

The arguments in this consolidated appeal case will be addressed issue by issue following the order in which they were filed. The Guam Services Agency is hereinafter referred to as “GSA”. Pacifica Data Systems, Inc. is hereinafter referred to as “PDS”. TeleGuam Holdings, LLC is hereinafter referred to as “GTA”.

OPA-PA-12-016

GTA disputes BIT’s finding that their product did not meet specifications.

The issue is a question of fact. BIT asserts that a review of GTA’s product was conducted after PDS protested the initial award to GTA, informing GSA that GTA’s product did not meet the listed specifications. Upon review of the literature provided GTA it was discovered that GTA product Cisco SPA501G did not have a display screen as required in bid form 3 of the bid specifications. (Exhibit 1, Tab 6, Vol. 3 of 8) As a result GSA looked to the lowest priced qualified product which was provided by PDS. (Exhibit 2, Tab 6, Vol. 3 of 8)

GTA makes two main arguments first that the bid specifications did not require a digital display. BIT disputes GTA’s argument as the bid required a digital display in form 3 of the bid. Furthermore GTA did submit products that did meet the specifications however the cost of those products exceeded the cost of the PDS product. As part of GTA’s bid submission they included the technical specifications of the Cisco SPA501G. (Exhibit 3 Tab 4, Vol. 2 of 8) Initially it appears that the device does have a digital display as GTA indicated; however, a close reading reveals that the screen area is a “paper label area”.

The second argument that GSA forwards is that they will provide a compliant product regardless of what model number that GTA provided. (See Appeal p.9) Bids are evaluated on the basis of information provided by the prospective bidders. A prospective bidder cannot claim that the product that will be delivered will comply with the bid even though the model number that was listed does not comply. Again, this issue is simply a question of fact did the GTA’s

lowest cost product comply with the specifications. If it does then GTA should be awarded the bid, if it does not then the bid should be awarded to PDS which submitted the lowest price for the phone requested.

OPA-PA-12-017

Attorney Kono will address the issue of shareholder requirements.

PDS disputes GSA's determination that GTA's bid contained minor informalities. PDS argues GTA has added additional terms and conditions, joined four subsidiaries, failed to specify the SPIN number and failed to submit a certificate of authority. GTA has admitted that mistakes in their bid submission occurred and that they (GTA) mistakenly inserted other terms and conditions. (Exhibit 4, Tab 15, Vol. 7 of 8) GSA made a determination that GTA's submission contained minor informalities that did not render GTA's bid nonresponsive as argued by PDS and thus the PDS' protest was denied. (Exhibit 5, Tab 15, Vol. 7 of 8).

OPA-PA-12-018

GTA disputes GSA's award of bid form 11 to PDS arguing that GTA should have received a partial award for the 1,000 Mbps network. The IFB consists of parts A-J which can be found on pages 25-27 of the IFB. Bid form 11 addresses part E. (Exhibit 6, Tab 4, Vol. 2 of 8). On September 17, 2011 GSA issued answers to questions posed by prospective bidders. One of the questions posed was "[W]ith respect with bid parts A-J, a. is the bidder required to bid on all of the office locations, or b. can the bidder bid on only specific office locations? GovGuam response: Yes. This is a Price List IFB. **There will only be one contract awarded for each Part.** The Bidder must provide services to all locations." (Emphasis added) (Exhibit 7, Tab 8, Vol. 4 of 8). GTA received a copy as evidenced by signed acknowledgement on the bottom corner of Exhibit 7.

Because all bidders were informed that only one contract would be awarded for each part GSA acted appropriately by denying GTA's request for a partial award of form 11.

GTA further argues that the IFB specifications were ambiguous. (GTA Appeal p.6) If the specifications were ambiguous the time for clarification was during the question and answer period or even prior to the bid opening. A bidder, who does not secure the lowest cost, cannot raise specification issues after a bid cost has been opened. GTA's argument should be struck as 2 GAR §9101(c)(1) requires that a protest be filed within 14 days after the protestor knows or should have known of the facts giving rise thereto. In our case GTA knew the bid specifications the day they picked up the bid and GTA knew that the GSA would award part E via form 11 as one contract on September 19, 2011 the date GTA received the question and answer letter. (See Exhibit 7) The 14 day period to protest specifications would have been October 3, 2011. GTA request should be denied as they have not timely protested this issue.

For the forgoing reasons BIT request that the OPA find that GSA has properly awarded each part of GSA 064-11.

Respectfully submitted this 11th day of January 2013.

OFFICE OF THE ATTORNEY GENERAL
Leonardo M. Rapadas, Attorney General

By:



FRED NISHIHIRA

Assistant Attorney General

EXHIBIT 1

#4

Bid Form 3 - Centrex Telephone Instruments

BIDDER NAME: <i>Tele Guam Holdc</i>		USAC SPIN:	
The Bidder shall provide a description, purchase price, and monthly rental rate for all phones and accessories.			
The Bidder shall describe the features of the phone and provide brochures in the IFB. The Bidder may expand the height of the rows to accommodate a complete description.			
Model Number	Description	Monthly Lease to Purchase Price	Purchase Price
Model Number <i>AB5700</i>	Single Line Analog Phone with call hold	\$ 1 85	\$ 61 ²⁰
Model Number	Single Line Digital Display with Hands-Free, Display, Programmable Feature Keys and Wireless Handset Option	\$ -	\$ 116 ⁶⁴
Model Number	4 Line Digital with Digital Display, Hands-Free, Hold, Programmable Feature Keys and Wireless Handset Option	\$ 4 ⁹³	\$ 160 ³⁰
Model Number	6 Line Digital with Digital Display, Hands-Free, Hold, Programmable Feature Keys and Wireless Handset Option	\$ -	\$ -
Model Number	Wireless Handset to be used with the digital telephones.	\$ -	\$ -
Model Number	Attendant Console	\$ -	\$ -

Cisco SPA501G	8 lines	3.52	116.64
CISCO SPA504G	4 lines	4.93	163 ³⁰
CISCO SPA508G	up to 8 line	5.87	194.40
CISCO SPA500S	Cisco Attendant Console	2.35	77.79
Aastra 53i	up to 9 line	4.96	164 ³⁴
Aastra 55i	up to 9 line	5.65	187.14
Aastra 670i	console	4.13	136.80
Platronics CS50	wireless	6.70	222.94

EXHIBIT 2

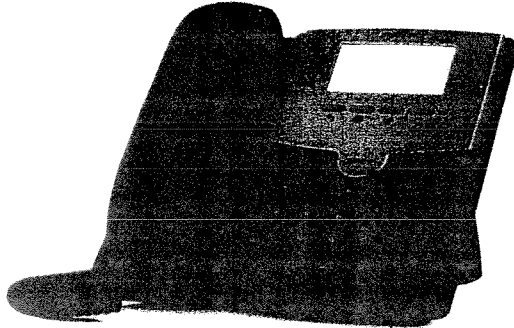
Vendor 1

Bid Form 3 - Centrex Telephone Instruments

BIDDER NAME: PDS		USAC SPIN:	
<p>The Bidder shall provide a description, purchase price, and monthly rental rate for all phones and accessories.</p> <p>The Bidder shall describe the features of the phone and provide brochures in the IFB. The Bidder may expand the height of the rows to accommodate a complete description.</p>			
Model Number	Description	Monthly Lease to Purchase Price	Purchase Price
Model Number	Single Line Analog Phone with call hold	\$ 3 ⁻	\$ 95 ⁻
Model Number	Single Line Digital Display with Hands-Free, Display, Programmable Feature Keys and Wireless Handset Option	\$ 2 ⁻	\$ 65 ⁻
Model Number	4 Line Digital with Digital Display, Hands-Free, Hold, Programmable Feature Keys and Wireless Handset Option	\$ 3 ⁻	\$ 95 ⁻
Model Number	6 Line Digital with Digital Display, Hands-Free, Hold, Programmable Feature Keys and Wireless Handset Option	\$ 4.50	\$ 155 ⁻
Model Number	Wireless Handset to be used with the digital telephones.	\$ 11 ⁵⁰	\$ 295 ⁻
Model Number	Attendant Console	\$ 3 ⁻	\$ 95 ⁻

EXHIBIT 3

Figure 1. Cisco SPA501G Basic 8-Line IP Phone



Telephony Features

- Eight voice lines
- Four Independent SIP Registrations*
- Line status: active line indication
- User interface driven by Interactive Voice Response (IVR)
- Shared line appearance**
- Speakerphone
- Call hold
- Music on hold**
- Call waiting
- Outbound caller ID blocking
- Call transfer: attended and blind
- Three-way call conferencing with local mixing
- Multiparty conferencing via external conference bridge
- Automatic redial of last calling and last called numbers
- On-hook dialing
- Call pickup: selective and group**
- Call park and unpark**
- Call swap
- Call back on busy
- Call blocking: anonymous and selective
- Call forwarding: unconditional, no answer, on busy
- Hot line and warm line automatic calling
- Call logs (60 entries each): made, answered, and missed calls
- Personal directory with auto-dial (100 entries)
- Do not disturb
- Digits dialed with number auto-completion
- Anonymous caller blocking
- Uniform Resource Identifier (URI) (IP) dialing support (vanity numbers)

- On-hook default audio configuration (speakerphone and headset)
- Multiple ring tones with selectable ring tone per line
- Date and time with support for intelligent daylight savings
- Call start time stored in call logs
- Distinctive ringing based on calling and called number
- 10 user-downloadable ring tones
- Speed dialing, eight entries
- Configurable dial/numbering plan support
- Intercom**
- Group paging**
- Network Address Translation (NAT) Traversal, including Simple Traversal of UDP Through NATs (STUN) support
- DNS SRV and multiple A records for proxy lookup and proxy redundancy
- Syslog, debug, report generation, and event logging
- Highly secure call encrypted voice communications support
- Built-in web server for administration and configuration with multiple security levels
- Automated remote provisioning, multiple methods; up to 256-bit encryption (HTTP, HTTPS, Trivial File Transfer Protocol [TFTP])
- Option to require administrator password to reset unit to factory defaults

Hardware Features

- Paper label area
- Dedicated illuminated buttons for:
 - Audio mute on/off
 - Headset on/off
 - Speakerphone on/off
- Voicemail message waiting indicator (VMWI) light
- Voicemail message retrieval button
- Dedicated hold button
- Settings button for access to IVR menu
- Volume control rocking up/down knob controls handset, headset, speaker, ringer
- Dedicated keys for redial, cancel, conference, and transfer
- Standard 12-button dialing pad
- High-quality handset and cradle
- Built-in high-quality microphone and speaker
- Headset jack: 2.5 mm
- Two Ethernet ports with integrated Ethernet switch: 10/100BASE-T RJ-45
- 802.3af-compliant PoE
- Optional 5 VDC universal (100-240V) switching; power supply is ordered separately (Cisco PA100)

Regulatory Compliance

- FCC (Part 15, Class B), CE Mark, A-Tick, C-Tick, Telepermit, UL, CB

Security Features

- Password-protected system, preset to factory default
- Password-protected access to administrator and user-level features
- HTTPS with factory-installed client certificate
- HTTP digest: encrypted authentication via MD5 (RFC 1321)
- Up to 256-bit Advanced Encryption Standard (AES) encryption
- SIP over Transport Layer Security (TLS)
- Secure Real-Time Transport Protocol (SRTP)

Documentation

- Quick-Start Installation and Configuration Guide
- User Guide
- Administration Guide
- Provisioning Guide (for service providers only)

Package Contents

- Cisco SPA501G Basic 8-Line IP phone, handset, and stand
- Handset cord
- RJ-45 Ethernet cable
- Quick-Start Guide
- CD

Specifications

Table 1 gives specifications for the Cisco SPA501G Basic 8-Line IP Phone.

Table 1. Specifications for the Cisco SPA501G Basic 8-Line IP Phone

Note: Many features are programmable within a defined range or list of options. Please see the SPA Administration Guide for details. The target configuration profile is uploaded to the SPA501G at the time of provisioning.

Specifications	
Data networking	<ul style="list-style-type: none"> • MAC address (IEEE 802.3) • IPv4 (RFC 791) • Address Resolution Protocol (ARP) • DNS: A record (RFC 1706), SRV record (RFC 2782) • Dynamic Host Configuration Protocol (DHCP) client (RFC 2131) • Internet Control Message Protocol (ICMP) (RFC 792) • TCP (RFC 793) • User Datagram Protocol (UDP) (RFC 768) • Real-Time Transport Protocol (RTP) (RFC 1889, 1890) • Real-Time Control Protocol (RTCP) (RFC 1889) • Differentiated Services (DiffServ) (RFC 2475) • Type of service (ToS) (RFC 791, 1349) • VLAN tagging 802.1p/Q: Layer 2 quality of service (QoS) • Simple Network Time Protocol (SNTP) (RFC 2030)

Specifications	
Voice gateway	<ul style="list-style-type: none"> • SIP version 2 (RFC 3261, 3262, 3263, 3264) • SPCP with the Cisco Unified Communications 500 Series • SIP proxy redundancy: dynamic via DNS SRV, A records • Reregistration with primary SIP proxy server • SIP support in NAT networks (including STUN) • SIPFrag (RFC 3420) • Secure (encrypted) calling via SRTP • Codec name assignment • Voice algorithms <ul style="list-style-type: none"> ◦ G.711 (A-law and μ-law) ◦ G.726 (16/24/32/40 kbps) ◦ G.729 A ◦ G.722 • Dynamic payload support • Adjustable audio frames per packet • Dual-tone multifrequency (DTMF), in-band and out-of-band (RFC 2833) (SIP INFO) • Flexible dial plan support with interdigit timers • IP address/URI dialing support • Call progress tone generation • Jitter buffer: adaptive • Frame loss concealment • Comfort Noise Generation (CNG) • Voice activity detection (VAD) with silence suppression • Attenuation/gain adjustments • VMWI - Voicemail waiting indicator, via NOTIFY, SUBSCRIBE • Third-party call control (RFC 3725)
Provisioning, administration, and maintenance	<ul style="list-style-type: none"> • Integrated web server provides web-based administration and configuration • Telephone keypad configuration via display menu/navigation • Automated provisioning and upgrade via HTTPS, HTTP, TFTP • Asynchronous notification of upgrade availability via NOTIFY • Nonintrusive in-service upgrades • Report generation and event logging • Statistics transmitted in BYE message • Syslog and debug server records: configurable per line
Power supply	<ul style="list-style-type: none"> • Power supply is optional and is purchased separately <ul style="list-style-type: none"> ◦ Models: Cisco PA100-NA, PA100-EU, PA100-UK, PA100-AU • DC output voltage: +5 VDC at 2.0A maximum • Switching power adapter: 100-240V 50-60 Hz AC input
Physical interfaces	<ul style="list-style-type: none"> • Two 10/100BASE-T RJ-45 Ethernet ports (IEEE 802.3) • Handset: RJ-9 connector • Built-in speakerphone and microphone • Headset 2.5mm jack
Indicator lights/LEDs	<ul style="list-style-type: none"> • Speakerphone on/off button with LED • Headset on/off button with LED • Mute button with LED • Message waiting LED
Body dimensions (W x H x D)	8.42 x 8.35 x 1.73 in. (214 x 212 x 44 mm)
Unit weight	2.00 lb (0.9 kg)
Operating temperature	32° ~ 104°F (0° ~ 40°C)
Storage temperature	-4° ~ 158°F (-20° ~ 70°C)
Operating humidity	5% to 95% noncondensing
Storage humidity	5% to 95% noncondensing

EXHIBIT 4



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January 24, 2012

Claudia Acfalle
Chief Procurement Officer
Government of Guam General Services Agency
148 Marine Corps Drive
Piti, Guam 96915

Subject: Protests by Pacific Data Systems and Docomo Pacific; IFB GSA 064-11

Dear Ms Acfalle:

This letter is in response to the protests submitted by PDS and Docomo, both dated December 23, 2011, related to Invitation for Bids No. GSA064-11.

PDS and Docomo Are Not Aggrieved And The Protests Must Be Denied

Both protests must be denied by GSA as neither PDS nor Docomo are "aggrieved" bidders pursuant to the Guam Procurement Law and the Guam Procurement Rules and Regulations because both protests are based entirely upon the bid submitted by GTA. The procurement law provides:

Right to Protest. Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer¹

Moreover, the procurement regulations provide:

Subject of Protest. Protestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.²

Neither protest is based upon any act of GSA in this procurement process or upon any alleged shortcoming in GSA064-11. Also, of the date of this letter, no award has been made. Thus, PDS and Docomo are not aggrieved bidders and their protests must be denied. Moreover, *all* bids should be fairly and objectively evaluated pursuant to procurement laws and regulations before any bid is awarded or disqualified.

¹ 5 GCA § 5424 (a).

² 2 GAR § 9101(c)(2).

EXHIBIT 4

The Procurement Regulations Allow Corrections After Bid Opening

GTA admits the mistakes in the Affidavit Disclosing Ownership and Commissions, the erroneous business licenses, the erroneous certificate of authority and the mistaken insertion of the additional terms and conditions. However, these were mere oversights on GTA's part and the correction of these mistakes is well within the authority of GSA to allow pursuant to the express language and intent of the procurement laws and regulations.

With regard to the Affidavit Disclosing Ownership, the information inserted therein is not false but merely incomplete. GTA inadvertently failed to include information on shareholders prior to the purchase of the company by AP Teleguam Holdings, Inc. in June of 2011. The change in ownership of GTA was widely publicized in Guam and the purchase of GTA was approved by the FCC and by the Guam Public Utilities Commission. The inadvertent failure to include prior owners was simple human oversight and nothing more. GTA is ready to provide a correct affidavit to GSA.

GTA also provided expired business licenses for Teleguam Holdings, LLC's dbas and the 2005 Certificate of Authority for Teleguam Holdings, LLC, which was subsequently transferred to GTA Telecom, LLC. Notwithstanding these oversights, GTA has always held current business licenses for the Teleguam Holdings, LLC dbas (all current through June 30, 2012) and a current Certificate of Authority for GTA Telecom, LLC and is ready to provide these to GSA. GTA has always been appropriately licensed and certified to operate in Guam and the failure to provide the correct documents does not affect GTA's legal ability to provide services.

With respect to the mistaken insertion of additional terms and conditions, this was a simple clerical and non-judgmental mistake. By submitting its bid, GTA conceded to all terms and conditions contained in the Invitation for Bids. The terms and conditions that were mistakenly inserted are intended only for individual or business accounts and in no way intended for submission in Government of Guam IFBs.

The procurement regulations expressly allow correction of "minor informalities" after opening of bids:

(4) Mistakes Discovered After Opening but Before Award.

(A) This Subsection sets forth procedures to be applied in three (3) situations described in Subsections 3109(m)(4)(A) through 3109(m)(4)(C) of this Subsection in which mistakes in bids are discovered after the time and date set for bid opening but before award.

(B) **Minor Informalities.** Minor informalities are matters of form, rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Procurement Officer shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the territory. . . .

(6) **Determination Required.** When a bid is corrected or withdrawn, or correction or withdrawal is denied, under Subsection 3109(m)(5) of this Section, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations, except that the Procurement Officer shall prepare the determination required in Subsection 3109(m)(4)(A) of this Section.³

The aforementioned section, 2 GAR § 3109(m), was promulgated by the GSA pursuant to the Procurement Law at 5 GCA § 5211, which provides in part:

(f) Correction or Withdrawal of Bids; Cancellation of Awards. Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, *shall be permitted in accordance with regulations promulgated by the Policy Office.* After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the Territory or fair competition shall be permitted. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Chief Procurement Officer, the Director of Public Works or head of a purchasing agency.⁴ [emphasis added]

This law was adopted by the Guam Legislature from the American Bar Association 1979 Model Procurement Code for State and Local Governments.⁵ The intent of allowing corrections to bids, so long as the correction do not cause the bidder to have the low bid, is clear from the commentary within the model code⁶:

COMMENTARY:

(1) Correction or withdrawal of bids before or after contract award requires careful consideration to maintain the integrity of the competitive bidding system, to assure fairness, and to avoid delays or poor contract performance. While bidders should be expected to be bound by their bids, circumstances frequently arise where correction or withdrawal of bids is proper and should be permitted.

(2) To maintain the integrity of the competitive sealed bidding system, a bidder should not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.

(3) An otherwise low bidder should be permitted to correct a material mistake of fact in its bid, including price, when the intended bid is obvious from the bid document or is otherwise supported by proof that has evidentiary value. A low bidder should not be permitted to correct a bid for mistakes or errors in judgment.

(4) In lieu of bid correction, the [State] should permit a low bidder alleging a material mistake of fact to withdraw its bid when there is reasonable proof that a mistake was made and the intended bid cannot be ascertained with reasonable certainty.

³ 2 GAR § 3109(m).

⁴ 5 GCA § 5211(f).

⁵ See 5 GCA Chapter 5 Compiler notes and comments.

⁶ See American Bar Association Model Procurement Code for State and Local Governments, 1979, p. 20.

(5) After bid opening an otherwise low bidder should not be permitted to delete exceptions to the bid conditions or specifications which affect price or substantive obligations; however, such bidder should be permitted the opportunity to furnish other information called for by the Invitation for Bids and not supplied due to oversight, so long as it does not affect responsiveness.

(6) A suspected bid mistake can give rise to a duty on the part of the [State] to request confirmation of a bid, and failure to do so can result in a nonbinding award. Where there is an appearance of mistake, therefore, the bidder should be asked to reconfirm the bid before award. In such instance, a bidder should be permitted to correct the bid or to withdraw it when the bidder acknowledges that a mistake was made.

(7) Correction of bid mistakes after award should be subject to the same proof as corrections before award with a further requirement that no correction be permitted that would cause the contract price to exceed the next low bid.

(8) Nothing in this Section is intended to prohibit the [State] from accepting a voluntary reduction in price from a low bidder after bid opening, provided that such reduction is not conditioned on, or results in, the modification or deletion of any conditions contained in the Invitation for Bid.

This makes clear that the Guam procurement laws and regulations foresee mistakes being made in bid submissions and actually require corrections to be made pursuant to duly adopted regulations and so long as the integrity of the competitive bidding system is not compromised. As will be discussed below, none of the mistakes impact the responsiveness of GTA's bid. Equally important, corrections to GTA's bid would in no way affect the bid prices offered by GTA.

We emphasize that the IFB GSA064-11 does not on its face require automatic disqualification of a bid for a failure to explicitly follow bid requirements. Page 2 of 56 of the IFB, Special Reminder to Prospective Bidders, reminds bidders to read the instructions and general terms and conditions and ascertain that certain check-marked requirements are submitted with the bid. This reminder states: "Failure to comply with the above requirements *may* be cause for disqualification and rejection of the bid." [emphasis added]. The discretion allowed to GSA by the word "may" to determine if disqualification is justified is entirely consistent with the express language and intent of the Procurement Law and Regulations.

GTA's Mistakes Are Minor Informalities

The mistakes in GTA's bid are entirely matters of form and are not at all matters of substance. These minor informalities do not affect "price, quantity, quality, delivery or contractual conditions".⁷ Therefore, pursuant to 2 GAR § 3109(m)(4)(B), GTA's correction of the minor informalities will not prejudice other bidders.

GTA has provided consistent and reliable telecommunications services to the Government of Guam for decades. GTA has continually provided services to the government during times of fiscal austerity and has worked with the government to avoid disconnection of services for unpaid invoices. Allowing correction of the mistakes is in the best interests of the government.

⁷ See 2 GAR § 3109(m)(4)(B)

PDS and Docomo point to a decision of the Office of the Public Auditor for strict enforcement of the Affidavit Disclosing Ownership.⁸ That case involved an invitation for bids issued by the Guam Community College. The OPA decision found that GTA submitted a false major shareholders disclosure affidavit in its bid to GCC and that GTA's bid was therefore non-responsive.⁹ Specifically, the OPA stated: "GTA's original affidavit disclosed that 100% of its interest was owned by itself and the substance of this disclosure was false. The false substance of GTA's original Major Shareholders Disclosure Affidavit far exceeds a matter of form"¹⁰ Along this line, the OPA appears to have relied heavily upon language in GCC IFB which made non-compliance subject to automatic disqualification. However, there is a significant difference between the GCC IFB language and the language in the GSA IFB in this case. The GCC Special Reminder to Prospective Bidders form provides that "[f]ailure to comply with the above requirements *will mean* a disqualification and rejection of the bid." [emphasis added]. As noted above, the similar GSA form contains permissive language. Thus, the GCC form relied upon by the OPA is different and distinguishable from the form in IFB GSA064-11.

Also with respect to the OPA decision relied upon by PDS and Docomo, the Affidavit Disclosing Ownership submitted by GTA in GSA064-11 was not false. It was simply incomplete. GTA stated correctly that it was owned by AP Teleguam Holdings, Inc. and that the subsidiary LLCs were owned by Teleguam Holdings, LLC. GTA inadvertently omitted information that the company was owned by others prior to the sale of the company in June of 2011. The mistake was a simple, unfortunate oversight. There was no attempt here to provide misleading information. The sale was widely publicized in the Guam media and the identities of the selling and purchasing entities were widely disclosed. Thus, the facts of the GCC case are distinguishable from the facts here. Moreover, the OPA noted that the GCC Procurement Officer made no written determination pursuant to 2 GAR § 3109(m)(6) granting correction of the minor informality.¹¹ This regulation provides:

Determination Required. When a bid is corrected or withdrawn, or correction or withdrawal is denied, under Subsection 3109(m)(5) of this Section, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations, except that the Procurement Officer shall prepare the determination required in Subsection 3109(m)(4)(A) of this Section.¹²

Thus, it is within the discretion and authority of the Chief Procurement Officer to make a written determination allowing correction of minor informalities. The purpose of this authority is clear: to allow corrections of non-material issues. As discussed below, so-called bidding conditions required by the IFB will not convert bidder qualifications reflecting on responsibility into matters of responsiveness. The OPA itself has issued conflicting decisions on this issue. It is in the interests of the government for the GSA to follow the purposes and intent of the procurement laws and regulations and grant a correction of the minor informalities.

⁸ The protests cite to *In the Appeal of Pacific Data Systems, Inc.* Appeal No. OPA-PA-10-005, Decision (Jan. 12, 2011).

⁹ *Id.* at p. 20, lines 4-6.

¹⁰ *Id.* at p. 14, lines 5-8.

¹¹ *Id.* at p. 14, lines 17-22.

¹² 2 GAR § 3109(m)(6)

For the foregoing reasons, GTA hereby respectfully requests the Chief Procurement Officer to make a written determination granting correction of the minor informalities in GTA's bid.

GTA's Bid Is Not Non-Responsive

Responsiveness of a bid is defined in the Guam Procurement Law as: "a bid which conforms in all material respects to the Invitation for Bids."¹³ The procurement regulations regarding corrections of minor informalities, provided above, allow correction of minor or immaterial mistakes. Thus, if a mistake is not material, it does not render a bid non-responsive.¹⁴ 2 GAR § 3109(m)(4)(B) describes material and prejudicial conditions as issues involving price, quantity, quality, delivery, or contractual conditions. None of the mistakes in GTA's bid involve any of these enumerated conditions. The mistakes are not material and they do not render the GTA bid non-responsive.

Issues of The Affidavit of Ownership, Business Licensing and Certificate of Authority Are Not Issues of Responsiveness

The Procurement Regulations enumerate the standards of a bidder's responsibility as follows:

1. the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
2. a satisfactory record of performance;
3. a satisfactory record of integrity;
4. qualified legally to contract with the territory; and
5. supplied all necessary information in connection with the inquiry concerning responsibility.¹⁵

Issues of licensing and certification to engage in telecommunications business in Guam clearly go to the standard above related to the bidder being qualified legally to contract with the government.

Shareholder disclosure allows the government to know the identity of the bidder or the bidder's owners. The same affidavit form requires disclosure of the identity of persons entitled to receive a commission, gratuity or other compensation for assisting in obtaining business related to the bid. Moreover, the statute requiring disclosure of major shareholders, 5 GCA § 5233, was placed in Part D, Qualifications and Duties, of the Guam Procurement Law. Thus, the purpose of disclosure of ownership relates most closely to the standard related to the bidder's record of integrity. It clearly follows that the issues of shareholder disclosure, licensing and certification go directly to a bidder's responsibility, not responsiveness of the bid.

¹³ 5 GCA § 5201(g).

¹⁴ See John Thos. Brown, *A Guam Procurement Process Primer*, Ver. 2.1 § VII(J)(2), p. 97 (2011).

¹⁵ 2 GAR § 3116(b)(2)(A).

With respect to responsibility determinations, an OPA procurement decision noted:

These concepts are often confused, particularly when the IFB contains specific requirements concerning bidders' responsibility characteristics such as the requirement for submission of information relating to responsibility. As a general rule, matters that deal with bidder responsibility cannot be converted into matters of responsiveness merely by inserting a provision in [sic] into the IFB requiring rejection of bids that do not comply.¹⁶

Thus, the fact that GSA064-11 contains these specific responsibility requirements does not convert them into matters of responsiveness and the inadvertent omission of such information cannot in and of itself render the bid non-responsive.

In fact, the Procurement regulations require GSA and the Chief Procurement Officer to base "on any available information":

(B) Information Pertaining to Responsibility. The prospective contractor shall supply information requested by the Procurement Officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the Procurement Officer shall base the determination of responsibility upon any available information or may find the prospective contractor nonresponsive if such failure is unreasonable.¹⁷

The determination of whether a bidder's failure to provide the information is unreasonable first requires GSA to conduct an "inquiry with respect to responsibility."¹⁸ Failure of a bidder to promptly supply information in connection with such an inquiry is a ground for a determination of nonresponsibility.¹⁹

Other Grounds in PDS' Protest Are Unsupported and Irrelevant

The submission of GTA's bid in the collective name of Teleguam Holdings, LLC, and its wholly owned subsidiaries is permissible. PDS points to no specific IFB requirement or any statute or regulation that prohibits this because none exist. The subsidiaries are appropriately licensed and certified to operate. The subsidiaries are entirely owned by Teleguam Holdings, LLC, and operate only to support their parent corporation. PDS offers no support for its position and it should be disregarded.

GTA has specified the SPINs and SPACs that it holds under its various subsidiaries. These designations have been available to the Government of Guam since the privatization of the Guam Telephone Authority and the federal benefits have continued uninterrupted since then. PDS offers no support for its position and it should be disregarded.

¹⁶ *In the Appeal of Jones and Guerrero Co., Inc.*, Appeal No. OPA-PA-07-005, Decision pp. 6-7 (2008) (citing Cibinic & Nash, *Formation of Government Contracts* 3rd pp. 545-546.

¹⁷ 2 GAR § 3116(b)(2)(B).

¹⁸ 2 GAR § 3116(a).

¹⁹ *Id.*

Conclusion

Based upon the foregoing, it is incumbent upon GSA to follow intent and purposes of the procurement law and regulations. GTA hereby respectfully requests GSA to allow correction of the mistakes in its bid or, in the alternative, to conduct an inquiry with respect to GTA's responsibility. GTA stands ready to provide all information necessary to show our responsibility.

Sincerely,

A handwritten signature in black ink, appearing to read 'ASQ', with a long horizontal flourish extending to the right.

Andrew S. Quenga
GTA General Counsel

EXHIBIT 5

Eddie Baza Calvo
Governor



Benita Manglona
Director, Dept. of Admin.

GENERAL SERVICES AGENCY
Government of Guam
148 Route 1 Marine Drive Corp
Piti, Guam 96915
475-1710 (T) / 475-1727 (F)

Ray Tenorio
Lt. Governor

Item 2

Anthony C. Blaz
Deputy Director

Memorandum to file:

WRITTEN DETERMINATION

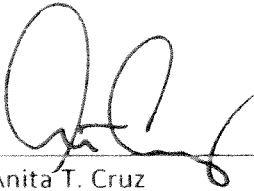
GSA BID NO.: GSA-064-11
TELECOMMUNICATION SERVICES

Pursuant to 2 GARR Div.4, Section 3109(m)(4)(B), I Anita T. Cruz, Buyer Supervisor, delegated the authority to review and act upon GSA-064-11, due to a conflict by the Chief Procurement Officer, as indicated by the lawsuit filed against her by Pacific Data Systems, do hereby make the following determination:

1. The "Major Shareholder Affidavit and Commission" form submitted by the bidder, GTA, failed to include all ownership of that company for the past year.
2. The submission specifically did not include that past ownership, within the past year.
3. I am aware of the OPA decision of OPA-011-11, in which a failure to submit a valid Major Shareholder Disclosure at the time of the bid opening was grounds for rejecting the bid.
4. However, a determination by the head of the purchasing agency indicating that it may have been a minor informality was not done in that case.
5. I therefore, based upon all of the information provided, the review of the bid documentation, do hereby made the determination that the failure to submit the total ownership for the past twelve months in this case is a minor informality for the following reasons:
 - a). The current ownership is provided.
 - b). The failure to submit the entire ownership for the past twelve months did not have any effect upon the price, delivery, quantity, quality or contractual conditions.
6. Also, a protest was further raised by GTA's failure to submit a correct "Certificate of Authority" and "Business License"
7. GTA notes that some of the business license submitted for the bid had expired.

8. Again, the use of the minor informality section of the Procurement rules and regulations allows the government to look at the submission by a bidder to determine whether it intended to comply with the requirements and if so, determine whether its failure to provide the proper documents may be waived in the best interest of the Territory.
9. Here, GTA intended to comply with the terms of the bid.
10. The failure to submit the proper documentation is a minor informality in that it did not have any effect upon the quantity, delivery, price, quality, or contractual conditions of the bid submission.

I, as the authorized procurement official of this bid, do hereby waive these insignificant mistakes on the grounds that it is in the best interest of the Territory to consider this bid mistakes on the grounds that it is in the best interest of the Territory to consider this bid, to consider the best price for the Territory and allow the bidder to correct its submission.


Anita T. Cruz

1/20/12
Date:

EXHIBIT 6

The assessment is a review of the services and comparisons between the results of the IFB of the GDOE and the IFB and non-bid authorizations of procurements. This is a work in progress by the Telecommunications and Information Policy Group of the Social Science Research Institute of the University of Hawaii.

The GovGuam plans to acquire around 1,686 Central Office (CO) and plain old telephone services (POTS) based telephone services through this IFB.

Bidder shall be aware that small offices that close during disasters may use the non-Centrex based services in Part B of this IFB.

Appendix C shows that some GovGuam agencies are using a Government Hosted Private Branch Exchange (PBX) or standalone PBX system. The telephones and services for the Government Hosted and standalone PBX systems are not included in this IFB. A determination by each GovGuam agency to continue with a "Hosted PBX" or standalone PBX will be made following the Price List established by this IFB. Should a GovGuam agency decide to continue with any existing service, then, a separate IFB may be issued for the support of this service.

B. Part B - Non-Centrex Cable or Wireless Telephone Services

For smaller agencies that will not need line powered CO Centrex Telephone Services, the GovGuam is requesting competitive bids for cable or wireless telephone services for small offices. The GovGuam agency may select this option only for sites that are not considered essential during disasters.

The GovGuam estimates that at least ten (10) offices may use this type of service. More may use the service, depending on the cost of the service and features provided. There may be several hundred lines.

C. Part C - Mobile Telephone Services

The GovGuam currently uses mobile telephone services. There are over 80 GSM accounts with GTA. The GovGuam will be seeking a corporate plan for these mobile services. The corporate plan will include shared minutes, unlimited texting, no-cost nights and weekends, and other plan features comparable to plans offered throughout the United States. An optional data plan will also be required as part of this IFB. The GovGuam plans to use at least 50 of these mobile services in a corporate GovGuam plan.

Bidder shall port the current mobile phone to new service

D. Part D - Integrated Services Digital Networking (ISDN) Primary Rate Interface (PRI), Basic Rate Interface (BRI), and Session Initiation Protocol (SIP) Trunks

The GovGuam currently uses ISDN Primary Rate Interface (PRI), ISDN Basic Rate Interface (BRI), and Session Initiation Protocol (SIP) Trunks. Appendix E of the Assessment contains a listing of the current trunks and pricing for the GovGuam. There are about 22 PRI and 3 BRI circuits. Although the GovGuam does not currently use SIP trunking, the price differential between PRI channels and SIP trunks may yield sufficient savings to warrant a conversion, at least for those sites that do not use PRIs or BRIs for video teleconferencing applications. The GovGuam will use an estimated 12 PRIs, 2 BRIs, and up to 30 SIP trunks.

E. Part E - Dedicated GovGuam Wide Area Network (GGWAN) Data Communication Services

Part E of this IFB is for a Government of Guam Wide Area Network. The GGWAN connects government offices to the GovGuam Data Center (GDC) in Hagatna through Ethernet based capacity. Appendix F of the Assessment shows that GovGuam is currently using a minimum 5 Mbps ETS service and a managed router service. There are an estimated 46 of these circuits that are in use.

The GovGuam has established a centralized server farm which requires higher bandwidth to ensure good response. The GovGuam is seeking dedicated fiber based capacity of 1 or 10 Gbps that would be used only by authorized GovGuam agencies. The Bidder must provide these services in a fiber ring topology to each site. The Bidder shall provide a single line diagram for a site and identify the demarcation. The network node must be installed within 90 days after receipt of a purchase order.

F. Part F - Broadband Internet Access

The Broadband Internet service is for users connected to the GGWAN. The GovGuam issued an IFB for a Price List for High Capacity Internet Access in 2007. Awards were made for T1 and 512 Kbps Internet links. The current services are aggregated via a router from the GDC rather than used from an ordering agency.

The Bidder will be required to provide per 1 Mbps pricing for Internet Access in 6 different categories:

1-25 Mbps	76-100 Mbps
26-50 Mbps	101-150 Mbps
51-75 Mbps	151-200 Mbps

Bid Form 11 - GovGuam Wide Area Network (1 and 10 Gbps)

BIDDER NAME:		USAC SPIN:		EVALUATION		
The Bidder shall provide the price for a fiber DWDM based Wide Area Network (WAN) Network to connect GovGuam agencies. The service is a dedicated GovGuam wide service and must provide a 100% CIR between two GovGuam locations configured on the ring. The Bidder shall provide an LC interface for Interface to high capacity switches/routers.				Based on Number of Services with Cost of the Period of Months		
Internet Access in Mbps	Installation (Per Node)	Per Node Monthly Recurring Cost (MRC) including all Surcharges	# of Services	# of Months	Total (60 Months + Installation)	
1,000 Mbps or 1 Gbps Dedicated for GovGuam (100% CIR, Ring Topology, NMS)	\$ -	\$ -	18	24	\$ -	
10,000 Mbps or 10 Gbps Dedicated for GovGuam (100% CIR, Ring Topology, NMS)	\$ -	\$ -	18	24	\$ -	

The Bidder shall insert the Installation and MRC for the 1 and 10 Gbps Dedicated Ethernet Network.

EXHIBIT 7

Eddie Baza Calvo
Governor

GENERAL SERVICES AGENCY
Government of Guam
Route 1 Marine Drive Corp
Piti, Guam 96915

Ray Tenorio
Lt. Governor



Benita Mangiona
Director, Department of Administration

George A. Santos
Deputy Director

Bid Invitation No. GSA-064-11

Telecommunication (Telephone) Services; Mobile Telephone Services; Integrated Services Digital Networking (ISDN) Primary Rate Interface (PRI), Basic Rate Interface (BRI), and Session Initiation Protocol (SIP); GIGAWAN Data Communication Services; Broadband Internet Access; DSL/Cable or Wireless Internet Services; Television Services; Routers, Managed Switches, and Network Equipment and Direct Inward Dialing (DIG) Numbers.

Response to Questions Lodged by Prospective Bidders
September 17, 2011

I. CLARIFICATIONS BY GOVERNMENT OF GUAM

The following are clarifications provided by GovGuam for different parts of the Invitation for Bid.

1. **Walk-Through** - The Walk-Through are in the process being scheduled. However, the Bidders are advised that this IFB is for the Government of Guam and that there may be sites that were not visited but included for the purposes of this IFB. Inasmuch as the GovGuam offices are located throughout the island, **the Bidder is advised that even with a walkthrough of the major sites, the Bidder is required to provide the services on an island-wide basis.**

The IFB is a Price List for Telecommunication Services that functions like a "tariff." The Bidder shall provide all services to any location on island. The GSA understands the desire to understand the sites. At the same time, this is not a site-specific IFB. Thus, there will be one site visit and the schedule for additional questions and responses shall govern.

2. FOR ALL PARTS

- a. **BID FORM** - The Bid Form in Excel can be picked up at GSA. For Bid Forms 0, 1, 4, and 7, the Bidders may use the Bid Form as the Point-by-Point Response. The Bidder are reminded and shall read all of the requirements in the excel spreadsheet carefully before responding. The Bid Forms are in addition to any Bid specification provided for in Amendment No.: 4 to this IFB. All Bid Forms were replaced and labeled RFB 0 through RFB 15. (Refer to Amendment No. 4 item #34)

ACKNOWLEDGEMENT COPY

RECEIVE BY 

DATE 9/19/2011
Telecommunications

41. GTA is requesting to be provided a transcription of questions and responses at GSA Pre-Bid conference held at GSA on July 7, 2011.
GovGuam Response: (Refer to Exhibit 2).
42. Will the contract awarded under this IFB supersede all previously existing and pending contracts awarded under IFBs, RFQs or RFPs for similar services?
GovGuam Response: Yes, within the Executive Branch of GovGuam Line Agencies.
43. The deadline to submit questions is July 14, 2011 at 5pm
Question: When will responses be provided?
GovGuam Response: September 17, 2011.
44. There is no Section V, VI in the content of the bid, please provide?
GovGuam Response: GSA intentionally left out.
45. Comment GovGuam
GovGuam Comment: The Government of Guam appreciates your interest in this IFB.

VIII. QUESTIONS FROM IT&E (July 14, 2011)

A. Pertains to All Parts of the Bid

1. 1. With respect with bid parts A-J, a. is the bidder required to bid on all of the office locations, or b. can the bidder bid on only specific office locations?
GovGuam Response: Yes. This is a Price List IFB. There will only be one contract awarded for each Part. The Bidder must provide services to all locations.
2. 2. If the answer to question 1a is yes, would that restrict competition and thus increase overall pricing?
GovGuam Response: Smaller awards would require far more administrative time, technical resources, and cause confusion over who is responsible for what service at a location within a Part. The administrative overhead would be very high. As such, these Parts are the traditional components that are bid for larger organizations.
3. 3. Does the government agree with the proposition that separating the components (bid parts and specific office locations) will result in greater competition and better pricing? If so, will the government agree to allow separate bids for each component?
GovGuam Response: No. Again, the administrative and technical costs to administer a component part IFB would be too high.
4. 4. Will the bidder be allowed site visits to all the Government of Guam office locations? Identify the Government of Guam agency physical address of site(s), point of contact name and number.
GovGuam Response: Yes, that is being accomplished.
5. 5. It seems unlikely that site surveys can be completed by the scheduled bid deadline. May we request for a 2-week extension from the date after the last site survey has been completed?

