of which PDS
22 claimed that GSA did not consider PDS’s Local Procurement Preference application in the
23

24 ¹ Newspaper Publication dated June 22, 2011, Exhibit 14, GSA Procurement
25 Record filed on May 24, 2012 and Page 1 of 56, IFB No. GSA-064-11, Exhibit 5,
26 GSA Procurement Record.

² Page 2 of 56, IFB No. GSA-064-11, Exhibit 5, GSA Procurement Record filed on
27 May 24, 2012.

³ Local Procurement Preference, Government of Guam General Terms and
28 Conditions #5, Page 19 of 56, IFB No. GSA-064-11, Exhibit 5, GSA Procurement
Record filed on May 24, 2012.

⁴ IFB Amendment Nos. 1 through 8, Exhibit 7, Id.

⁵ Bid Abstract and Register, Exhibit 6, Id.

⁶ Bid Status, Exhibit 9, Id.

1 award of Bid Form 10 and that PDS should be the lowest responsive and responsible bidder
2 after application of the 15% Local Procurement Preference.⁷

3 6. On May 3, 2012, GSA denied the protest concerning local procurement
4 preference, stating that “Local procurement preference was not applicable in this case as all of
5 the businesses which submitted a bid was [*sic*] considered to meet the requirements to be
6 considered local and have the local preference available. As such, there was no benefit available
7 to any of the submitted vendors.”⁸

8 7. Fourteen days later, on May 17, 2012, PDS filed this appeal with the Office of
9 Public Accountability (“OPA”).

10 8. On July 12, 2012, GTA filed a Motion to Dismiss the Appeal alleging PDS
11 untimely protested to GSA. PDS filed a Reply (Opposition) to the Motion to Dismiss on
12 August 14, 2012, and GTA filed a Response on August 21, 2012.

13 9. On August 14, 2012, PDS filed a Motion to Withdraw Request for Hearing and
14 requested that the OPA make a determination in this appeal based on the applicable filings.

15 III. ANALYSIS

16 Pursuant to 5 G.C.A. § 5703, the Public Auditor shall review GSA’s May 3, 2012
17 decision denying PDS’s April 30, 2012 protest *de novo*.

18 A. PDS’S PROTEST WAS TIMELY.

19 To be timely, the Protest must have been submitted in writing to the head of the
20 Purchasing Agency within fourteen (14) days after PDS knew or should have known of the facts
21 giving rise thereto. 5 G.C.A. § 5425(a). If the protest was not filed within the time required, it
22 would have been untimely and could not be appealed to the OPA. *In Re Appeal of Island*
23 *Business Systems & Supplies*, OPA-PA-08-011, Page 6. PDS had an obligation to protest at
24 the point in time when it knew or should have known that it had not received a Local
25

26
27
28 ⁷ Protest Letter from PDS President John Day to GSA Chief Procurement Officer
Claudia Acfalle on April 30, 2012, Exhibit 1, Id.

⁸ Response Letter from GSA Chief Procurement Officer Claudia Acfalle to PDS
President John Day on May 3, 2012, Exhibit 2, Id.

1 Procurement Preference to the exclusion of other bidders. At that point, its fourteen (14) day
2 clock started to run.

3 The issue raised by PDS in its protest was that GSA did not factor in the Local
4 Procurement Preference in awarding Bid Form 10 to GTA⁹. PDS stated that the Local
5 Procurement Preference was a requirement of the IFB and that it (PDS) was the only party to
6 submit a Local Procurement Preference application. PDS further stated that it, and not GTA,
7 was entitled to the fifteen percent (15%) preference in construing its bid. When PDS knew or
8 should have known that the Preference application was not interpreted by GSA as entitling only
9 PDS to the fifteen percent (15%) preference is not clear from the record. PDS argues that it did
10 not know whether other bidders submitted the Local Procurement Preference Application¹⁰.
11 Conversely, GTA argued that the fourteen (14) day clock started to run when PDS picked up its
12 IFB packet or shortly thereafter and discovered that the Local Procurement Preference
13 Application was not included with the Bid Packet. GTA asserts that since PDS did not Protest
14 within fourteen (14) days from picking up the IFB package, PDS's Protest was untimely.¹¹

15 The IFB required certain documents and affidavits to be submitted in the bidder's bid
16 envelope, such as the Bid Guarantee of fifteen percent (15%) of the Bid amount, Statement of
17 Qualifications, Affidavit Disclosing Ownership and Commission, Non-Collusion Affidavit,
18 DOL Wage Determination Affidavit, etc.

19 The Bids were opened on December 9, 2011, but the record is unclear as to whether the
20 issue of a Local Procurement Preference was discussed and, therefore, whether PDS knew or
21 should have known about the application of the fifteen percent (15%) local preference at the Bid
22 opening. On April 27, 2012, GSA sent PDS a bid status form indicating that PDS, GTA, and
23 IT&E were partial awardees. On April 27, 2012, PDS knew how its bid preference was being
24 treated. PDS filed its protest to GSA on April 30, 2012, within the 14-day time requirement.
25 On May 3, 2012, GSA denied the Protest.

26
27 ⁹ Protest Letter from PDS President John Day to GSA Chief Procurement Officer
Claudia Acfalle on April 30, 2012, Exhibit 1, Id.

28 ¹⁰ PDS Reply to GTA Teleguam LLC Motion to Dismiss filed on August 14, 2012.

¹¹ Teleguam Holdings, LLC's Motion to Dismiss; Memorandum of Points and
Authorities, filed on July 12, 2012.

1 On May 17, 2012, PDS filed its Appeal in this case with the OPA, arguing that it, and
2 not GTA, had submitted the Local Procurement Preference Application as part of its bid
3 submission and was entitled to a fifteen percent (15%) local procurement preference adjustment
4 by GSA in the evaluation of the Bid Form 10 submissions, between PDS and GTA.

5 The question of when a protesting offeror knew or should have known is a question of
6 fact. The Guam Supreme Court reviewed similar facts and the issue of when a protesting offeror
7 knew or should have known of protest-triggering facts in *Guam Imaging Consultants, Inc., et*
8 *at., v. GMHA, et al.*, 2004 Guam 15. The protesting offeror had, at an earlier date, received
9 notice of intent to award the contract to another offeror, but did not protest until later when
10 information was revealed in a government memorandum which suggested the protester may be
11 aggrieved. The Supreme Court held the protesting offeror “did not know, nor should it have
12 known, of the facts giving rise to this protest until it received” the memorandum. The Court
13 ruled that the protest was timely filed based on that revelation, and was not time barred because
14 of the earlier notice of intent to award to another. *Id* at ¶ 33. The Public Auditor finds that it was
15 only upon receipt of the April 27, 2012 Bid Status that PDS was made aware how its bid was
16 evaluated against other bidders. Therefore, by filing a bid protest on April 30, 2012, PDS
17 timely protested within the 14-day requirement and properly set forth its grounds for appeal as
18 required by 2 G.A.R. § 12104.

19 **B. MERITS OF THE APPEAL.**

20 PDS’s appeal seeks the remedy of rescinding the award of Bid Form 10 to GTA and
21 reassessing the Bid Form 10 evaluations taking into consideration the fifteen percent (15%)
22 local procurement preference that PDS argues it qualifies for, and not GTA, since GTA did not
23 submit the Local Procurement Preference Application. The Public Auditor must now decide
24 whether to uphold or deny the Appeal.

25 On page 2 of the IFB, GSA identifies all of the requirements to be submitted with the
26 Bid. It states in bold lettering that failure to comply may be cause for disqualification and
27 rejection of the Bid. A review of the IFB finds that nowhere therein is a stated requirement to
28 submit a Local Procurement Preference Application. The designation of a Local Procurement

1 Preference is found at page 19 of the IFB's General Terms and Conditions, but the items
2 specified therein are not all required to be included in the bid packet. The Public Auditor finds
3 that the Local Procurement Preference Application is not a requirement of a qualifying bid.¹²
4 On May 3, 2012, GSA stated that the Local Procurement Preference was not applicable because
5 all bidders were considered local and PDS suffered no prejudice. As such, the Public Auditor
6 finds that there is no merit to PDS's arguments pertaining to the application of the Local
7 Procurement Preference and request for rescinding of the award. Therefore, PDS's appeal is
8 DENIED.

10 IV. CONCLUSION

11 Based on the foregoing, the Public Auditor hereby determines the following:

12 1. The Public Auditor finds that PDS's Protest was timely.

13 2. The Public Auditor finds no merit to PDS's Protest allegation that the Local
14 Procurement Preference Application was a requirement to be qualified for the Bid or that PDS
15 was entitled to a fifteen percent (15%) adjustment of its Bid price because only PDS, and not
16 GTA, submitted a Local Procurement Preference Application.

17 3. The Public Auditor finds that both GTA and PDS were entitled to a Local
18 Procurement Preference, as both parties were local companies known to GSA, and as such, PDS
19 suffered no prejudice or harm in that regard.

20 4. Pacific Data Systems' Appeal is hereby DENIED.

21
22 This is a Final Administrative Decision. The parties are hereby informed of their right
23 to appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance
24 with Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final
25 Administrative Decision (5 G.C.A. § 5481(a)).
26

27
28 ¹² For future reference, GSA may, through the Administrative Adjudication Act, want to clarify whether or not a local procurement preference application will be required for bid submission.

1 A copy of this Decision shall be provided to the parties and their respective attorneys, in
2 accordance with 5 G.C.A. § 5702 and shall be made available for review on the OPA website,
3 www.guamopa.org.

4
5 DATED this 5th day of September, 2012.

6
7 
8 **DORIS FLORES BROOKS, CPA, CGFM**
9 **PUBLIC AUDITOR**