



OFFICE OF THE PUBLIC AUDITOR

April 11, 2008

To: **Purchasing Agency:**
Mr. Peter John D. Camacho, MPH, Administrator
Guam Memorial Hospital Authority
850 Carlos Camacho Road
Oka, Tamuning, Guam 96911

Attorney for the Purchasing Agency
Mr. Aaron R. Jackson, Esq.
Mair, Mair, Spade & Thompson PC
238 A.F.C. Flores Street
Suite 801, Pacific News Building
Hagatna, Guam, 96910

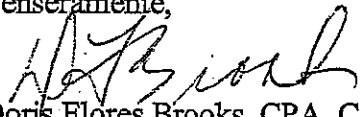
X **Appellant:**
Mr. George Lee Palmer, President & Director
Pacific Security Alarm, Inc.
1851 A. Army Drive
Harmon, Guam, 96913

Attorney for Appellant:
Mr. G. Anthony Long, Esq.
Law Office of G. Anthony Long
P.O. Box 504970
Second Floor Lim's Bldg.
San Jose, Saipan, MP 96950


Transmitted herewith is a copy of the Decision and Findings of Fact on appeal OPA-PA-07-009 in the appeal of Pacific Security Alarm, Inc. relative to the procurement of Invitation for Bid (IFB) No. GMHA 023-2007 Removal and Replacement of Fire Alarm System Project.

A complete copy of the Decision and Findings of Fact will be posted on our website within the next day and available for public view at www.guamopa.org.

Senseramente,

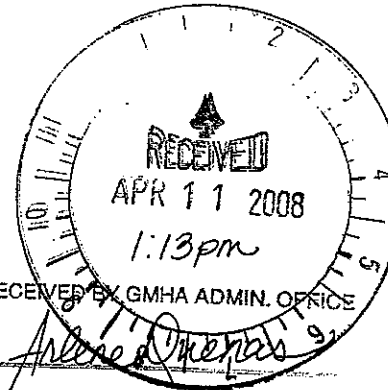

Doris Flores Brooks, CPA, CGFM
Public Auditor

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MAIR, MAIR, SPAD,
& THOMPSON
DATE: 04-11-08
TIME: 1:34
REC'D BY: [Signature]

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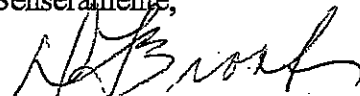
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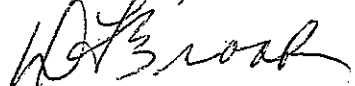
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PROCUREMENT APPEALS

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4
5 IN THE APPEAL OF,
6 PACIFIC SECURITY ALARM, INC.,
7 Appellant

APPEAL NO: OPA-PA-07-009

DECISION

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10 **I. INTRODUCTION**

11 This is the Public Auditor's Decision on an appeal filed on November 16, 2007, by
12 Pacific Security Alarm, Inc., (Hereafter "PSA") regarding the Guam Memorial Hospital
13 Authority's (Hereafter "GMHA") denial of PSA's protest of GMHA's August 7, 2007
14 cancellation of GMHA Bid No. 023-2007 (For GMHA Removal & Replacement of Fire Alarm
15 System Project) (Hereafter "IFB"). The Public Auditor holds that GMHA's August 7, 2007,
16 cancellation of the IFB is void. Accordingly, PSA's November 16, 2007, appeal is sustained.

17
18 **II. FINDING OF FACT**

19 The Public Auditor in reaching this Decision, has considered and incorporates herein the
20 Findings of the Hearing Officer, Anthony R. Camacho, Esq., issued on April 11, 2008. In
21 addition, this Decision is based on the Procurement Record, all documents submitted by the
22 parties in the appeal, as well as all testimony and arguments presented at the February 21, 2008,
23 and March 24, 2008, Hearings on this matter.

24 1. GMHA Bid No. 023-2007 solicited bids from contractors to remove GMHA's existing
25 fire alarm system and replace it with a new fire alarm system.

26 2. The IFB's Bid Invitation states, in relevant part: "The Authority [GMHA] reserves
27 the unqualified right, in its sole and absolute discretion, to reject any and all bids, or to waive a
28 minor informality in any Bid and accept that Bid or combination of Bids, if any, which in its sole
and absolute judgment will under all circumstances best serve GMHA's interests."

Decision- 1

1 3. Paragraph 23, page 3, of the IFB's General Terms and Conditions was marked so that
2 it applied to the IFB and said paragraph states, in relevant part: "The Hospital Administrator
3 shall have the authority to award, cancel, or reject bids, in whole or in part for any one or more
4 items if he determines it is in the public interest."

5 4. Paragraph V.B., page 9, of the IFB's Instructions to Bidders states, in relevant part:
6 "GMHA reserves the unqualified right, in its sole and absolute discretion, to reject any and all
7 Bids, or to accept that Bid or combination of Bids, if any, which in its sole and absolute
8 judgment will under all circumstances best serve GMHA's interests."

9 5. The deadline for bidders to submit bids in response to the IFB was at 1:30 P.M. on
10 July 13, 2007.¹

11 6. Two (2) bidders submitted bids in response to the IFB. The bids were publicly opened
12 at 2:00 P.M. on July 13, 2007. The first bid opened was from Kevin & Steve Corporation,
13 whose total bid price was \$996,000.00, and the second bid opened was from PSA, whose total
14 bid price was \$927,021.79.²

15 7. On or about July 30, 2007, the bids were evaluated by GMHA's Facilities
16 Maintenance Department Evaluation Committee, which recommended, to GMHA's Materials
17 Management Administrator, Daniel C. Matanane, canceling the IFB due to various discrepancies
18 in both bids and due to insufficient funds to execute the project.³

19 8. On or about July 31, 2007, GMHA's Materials Management Administrator, Daniel C.
20 Matanane, made a recommendation to GMHA's Hospital Administrator, Peter John D. Camacho,
21 that the IFB be cancelled pursuant to 26 G.A.R., Div. 2, Chap. 16, §16316(c), because prices
22
23

24 ¹ Bidders Register, IFB.

25 ² Abstract of Bids, IFB.

26 ³ PSA Exhibit 5, Letter from Craig T. Guevara to GMHA Materials Management Administrator dated July 30,
27 2007.
28

1 exceed available funds and it would not be appropriate to adjust quantities to come within
2 available funds.⁴

3 9. On or about August 7, 2007, GMHA Hospital Administrator PeterJohn D. Camacho
4 canceled the IFB due to insufficient funds.⁵

5 10. On or about August 9, 2007, GMHA provided PSA notice of the cancellation of the
6 IFB and said notice was received by PSA.⁶

7 11. On or about August 22, 2007, thirteen (13) days after PSA received notice of the
8 cancellation of the IFB, PSA protested the cancellation of the IFB.⁷ PSA argued that
9 cancellation after publicly opening the bids was unfair and requesting that GMHA rescind the
10 cancellation.

11 12. On or about November 1, 2007, GMHA denied PSA's August 22, 2007, protest
12 finding, in relevant part, that GMHA's Procurement Rules and Regulations permit cancellation
13 of a solicitation after bids have been opened but prior to award of a contract and that GMHA
14 properly cancelled the IFB because it did not have sufficient funding.⁸

15 13. On or about November 1, 2007, PSA received GMHA's denial of their August 22,
16 2007 protest.⁹

17 14. On or about November 16, 2007, fifteen (15) days after receiving GMHA's denial of
18 its protest, PSA filed this appeal arguing the inherent unfairness of canceling the IFB after
19 opening the bids and that GMHA failed to follow its procurement regulations.¹⁰

21 ⁴ PSA Exhibit No. 6, Letter from Daniel C. Matanane to PeterJohn D. Camacho dated July 31, 2007.

22 ⁵ PSA Exhibit No. 7, Bid Status dated August 7, 2007.

23 ⁶ GMHA FAX Confirmation Letter addressed to PSA dated August 9, 2007, Agency Procurement Record, and
24 GMHA's Agency Report, page 2.

25 ⁷ PSA Protest Letter dated August 23, 2007 received by GMHA on August 22, 2007, Agency Procurement Record.

26 ⁸ Letter from PeterJohn D. Camacho to Lee Palmer dated November 1, 2007, Agency Procurement Record.

27 ⁹ GMHA FAX Confirmation Letter addressed to PSA dated November 1, 2007, Agency Procurement Record.

28 ¹⁰ PSA Appeal.

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4 **III. ANALYSIS**

5 **A. PSA's August 23, 2007 Protest was timely.**

6 GMHA argues that PSA's Protest was not timely because it cancelled the IFB on August
7 7, 2007, and PSA's protest was filed sixteen (16) days later on August 23, 2007.¹¹ A
8 procurement protest shall be submitted in writing within fourteen (14) days after an aggrieved
9 person either knows or should know of the facts giving rise thereto. 5 G.C.A. §5425(a) and 26
10 G.A.R., Div. 2, §16901(c)(1). Here, although GMHA cancelled the bid on August 7, 2007,
11 GMHA admits that PSA did not receive notice of the cancellation until August 9, 2007.¹²
12 Further, although PSA's Protest is dated August 23, 2007, GMHA's stamp clearly shows that
13 GMHA received the protest on August 22, 2007. The Public Auditor finds that there is no merit
14 to GMHA's argument that PSA's Protest was untimely, because August 9, 2007, was the earliest
15 date PSA became aware of GMHA's cancellation of the IFB and PSA filed their protest fourteen
16 (14) days later on August 22, 2007.
17

18 **B. GMHA's cancellation of the IFB violated GMHA's Procurement Regulations**

19 GMHA's cancellation of the IFB after opening of the bids is not in accordance with
20 GMHA's Procurement Regulations. GMHA is exempted from the Government of Guam's
21 centralized procurement regime and its procurement is governed by its own procurement
22 regulations, and, to the maximum extent practicable, Guam's Procurement Law. See 5 G.C.A.
23 §5030(k) and §5125. Further, the Supreme Court of Guam has ruled that GMHA's procurement
24 activities are governed by GMHA's Procurement Regulations and Guam's Procurement Law,
25
26

27
28 ¹¹ GMHA's Agency Report, page 2.

¹² Id.

1 unless a conflict exists between the two, in which case, Guam's Procurement Law prevails.

2 *Guam Imaging Consultants, Inc., v. Guam Memorial Hospital Authority*, 2004 Guam 15 at ¶22.

3 Guam's Procurement Law states that an Invitation for Bids (IFB) may be cancelled, or
4 any or all bids may be rejected in whole or in part as may be specified in the solicitation, when it
5 is in the best interests of the Territory in accordance with regulations. 5 G.C.A. §5225. The first
6 step of the analysis is to determine if GMHA cancelled the bid in accordance with the IFB's
7 terms and conditions. Here, the IFB gives the Hospital Administrator the authority to: "award,
8 cancel, or reject bids, in whole or in part for any one or more items if he determines it is in the
9 public interest."¹³ Thus, the Public Auditor finds that, pursuant to the IFB's terms and
10 conditions, the Hospital Administrator for GMHA had the authority to cancel the IFB if it was in
11 the public interest.

12 On August 7, 2007, it was in the public's interest to cancel the IFB. GMHA cancelled
13 the IFB due to insufficient funding for the project. Specifically, GMHA budgeted six-hundred-
14 thousand dollars (\$600,000) for the project and the bids received were well in excess of that
15 amount, PSA's bid was for \$927,021.79, and Kevin & Steve Corporation's bid was for
16 \$996,000.00.¹⁴ Although evidence presented in the hearing in this matter showed GMHA did
17 receive additional funding for the project in late 2007, there is no question that on the August 7,
18 2007, GMHA did not have sufficient funds to accept either of the bids it received. The Public
19 Auditor finds that GMHA's August 7, 2007, cancellation of the IFB was in the public interest
20 because it is a compelling public interest that GMHA be able to satisfy its contractual
21 obligations.

22 The Public Auditor is not convinced by PSA's argument that GMHA acted in bad faith
23 by canceling the IFB without explaining the lack of funding or offering a reason why it would
24 not be appropriate to adjust quantities to come within available funds. Generally, all parties
25 involved in the negotiation, performance, or administration of Government of Guam contracts

27 ¹³ Paragraph 23, page 3, IFB General Terms and Conditions.

28 ¹⁴ PSA Exhibit 3, GMHA Requisition, and Abstract of Bids, Procurement Record.

1 must act in good faith. 5 G.C.A. §5003. Here, it is clear that at the time the IFB was cancelled,
2 the bid prices were in excess of the amount GMHA had budgeted for the project. Further,
3 GMHA explained that it is not feasible to adjust the quantities for the project because they desire
4 to remove and replace their entire fire alarm system in one project and at one time.¹⁵ The Public
5 Auditor finds that GMHA acted in good faith in canceling the IFB on August 7, 2007, and that
6 GMHA's explanations as to why it is not feasible to adjust the quantities for the project are
7 reasonable.

8 The second step of the analysis is to determine whether the cancellation was in
9 accordance with GMHA's Procurement Regulations. GMHA's Procurement Regulations
10 distinguish between the cancellation of an IFB and the rejection of all proposals. A cancellation
11 of an IFB can only occur prior to the opening of the bids. 26 G.A.R., Div. 2, §16316(d)(1)(B).
12 A rejection of all bids can only occur after opening of the bids, but prior to award. 26 G.A.R.,
13 Div. 2, §16316(d)(2)(A). There is no question that GMHA cancelled the IFB after the opening
14 of the bids. It is important to note that the form used by GMHA to cancel the IFB closely
15 follows the language of the two aforementioned regulations, and that the blocks for canceling the
16 IFB were checked instead of the boxes for rejection all bids. Interestingly, had the correct
17 rejection boxes been checked instead of the impermissible cancellation boxes, the outcome of
18 this issue may have been different. Thus, the Public Auditor finds that GMHA's cancellation of
19 the IFB after bid opening is not in accordance with GMHA's Procurement Regulations.

20 The Public Auditor is not convinced by GMHA's argument that there is no meaningful
21 distinction between the cancellation and rejection of a bid. As stated above, Guam's
22 Procurement Law mandates that a cancellation of an IFB be in accordance with regulations. 5
23 G.C.A. §5225. Further, as stated above, GMHA's Procurement Regulations clearly distinguish
24 separate time frames for a cancellation and rejections of bids. Thus, the Public Auditor finds that
25 this argument has no merit because pursuant to GMHA Procurement Regulations, there is a
26 significant difference between cancellations and rejections of bids in that cancellations are
27

28 ¹⁵ Apellee's Hearing Brief, page 8.

1 limited to the period prior to bid opening, and rejections of bids are limited to the period after bid
2 opening, but prior to award.

3 The Public Auditor is also not convinced by GMHA's argument that the rule in *J&B*
4 *Modern Tech v. GLAA*, CV0732-06 (Superior Court of Guam) should control this issue. The rule
5 in *J&B Modern Tech v. GLAA* is distinguishable from this matter because the rule in that case
6 concerns whether boxes checked on a standard form, such as GMHA's August 7, 2007, Bid
7 Status Form which cancelled the IFB, are sufficient notice of the reasons for cancellation, and
8 the Court in that case did not decide whether a purchasing agency can cancel an IFB after the
9 opening of bids which is the issue here. Thus, the Public Auditor finds that *J& B Modern Tech*
10 *v. GLAA*, CV0732-06 (Superior Court of Guam) is distinguishable from this case.

11 Finally, the Public Auditor is not convinced by GMHA's argument that PSA is not
12 prejudiced by an improper cancellation of the IFB. PSA's bid was publicly opened and is now a
13 public record and PSA suffers prejudice because it will be at a substantial competitive
14 disadvantage when a GMHA re-solicits the project. Further, PSA was the lowest bidder and had
15 a greater chance of being awarded the contract and is prejudiced by the improper cancellation of
16 the IFB. Thus, the Public Auditor finds that PSA was prejudiced by the improper cancellation of
17 the IFB.

18
19 **C. GMHA's August 7, 2007 cancellation of the IFB is void.**

20 GMHA's August 7, 2007, cancellation of the IFB is void. If prior to award it is
21 determined that a solicitation of a contract is in violation of law, then the solicitation shall be
22 revised to comply with the law. 5 G.C.A. §5441(b). Here, voiding the cancellation will revise
23 the solicitation to comply with the law. Pursuant to GMHA's Procurement Regulations, GMHA
24 has the following options: (1) Award the contract to the lowest responsive bidder; or (2) Reject
25 all or some of the bidders as being non-responsive in accordance with Procurement Law and
26 GMHA Procurement Regulations; or (3) Reject all bids in accordance with GMHA's
27 Procurement regulations (However, based on the evidence of additional funding, GMHA
28 probably could not use insufficient funds as a legitimate reason for rejecting all the bids).

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3 **IV. CONCLUSION**

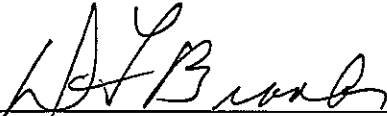
4 Based on the foregoing, the Public Auditor hereby determines the following:

- 5 1. PSA's August 22, 2007, Protest was timely.
6 2. GMHA's August 7, 2007, cancellation of the IFB was not in accordance with
7 GMHA's Procurement Regulations.
8 3. PSA's Appeal is hereby sustained.
9 4. GMHA's August 7, 2007, cancellation of the IFB is void.

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

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

17
18 **DATED** this 11th day of April, 2008.
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DORIS FLORES BROOKS, CPA, CGFM
25 PUBLIC AUDITOR
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