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PROCUREMENT APPEALS

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**OFFICE OF THE PUBLIC AUDITOR**

In the Appeal of )  
)  
L.P. GANACIAS ENTERPRISES, INC. )  
dba RADIOCOM )  
)  
Appellant. )  
\_\_\_\_\_ )

Appeal No. OPA-PA-06-03

**COMMENT ON AGENCY  
REPORT**

L.P. Ganacias Enterprises, Inc., dba RadioCom ("RadioCom") submits its comments to the submission by the General Services Agency ("GSA") and Office of Homeland Security ("OHS") of the procurement record and the agency report.

On December 29, 2006 the GSA/OHS belatedly filed with the Office of the Public Auditor ("OPA") their procurement record with an unsigned cover letter dated December 28, 2006. The GSA/OHS has not separately filed the required Agency Report as required by 2 G.A.R. § 12105; unless their unsigned December 28, 2006 procurement record cover letter is supposed to be their Agency Report.

With respect to the procurement record, it is quite obviously incomplete. It did not include a copy of the protest as required by the OPA's rules. The record did not include any solicitation, to include specifications, and therefore it is impossible to tell what precise product the GSA/OHS was seeking or the performance requirements of that product. The record did not include all other documents relevant to the protest as there is clearly far more correspondence than that included in the purported procurement record.

Based on the record, it appears that S.E.S. USA, Inc. ("SES"), to whom this procurement was illegally sole sourced, simply showed up on Guam on or about February 23, 2006 to travel around the island locating sites for the warning system. This is evidenced by the SES report of March 7, 2006. However, there is no correspondence or any other document pre-dating the February 23, 2006 visit by SES. One must ask how they got here and whether they just showed up unannounced to propose their services. The record is silent. Clearly, there were procurement related communications well prior to the February 23, 2006 SES visit to Guam and the record is, therefore, incomplete.

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For example, 5 G.C.A. § 5249 requires that the procurement record be maintained as follows:

Each procurement officer shall maintain a complete record of each procurement. The record shall include the following:

(a) the date, time, subject matter and names of participants at any meeting including government employees that is in any way related to a particular procurement;

(b) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement;

(c) sound recordings of all pre-bid conferences; negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement;

(d) brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications; and

(e) the requesting agency's determination of need.

The procurement record filed by the GSA/OHS is woefully devoid of the information required by the Guam Procurement Act as set forth above. We do not know the date, time, subject matter and names of participants at any meeting between the GSA/OHS and SES. There is simply no log of communications between the GSA/OHS and SES and there are no sound recordings of negotiations or discussions with SES. Further, there are no drafts or other papers used in the development of specifications<sup>1</sup>.

Given the foregoing, the procurement record as submitted by the GSA/OHS is simply a sham. This is further illustrated by the fact that no responsible procurement officer has executed a written certification under penalty of perjury that the record was properly maintained and is complete as required by 5 G.C.A. § 5250. The certification is itself to be made a part of the record. Since the GSA/OHS obviously failed to properly maintain a complete procurement record and since no one from those agencies was willing to declare under penalty of perjury to its maintenance and completeness, it should be disregarded and RadioCom's protest should be sustained on that basis alone.

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<sup>1</sup> 5 G.C.A. § 5267 requires that "[t]he specifications ... shall identify the person responsible for drafting the specifications and any persons, technical literature or manufacturer's brochures relied upon by the responsible person in drafting the specifications."

With respect to the submission of an agency report, if the OHS letter of December 28, 2006 to the OPA constitutes the Agency Report, it is inadequate and provides no justification for this illegal procurement. In the OHS Procurement Request and Tracking Form, dated on or about June 9, 2006, the OHS provides an apparent sole source justification that "Guam does not have an all hazards warning system in place in case of an emergency natural or man-made". However, in the GSA's June 27, 2006 Interoffice Memorandum<sup>2</sup> regarding this sole source procurement, the sole source justification is referenced as "[a]ward based on the compatibility of equipment, accessories, or replacement parts" and "[i]tems, equipment or materials are standard and uniform to the government." However, if, as stated by the OHS, Guam does not have an existing warning system, there can be no compatibility issues or a requirement for standard and uniform materials. Therefore, the GSA/OHS illegally engaged in a sole source procurement. In addition, as illustrated by the procurement record submitted by the GSA/OHS, they violated the Guam Procurement Act by advancing a ten per cent 10% down payment as 5 G.C.A. § 5007 provides that "no procurement shall be made ... which shall require advance payment."

Finally, on January 15, 2007 the GSA served on RadioCom its January 9, 2007 letter purporting to deny RadioCom's protest. Because the information and documents contained therein were not included in the Procurement Record or the Agency Report previously submitted to the OPA it should be disregarded. However, that filing does illustrate the subterfuge to which the GSA/OHS is engaged.

In its January 5, 2007 letter to the OPA, GSA states that it "has not rendered a decision on the protest ... due to sensitive issues needing approval by the U.S. Department of Homeland Security." In its January 9, 2007 protest denial letter, the GSA states that it was "awaiting ... authorization from the Guam Office of Homeland Security to release the documents that formed the basis of our determination." Regardless of which agency they were awaiting authorization, the only additional documentation provided was an "Interim National Preparedness Goal" released publicly by the U.S. Department of Homeland Security on March 31, 2005. This report is not sensitive as it has been in the public domain for nearly two years and no authority is required from anyone for its release. Further, it has nothing to do with this procurement as there are no GSA/OHS specifications requiring any compliance with any of the "goals" set forth in that document.

Most curious is the GSA reference in its January 9, 2007 protest denial letter that the sole source was not undertaken pursuant to 5 G.C.A. § 5122<sup>3</sup> but, rather, 2 G.A.R. § 3112. Section 3112 is merely the regulation adopted to implement the statutory sole source provision set forth in 5 G.C.A. § 5214. Regulations cannot be inconsistent with the statute pursuant to which they are promulgated. See, e.g., Wade v. Taitano, 2002 Guam 16, ¶ 9 ("We agree with the trial court's ultimate conclusion that regulation 2108(c) is inconsistent with the GEC's enabling statutes").

Nonetheless, the GSA attempts to justify this procurement under 2 G.A.R. § 3112 "for interoperability and standardization of equipment, with the Naval and Air Force Bases here on Guam." See, GSA's January 9, 2007 letter. However, there is no specification prepared by the

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<sup>2</sup> This document was inexplicably missing from the GSA/OHS procurement record submittal although RadioCom did submit it with their Notice of Appeal.

<sup>3</sup> Sole source procurement is actually governed by 5 G.C.A. § 5214 which may be used when "there is only one source for the required supply."

GSA requiring that the early warning system be interconnected with any such system that may exist on Guam military bases. Nor does the proposal submitted by SES reference any scope of work or charges for such interconnection. Finally, in the National Preparedness Goal attached to the GSA's January 9, 2007 letter it is expressly provided that:

Nothing in this directive shall limit the authority of the Secretary of Defense with regard to the command and control, training, planning, equipment, exercises, or employment of Department of Defense forces or the allocation of Department of Defense resources.

The Secretary [Homeland Security], in coordination with other appropriate Federal civilian departments and agencies, shall develop and maintain a Federal response capability inventory ... . The Department of Defense will provide to the Secretary information describing the organizations and functions within the Department of Defense that may be utilized to provide support to civil authorities during a domestic crisis.

See, Interim National Preparedness Goal, Appendix C, p. C-5.

The National Preparedness Goal is a civilian program developed independently from the United States military; although the Department of Defense ("DOD") may provide to the Secretary of Homeland Security "information describing the organizations and functions" within the DOD that "may be utilized to provide support to civil authorities." The GSA/OHS has certainly not illustrated that the DOD has made any early warning systems on Guam military installations available to civil authorities. In fact, the Navy has advised RadioCom that they will not make their early warning systems available to the government of Guam. See, Declaration of Victoria G. Borja.

In its January 9, 2007 protest denial letter, the GSA references the National Preparedness Goal regarding "equipment" and item numbers 14 and 15 thereunder. See, Interim National Preparedness Goal, Appendix C, p. C-4. Item 14 provides that the "Secretary ... and other Federal civilian departments and agencies, shall establish and implement streamlined procedures *for the ongoing development and adoption of appropriate first responder equipment standards* that support nationwide interoperability ... ." Id., (emphasis added). The GSA/OHS has not illustrated that the Secretary of Homeland Security has adopted any "equipment standards" or, if so, what those standards are.

RadioCom is a Guam corporation and is a vendor of a competing warning system through Federal Signal Corporation. See, Declaration of Victoria G. Borja. RadioCom installed the Federal Signal system recently on Rota. Id. Pursuant to 5 G.C.A. § 5214, an agency may only acquire goods or services through sole source procurement when "the Chief Procurement Officer ... determines in writing that there is only one source for the required supply, service or construction item ... ." As RadioCom offers an early warning system, SES was not the only source for the system. Furthermore, there is no document in the procurement record that even remotely indicates that SES is the only company that can supply an early warning system.


In addition, pursuant to 5 G.C.A. § 5008, “[a]ll procurement of supplies and services shall be made from among businesses licensed to do business on Guam and that maintain an office or other facility on Guam ... .” Rather than procure the warning system from RadioCom, a business licensed to conduct business on Guam, the OHS/GSA procured the warning system from a company doing business in Washington State; thereby ensuring that the community of Guam obtains no benefit from the trickling of those funds through our economy.

RadioCom requests a hearing pursuant to 2 G.A.R. § 12108(a).

Dated this 18<sup>th</sup> day of January, 2007.

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