



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

**PROCUREMENT APPEALS**

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6 IN THE APPEAL OF,

7 JOETEN DEVELOPMENT, INC.

8 Appellant

) **APPEAL NO: OPA-PA-11-012**

) **DECISION**

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11 **I. INTRODUCTION**

12 This is the Decision of the Public Auditor for an appeal filed on July 6, 2011, by  
13 JOETEN DEVELOPMENT, INC., (Hereafter referred to as "JDI") regarding the GENERAL  
14 SERVICES AGENCY, GOVERNMENT OF GUAM's (Hereafter referred to as "GSA") June  
15 10, 2011 denial of JDI's May 25, 2011, protest concerning GSA's May 4, 2011 cancellation of  
16 GSA Bid Invitation No. GSA-047-11 (Lease of Office Space) (Hereafter referred to as "IFB").  
17 The Public Auditor holds that GSA's May 4, 2011 cancellation of the IFB violates 5 G.C.A.  
18 §5225 because it was not made in accordance with Guam Procurement Regulations.  
19 Accordingly, JDI's appeal is hereby GRANTED.

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21 **II. FINDINGS OF FACT**

22 The Public Auditor in reaching this Decision has considered and incorporates herein the  
23 procurement record and all documents submitted by the parties pursuant to JDI's August 19,  
24 2011 Hearing Waiver. Based on the aforementioned record in this matter, the Public Auditor  
25 makes the following findings of fact:  
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1           1. On or about August 10, 2001, JDI leased Lot No. 5223-5A-1-2, Barrigada, Guam,  
2 complete with a building, to PRICEMART, INC., a Delaware Corporation, for a period of ten  
3 (10) years expiring on August 9, 2011.<sup>1</sup>  
4

5           2. On or about April 12, 2005, The DEPARTMENT OF REVENUE & TAXATION,  
6 GOVERNMENT OF GUAM (Hereafter Referred to as "DRT") entered into a sublease  
7 agreement with PSMT Guam Inc., a Guam corporation, for Lot No. 5223-5A-1-2, Barrigada,  
8 Guam, and the building upon said lot, for a one (1) year term with an option to extend the  
9 sublease, on an annual basis, for additional twelve (12) month terms, and stating that DRT is  
10 prohibited from extending the lease term after August 9, 2011.<sup>2</sup> Further, said sublease allowed  
11 DRT to hold over as a tenant on a month to month basis after August 9, 2011.<sup>3</sup>

12           3. DRT is currently occupying Lot No. 5223-5A-1-2, Barrigada, Guam, and its building  
13 and was appropriated, in DRT's approved Fiscal Year 2011 budget, a total amount of one-  
14 million-two-hundred-forty-four-thousand-and eight-hundred-forty-nine-dollars (\$1,244,849) per  
15 year, or one-hundred-three-thousand-seven-hundred-thirty-seven-dollars-and-forty-two-cents  
16 (\$103,737.42) per month for office space rental.<sup>4</sup> Further, DRT is requesting the amount of one-  
17 million-seventy-five-thousand-four-hundred-twenty-dollars (\$1,075,420) per year, or eighty-  
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21 <sup>1</sup> Article 1, Term of Lease, page 1, Net Lease Agreement, Exhibit A, Sublease  
22 for Commercial Space filed on September 2, 2011 by DRT.

23 <sup>2</sup> Paragraphs 2 and 4, pages 1 and 5 respectively, Sublease for Commercial  
24 Space filed on September 2, 2011 by DRT.

25 <sup>3</sup> Paragraph 12, page 9, Id.

26 <sup>4</sup> Summary of DRT, Government of Guam Fiscal Year 2011 Budget, Program Budget  
27 Digest, Exhibit A, JDI's Memorandum of Points and Authorities Re: JDI's  
28 Appeal filed on August 29, 2011.

1 nine-thousand, six-hundred-eighteen-dollars-and-thirty-three-cents (\$89,618.33) per month, for  
2 its office rental in its FY2012 Budget.<sup>5</sup>

3 4. On February 2, 2011, DRT encumbered the amount of one-hundred-thousand-dollars  
4 (\$100,000) from DRT's FY2011 Budget, for one-month of Office Rental from the contractor  
5 awarded the IFB.<sup>6</sup>

6 5. On March 29, 2011, GSA issued the IFB which solicited bids from contractors to  
7 lease office space for the DRT for a lease term of three (3) years with a renewal option for two  
8 (2) years or upon availability of funds.<sup>7</sup> The Bid Invitation for the IFB was also published on  
9 March 29, 2011 in the *Marianas Variety*.<sup>8</sup>

10 6. The IFB states, in relevant part: "The Chief Procurement Officer shall have the  
11 authority to award, cancel, or reject bids, in whole or in part for any one or more items if she  
12 determines it is in the public interest."<sup>9</sup>

13 7. The deadline for bidders to submit bids in response to the IFB was at 10:00 a.m. on  
14 April 14, 2011.<sup>10</sup>

15 8. Only JDI submitted a bid in response to the IFB. The bid was officially opened at  
16 10:00 a.m. on April 14, 2011, and JDI bid 53,300 square feet of office space for 12 months at  
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19 <sup>5</sup> DRT Summary of Base Operational Appropriation, Exhibit B, Id.

20 <sup>6</sup> DRT Requisition #Q110800042, TAB 14, Procurement Record filed on July 13,  
21 2011, and page 2, Government of Guam's Brief filed on August 29, 2011.

22 <sup>7</sup> Invitation for Bid, page 1, and Lease Term, Lease of Office Space, page 26,  
23 IFB, TAB 4, Procurement Record filed on July 13, 2011.

24 <sup>8</sup> Advertisement, TAB 15, Id.

25 <sup>9</sup> Paragraph 22, General Terms and Conditions, page 20, Id.

26 <sup>10</sup> Invitation for Bid, page 1, Id.  
27  
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1 eighty-one-thousand-five-hundred-forty-nine-dollars (\$81,549) per month for a total of nine-  
2 hundred-seventy-eight-thousand-five-hundred-eighty-eight-dollars (\$978,588) per year.<sup>11</sup>

3 9. On May 2, 2011, DRT informed GSA that DRT was canceling the IFB in its entirety  
4 due to insufficient funds and that DRT will be submitting a new solicitation at a later date.<sup>12</sup>

5 10. On May 4, 2011 GSA evaluated JDI's bid and determined that based on the May 2,  
6 2011 letter from DRT, it is recommended that the IFB be cancelled in its entirety due to  
7 insufficient funds and that it be re-bid at a later date, and said recommendation was approved by  
8 GSA's Chief Procurement Officer on May 11, 2011.<sup>13</sup>

9 11. On or about May 11, 2011, GSA issued a Bid Status canceling the IFB in its entirety  
10 due to insufficient funds to be re-bid at a later date.<sup>14</sup>

11 12. On or about May 13, 2011, JDI received the aforementioned Bid Status canceling the  
12 IFB.<sup>15</sup>

13 13. On May 25, 2011, twelve (12) days after JDI received notice of the cancellation of  
14 the IFB, JDI protested the cancellation of the IFB.<sup>16</sup> JDI argued that: (1) DRT has sufficient  
15 funds to award the IFB contract; (2) The IFB was canceled after JDI's bid was publicly opened  
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17 <sup>11</sup> GSA Bid Analysis dated May 4, 2011, TAB 11, Procurement Record filed on  
18 July 13, 2011.

19 <sup>12</sup> Letter dated May 2, 2011 from Marie M. Benito, Acting Director, DRT, to  
20 Chief Procurement Officer, RE: Cancellation - IFB, TAB 10, Id.

21 <sup>13</sup> GSA Memorandum dated May 4, 2011 from GSA Buyer I Paul T. Llanes to GSA  
22 Chief Procurement Officer Claudia S. Acfalle, TAB 11, Id.

23 <sup>14</sup> Bid Status dated May 4, 2011 and approved on May 11, 2011 by GSA Chief  
24 Procurement Officer Claudia S. Acfalle, TAB 9, Id.

25 <sup>15</sup> Acknowledgement Copy, Bid Status dated May 4, 2011 approved on May 11,  
26 2011, TAB 9, Id.

27 <sup>16</sup> JDI Protest Letter dated May 25, 2011 received by GSA on May 25, 2011, TAB  
28 1, Id.

1 causing JDI harm in any future re-bid of the IFB; (3) GSA violated Guam Procurement Law  
2 and Regulations by treating JDI in a discriminatory fashion and by not evaluating JDI's bid; (4)  
3 GSA violated Guam's Procurement law by failing to evaluate JDI's bid and award the IFB to  
4 JDI; and (5) JDI should have been awarded the IFB.<sup>17</sup>

5 14. On June 10, 2011, GSA denied JDI's protest because: (1) JDI's bid far exceeded the  
6 amount certified by the Department; and (2) JDI was not treated in a discriminatory manner; and  
7 JDI is welcome to submit a new bid when the IFB is re-issued.<sup>18</sup>

8 15. On June 21, 2011, JDI received GSA's denial of its May 25, 2011 protest.<sup>19</sup>

9 16. On July 6, 2011, fifteen (15) days after receiving GSA's denial of its protest, JDI  
10 filed this appeal.<sup>20</sup>

11 17. On August 10, 2011, PRICESMART INC., assigned all its rights and interest in its  
12 sublease with DRT for Lot No. 5223-5A-1-2, Barrigada, Guam and its building to JDI.<sup>21</sup>

### 14 III. ANALYSIS

15 The main issue presented by this appeal is whether GSA's May 11, 2011 cancellation of  
16 the IFB complied with Guam's Procurement Laws and Regulations. Pursuant to 5 G.C.A. 5703,  
17 the Public Auditor shall review GSA's cancellation of the IFB and ancillary issues concerning  
18 said cancellation *de novo*.

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22 <sup>17</sup> Page 2, Id.

23 <sup>18</sup> Letter dated June 10, 2011 from GSA Chief Procurement Officer Claudia S.  
24 Acfalle to John Terlaje, Esq. re Bid Protest, TAB 2, Id.

25 <sup>19</sup> GSA FAX Confirmation Letter addressed to JDI dated June 22, 2011, TAB 2,  
26 Id.

27 <sup>20</sup> Notice of Appeal filed on July 6, 2011.

28 <sup>21</sup> Assignment Agreement filed on September 2, 2011 by DRT.

1 **A. GSA's Cancellation of the IFB Violated 5 G.C.A. §5225**

2 GSA's cancellation of the IFB after opening of the bids is not in accordance with Guam  
3 Procurement Regulations. Guam's Procurement Law states that an Invitation for Bids (IFB) may  
4 be cancelled or any or all bids may be rejected in whole or in part, as may be specified in the  
5 solicitation, when it is in the best interests of the Territory in accordance with regulations. 5  
6 G.C.A. §5225. The first step of the analysis is to determine if GSA cancelled the bid in  
7 accordance with the IFB's terms and conditions. Here, as stated above, the IFB gives GSA's  
8 Chief Procurement Officer the authority to: "award, cancel, or reject bids, in whole or in part for  
9 any one or more items if she determines it is in the public interest."<sup>22</sup> Thus, the Public Auditor  
10 finds that the IFB's terms and conditions give GSA's Chief Procurement Officer the authority to  
11 cancel the IFB, if she determines that in doing so, it is in the public interest. However, it was not  
12 in the public's interest to cancel the IFB due to insufficient funding. As stated above, DRT  
13 received approval in DRT's Fiscal Year 2011 budget, a total amount of one-million-two-  
14 hundred-forty-four-thousand-and eight-hundred-forty-nine-dollars (\$1,244,849) per year, or one-  
15 hundred-three-thousand-seven-hundred-thirty-seven-dollars-and-forty-two-cents (\$103,737.42)  
16 per month.<sup>23</sup> Here, JDI's bid price, at nine-hundred-seventy-eight-thousand-five-hundred-  
17 eighty-eight-dollars (\$978,588) per year or eighty-one-thousand-five-hundred-forty-nine-dollars  
18 (\$81,549) per month is lower than DRT's existing monthly and annual rent payments.<sup>24</sup> Had  
19 GSA awarded JDI the IFB contract in April, 2011, and had DRT used the one-hundred-thousand-  
20 dollars (\$100,000) it encumbered for the IFB award, to cover the additional rental and movement  
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23 <sup>22</sup> Paragraph 22, General Terms and Conditions, page 20, TAB 4, Procurement  
24 Record filed on July 13, 2011.

25 <sup>23</sup> Summary of DRT, Government of Guam Fiscal Year 2011 Budget, Program Budget  
26 Digest, Exhibit A, Memorandum of Points and Authorities Re: JDI's Appeal  
27 filed on August 29, 2011.

28 <sup>24</sup> GSA Bid Analysis dated May 4, 2011, TAB 11, Procurement Record filed on  
July 13, 2011.

1 costs to move into JDI's new office space in May, 2011, DRT would have incurred cost savings  
2 of eighty-eight-thousand-seven-hundred-fifty-three-dollars-and-sixty-eight-cents (\$88,753.68) on  
3 rental costs for June-September, 2011.<sup>25</sup> Thus, the Public Auditor, considering the significant  
4 cost savings in rent, in light of the severe financial crisis the Government of Guam is currently  
5 facing, finds that the Chief Procurement Officer did not comply with the terms of the IFB,  
6 because canceling the IFB is not in the public interest.

7 The second step of the analysis is to determine whether the cancellation was in  
8 accordance with Guam's Procurement Regulations. Guam's Procurement Regulations  
9 distinguish between the cancellation of an IFB and the rejection of all bids. A cancellation of an  
10 IFB can only occur prior to the opening of the bids. 2 G.A.R., Div. 4, Chap. 3, §3115(d)(1)(B).  
11 A rejection of all bids can only occur after the opening of the bids, but prior to award. 2 G.A.R.,  
12 Div. 3, Chap. 3, §3115(d)(2)(A). There is no question that GSA cancelled the IFB after the  
13 opening of the bids. It is important to note that the form used by GSA to cancel the IFB closely  
14 follows the language of the two aforementioned regulations, and that the blocks for canceling the  
15 IFB were checked instead of the boxes for rejection of all bids. Additionally, a cancellation of  
16 the IFB may only occur after the Chief Procurement Officer, the Director of Public Works, or the  
17 head of a purchasing agency determined in writing that such action is in the Government of  
18 Guam's best interest. 2 G.A.R., Div. 4, Chap. 3, §3115(d)(1)(B) Here, the Bid Status canceling  
19 the IFB, although signed by the Chief Procurement Officer, does not comply with this  
20 requirement because there is no indication that the cancellation is in the best interest of the  
21 Government of Guam. Further, as stated above, due to the significant cost savings offered by  
22 JDI's bid, it is not in the best interest of the Government of Guam to cancel the IFB. Thus, the  
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25 <sup>25</sup> \$103,737.42 (Current FY 2011 Appropriated Monthly Rent) - \$81,549 (JDI  
26 Monthly Rent) = \$22,188.42. \$22,188.42 (Estimated Cost Savings on Monthly  
27 Rent) x 4 (Monthly Rent for June, July, August, September, 2011) =  
28 \$88,753.68.

1 Public Auditor finds that GSA's cancellation of the IFB after bid opening is not in accordance  
2 with Guam Procurement Regulations.

3  
4 **B. GSA Must Evaluate JDI's Bid.**

5 JDI's bid must be evaluated to determine whether it is responsive, and whether the bid's  
6 price is fair and reasonable. If only one responsive bid is received in response to an invitation  
7 for bid, an award may be made to the single bidder if the procurement officer finds that the price  
8 submitted is fair and reasonable and that other prospective bidders had reasonable opportunity to  
9 respond, or there is not adequate time for re-solicitation, otherwise the bid may be rejected. 2  
10 G.A.R., Div. 4, Chap. 3, §3102(c)(1). Here, as stated above, only one (1) bid was received in  
11 response to the IFB. Further, as stated above, other potential bidders had sixteen (16) days  
12 from March 29, 2011, the day the IFB was issued, to April 14, 2011, the bid submission  
13 deadline, to prepare and submit their bids. Bidding time is the period of time between the date of  
14 distribution of an invitation for bids and the time and date set for receipt of bids and a minimum  
15 of fifteen (15) days shall be provided unless a shorter time is deemed necessary for a particular  
16 procurement as determined in writing by the procurement officer. 2 G.A.R., Div. 4, Chap. 3,  
17 §3109(d). Thus, the Public Auditor finds that other potential bidders had a reasonable  
18 opportunity to respond to the IFB. As stated above, DRT's existing sublease, in which JDI is  
19 now its landlord, expired on August 9, 2011 and DRT is currently holding over on Lot No. 5223-  
20 5A-1-2, Barrigada, Guam, and its building as a month-to-month tenant. The Public Auditor finds  
21 that there is no adequate time for re-solicitation because under the hold over provisions of the  
22 existing sublease, DRT is paying twenty-two-thousand-one-hundred-eighty-eight-dollars-and-  
23 forty-two-cents (\$22,188.42) more per month than it would if it simply accepted JDI's bid. This  
24 extra monthly cost must be eliminated as the Government of Guam is currently in an austere  
25 financial condition. Therefore, the Public Auditor finds that GSA must comply with 2 G.A.R.,  
26 Div. 4, Chap. 3, §3102(c)(1) by evaluating JDI's bid to determine if it is responsive and if JDI's  
27 bid price is fair and reasonable.



1 **C. GSA's May 11, 2011 Cancellation of the IFB is Vacated.**

2 GSA's May 11, 2011 cancellation of the IFB violates Guam Procurement Law and  
3 Regulations as stated above and must be vacated. If prior to award it is determined that a  
4 solicitation of a contract is in violation of law, then the solicitation shall be revised to comply  
5 with the law. 5 G.C.A. §5451(b) and 2 G.A.R., Div. 4, Chap. 9, §9105(a) (2). The Public  
6 Auditor hereby revises the solicitation to comply with the law by vacating GSA's May 11, 2011  
7 cancellation of the IFB.

8  
9 **IV. CONCLUSION**

10 Based on the foregoing the Public Auditor hereby determines the following:

11 1. GSA's May 11, 2011 cancellation of the IFB violated 5 G.C.A. §5225 because  
12 GSA violated the terms of the IFB by canceling the IFB when such act was not in the public  
13 interest due to JDI's bid price being lower than the monthly rent DRT is currently paying, and  
14 because a cancellation of an IFB can only occur prior to the opening of the bids as required by 2  
15 G.A.R., Div. 4, Chap. 3, §3115(d)(1)(B), and finally, because the Chief Procurement Officer did  
16 not make the written determination finding that canceling the IFB was in the best interest of the  
17 Government of Guam as required by 2 G.A.R., Div. 4, Chap. 3, §3115(d)(1)(B).

18 2. GSA must comply with 2 G.A.R., Div. 4, Chap. 3, §3102(c)(1) by evaluating JDI's  
19 bid to determine if it is responsive and if JDI's bid price is fair and reasonable. GSA must  
20 complete the following no later than 5:00 p.m. on or before September 30, 2011.

21 3. GSA's May 11, 2011 cancellation of the IFB is hereby VACATED.

22 4. JDI's Appeal is hereby GRANTED.

23 5. JDI is hereby awarded, pursuant to 5 G.C.A. §5425(h)(2), JDI's reasonable costs  
24 incurred in connection with JDI's May 25, 2011 Protest, excluding JDI's attorney's fees,  
25 because, as JDI was the only bidder, JDI had a reasonable likelihood of being awarded the  
26 contract but for GSA's reckless violation of 5 G.C.A. §5225. GSA may object to JDI's cost  
27 demand by filing the appropriate motion with the Public Auditor no later than fifteen (15) days  
28 after JDI submits such cost demand to GSA.

1 This is a Final Administrative Decision. The Parties are hereby informed of their right to  
2 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with  
3 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative  
4 Decision. 5 G.C.A. §5481(a).

5 A copy of this Decision shall be provided to the parties and their respective attorneys, in  
6 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website  
7 [www.guamopa.org](http://www.guamopa.org).

8  
9 **DATED** this 27<sup>th</sup> day of September, 2011.

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11   
12 DORIS FLORES BROOKS, CPA, CGFM  
13 PUBLIC AUDITOR  
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# FAX

To: **Mr. Timothy McLaughlin, Esq.**  
**Assistant AG and Legal Counsel for DRT**

**Ms. Claudia S. Acfalle**  
**Chief Procurement Officer, GSA**

**Mr. John C. Terlaje**  
**Legal Counsel for Appellant – Joeten**  
**Development, Inc.**

From: **Doris Flores Brooks, CPA, CGFM**  
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All Media	Date:	September 27, 2011	
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	LOJCT: 472-8896 (for JDI)	Nos.	

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Re: **Appeal No. OPA-PA-11-012: DECISION**

**Note: Action Required by GSA-DRT by Sept. 30, 2011: See Item no. 2, pg. 9**

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