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9 **BEFORE THE OFFICE OF THE PUBLIC ACCOUNTABILITY**

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11 IN THE APPEAL OF) APPEAL NO.: OPA-PA-16-013
12)
13 IP&E Holdings, LLC,) **REBUTTAL TO IP&E'S RESPONSE**
14) **TO GWA'S AGENCY REPORT AND**
15) **STATEMENT**
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COMES NOW, GUAM WATERWORKS AUTHORITY (GWA), the purchasing agency in this matter, by and through its attorney, KELLY O. CLARK, ESQ., hereby files its Rebuttal to the Protestor's Response to GWA's Agency Report and Statement.

Protestor first states that GWA was required under 2 GAR §3109 to use only the estimated quantities set forth in the IFB. It is GWA's position that the estimated quantities may be used as a part of the criteria however, the IFB specifically allows GWA to award based on the bidder's conformance with the Invitation for Bids and also the bid that "would be the most advantageous to GWA in terms of price and all other factors considered as determined by GWA". There was no indication that the award criteria would rely solely on the estimated quantities and in fact, the IFB did not even mention that the estimated quantities would be one of the criteria for the award.

ORIGINAL

1 Referring to 2 GCA §3109(n) and likely more specifically sub-paragraph (4)(a), the
2 Protestor cites *Mallinckrodt, Inc.* File: B-282902, Sept. 10, 1999, for the general proposition
3 that challenges to IFB's with inaccurate estimates should be sustained. However, there are
4 several factual issues in *Mallinckrodt* that prevent a consummate application of the case to the
5 instant protest. First, the difference between the *Mallinckrodt* IFB estimate and the quantity the
6 agency sought to procure was 400%, which the Comptroller found was a significant deviation.
7 Second, the apparent low bidder altered its bid to reflect the lower estimated amount, thus
8 making it impossible to evaluate the bids equitably. Third, the protestor in *Mallinckrodt* sought
9 and was rewarded with a re-solicitation. The remedy of re-solicitation is not what the Protestor
10 is seeking in the instant case, which is an award to the Protestor as a single awardee.
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15 With respect to a re-solicitation, GWA does not desire such a severe result and further
16 does not believe the facts in this matter provide a compelling reason to do so. In *Mallinckrodt*,
17 the Comptroller found that a 400% difference was substantial enough to require a re-
18 solicitation. Here, a difference of 45-50% is not substantial and therefore does not rise to the re-
19 solicitation level in GWA's opinion.
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22 The second factor in determining low bidder set forth in 2 GCA §3109(n)(4)(b) requires
23 all bids be treated equitably. There are no facts alleged or argument by Protestor that the
24 bidders were treated inequitably as they priced their products for the procurement. Neither does
25 the Protestor allege that the offer it submitted would have been different had the estimated
26 numbers been closer to GWA's actual usage. *See Safety Kleen, Inc. B-284125 Feb. 23, 2000.*
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28 Where an award meets the agency's actual needs without prejudice to other offerors, a deviation
29 is unobjectionable.
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1 In summary there is no indication in the IFB that the award criteria will be solely limited
2 to the estimated quantities, that a part of GWA's award criteria was plugging in actual usage did
3 not substantially deviate from the estimated quantities and no facts were alleged to support a
4 claim of inequitable treatment of the bidders.
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6 For the reasons stated above, GWA respectfully requests IP&E's protest be denied.
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8 Dated this 14th day of October, 2016.
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10 Respectfully submitted,

11 **GUAM WATERWORKS AUTHORITY (GWA)**
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13 By: 
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16 GWA General Counsel
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