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PROCUREMENT APPEALS

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FILE No. OPA-PA-09-003

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9 *Attorney for the Guam Power Authority*

10
11 OFFICE OF THE PUBLIC AUDITOR
12 PROCUREMENT APPEALS

13
14 IN THE APPEAL OF) DOCKET NO. OPA-PA-09-003
15)
16 GUAM PACIFIC ENTERPRISE, INC.) AGENCY REPORT
17)
18 Appellant.)
19 _____)
20

21 Appellee GUAM POWER AUTHORITY (GPA), by and through its attorney, D.

22 GRAHAM BOTHA, ESQ., hereby submits its Agency Report in the form required under 2

23 G.A.R. §12105:

24 (a) A copy of the protest: *Previously submitted to the Office of the Public Auditor*
25 *("OPA") on August 4, 2009, by GPA.*
26

27 (b) A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer
28 that is being considered for award or whose bid or offer is being protested, if any had been
29 submitted prior to the protest: *Previously submitted to the Office of the Public Auditor ("OPA")*
30 *on August 4, 2009, by GPA.*
31

32 (c) A copy of the solicitation, including the specification or portions thereof relevant to
33 the protest: *Previously submitted to the Office of the Public Auditor ("OPA") on August 4,*
34 *2009, by GPA.*
35

36 (d) A copy of the abstract of bids or offers or relevant or portions thereof relevant to
37 the protest: *Previously submitted to the Office of the Public Auditor ("OPA") on August 4,*
38 *2009, by GPA.*
39

40 (e) Any other documents which are relevant to the protest, including the contract, if one
41 has been awarded, pertinent amendments, and plans and drawings: *Previously submitted to the*

1 *Office of the Public Auditor (“OPA”) on August 4, 2009, by GPA.*

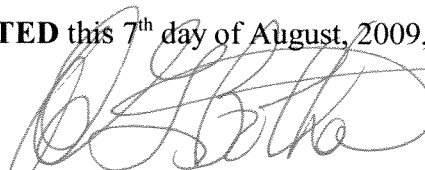
2
3 (f) The decision from which the Appeal is taken, if different than the decision
4 submitted by Appellant: *Previously submitted to the Office of the Public Auditor (“OPA”) on*
5 *August 4, 2009, by GPA.*

6
7 (g) A statement answering the allegation of the Appeal and setting forth findings,
8 actions, and recommendations in the matter together with any additional evidence or information
9 deemed necessary in determining the validity of the Appeal. The statement shall be fully
10 responsive to the allegations of the Appeal: *Please see attached.*

11
12 (h) If the award was made after receipt of the protest, the report will include the
13 determination required under 2 G.A.R. §9101(e): *Not applicable.*

14
15 (i) A statement in substantially the same format as Appendix B to this Chapter,
16 indicating whether the matter is the subject of a court proceeding: *Please see attached.*

17
18 **RESPECTFULLY SUBMITTED** this 7th day of August, 2009, by:

19
20
21 
22 D. GRAHAM BOTHA, ESQ.
23 Legal Counsel for the Guam Power Authority
24

1 **D. GRAHAM BOTHA, ESQ.**
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9 *Attorney for the Guam Power Authority*

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11 **OFFICE OF THE PUBLIC AUDITOR**
12 **PROCUREMENT APPEALS**


13
14 IN THE APPEAL OF) DOCKET NO. OPA-PA-09-003
15)
16 GUAM PACIFIC ENTERPRISE, INC.) **DECLARATION REGARDING**
17) **COURT ACTION**
18 Appellant.)
19 _____)
20

21 Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses
22 interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action
23 on any appeal where action concerning the protest or appeal has commenced in any court.

24 The undersigned party does hereby confirm that to the best of his or her knowledge, no
25 case or action concerning the subject of this Appeal has been commenced in court. All parties
26 are required to and the undersigned party agrees to notify the Office of the Public Auditor within
27 24 hours if court action commences regarding this Appeal or the underlying procurement action.

28 Submitted this 7th day of August, 2009.

29
30 **GUAM POWER AUTHORITY (GPA)**

31
32 By: 
33 _____
34 **JOAQUIN C. FLORES, P.E.**
35 **General Manger**

STATEMENT ANSWERING ALLEGATIONS OF APPEAL

(As required by 2 G.A.R. §12105(g))

I. RELEVANT BACKGROUND

A. GPA SOLICITS QUOTES FOR PURCHASES OF ELECTRICAL SUPPLIES IN ACCORDANCE WITH PROCUREMENT PROCEDURES

The procurement record, as set forth in the Agency Report, indicates that Guam Power Authority (GPA) has done business with Guam Pacific Enterprise, Inc. (GPE) since at least early 2002. With regard to the various purchase orders, it appears that these purchase orders were issued by GPA in accordance with proper procurement procedures through a Request for Quotes (RFQ), Tabs 2 - 8, with the exception of PO #9177, which was issued under GPA 055-05 IFB. Tab 8.

The Appellant, GPE's, appeal indicates that the appeal is of a protest of method, solicitation or award, Tab 1 pg. 1, but the supporting documentation and statement does not reflect a protest regarding a solicitation or award. In fact, all of the purchase orders referenced by GPE indicate that GPE was awarded the contract with GPA. GPE's appeal letter dated July 23, 2009, only indicates that GPE is appealing the issue of liquidation damages, Tab 1 pg. 5.

The earliest of these purchase orders, PO#5213, dates back to 2002, and indicates that GPE was properly assessed liquidated damages as a result of late delivery. Tab 8 pgs. 153-158. There is a consistent pattern of late delivery, despite the vendor GPE agreeing to make delivery within the GPA time specifications.

II. DISCUSSION

A. GUAM PACIFIC ENTERPRISE (GPE) WAS APPROPRIATELY ASSESSED

LIQUIDATED DAMAGES FOR LATE DELIVERY IN ACCORDANCE WITH THE TERMS OF THE REQUEST FOR QUOTES AND THE PURCHASE ORDERS

Procurement law requires that GPA administer its procurement program in a fair and equitable manner. Awards must be made to the lowest responsible and **responsive** bidders. A responsive bidder is a person who has submitted a bid which conforms in all material respects to the Invitation for Bid. 5 GCA §5201(g) and 2 GAR, Div. 4, Chap. 3, §3109(n)(2). Further, any bidder's offering which does not meet the acceptability requirements shall be rejected as non-responsive. 2 GAR, Div. 4, Chap. 3, §3109(n)(3)(c).

Procurement law requires that if appellant Guam Pacific Enterprise (GPE) had advised GPA when it submitted its bid that it could not deliver to GPA in a timely fashion as specified that GPA would be required to reject its bid as non-responsive. A unilateral decision on the part of GPE to extend its delivery dates, without GPA's consent, is not only contrary to the bid specifications, but also to Guam procurement law which provides for the "fair and equitable treatment of all persons who deal with the procurement system" and provides "safeguards for the maintenance of a procurement system of quality and integrity." 2 G.A.R. §1102. Any modification of a bid received after the time and date set for opening of the bids at the place designated for opening is late. 2 GAR, Div. 4, Chap. 3, §3109(k)(2).

In each of the referenced purchase orders, GPE indicated that it intended to deliver the requested electrical supplies within the period specified by GPA. For example, RFQ 19181 (1/6/09) specified a delivery date of 8-10 weeks or sooner. Tab 2, pg. 26. GPE responded to the RFQ and indicated that "ETA Guamside delivery about 8-10 weeks or sooner A.R.O." Tab 2, pgs 23-24. Consistent with prior purchase orders, GPE failed to make delivery by the required delivery date of April 13, 2009, and GPA appropriately and as required under Guam procurement

law issued a Notice of Delivery Default dated April 14, 2009. Tab 2, pg. 22. Purchase Order #13394, dated 1/21/09, is specific as to the time of delivery of 4/13/09. Tab 2, pg. 20. Delivery for the parts was not made until May 29, 2009. Tab 2, pgs. 19-21. The vendor, GPE, only notified GPA of an expected late delivery and requested an extension on April 13, 2009, the required delivery date. Tab 2, pg. 15, and after receiving GPA's Notice of Delivery Default. GPA properly deducted liquidated damages from the Check No. 043980 issued to GPE as a result of late delivery. Tab 1, pg. 12.

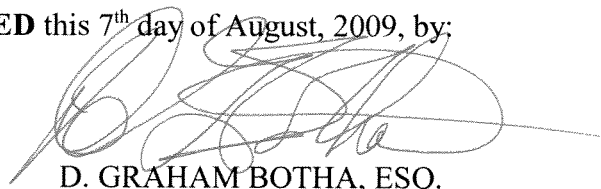
In addition, several of the claims for reimbursement of liquidated damages by GPE are clearly outside of a statute of limitations for filing a claim. Despite not being filed in a timely manner, they show a consistent pattern on the part of GPE of agreeing to the specified delivery dates required by GPA, and then failing to deliver in a timely manner. Most extension requests to GPA weren't made until after GPA served GPE with a Notice of Delivery Default.

GPA has a duty to award to the lowest responsible and responsive bidder in all bids, and GPA complies with these requirements. It would clearly be unfair to other competing bidders not to penalize GPE for late deliveries.

CONCLUSION

GPA requests that the appeal of Guam Pacific Enterprise be dismissed, and that the Public Auditor award all legal and equitable remedies that GPA may be entitled to as a result.

RESPECTFULLY SUBMITTED this 7th day of August, 2009, by:



D. GRAHAM BOTHA, ESQ.
Legal Counsel for the Guam Power Authority