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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: 1/11/13  
TIME: 3:00  AM  PM BY: MH  
FILE NO OPA-PA: 12-017

IN THE OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEAL

IN THE APPEAL OF  
  
PACIFIC DATA SYSTEMS, INC.,  
  
Appellant.

Docket No. OPA-PA-12-017  
  
**TELEGUAM HOLDINGS, LLC'S  
HEARING BRIEF**

Teleguam Holdings, LLC and its wholly owned subsidiaries ("GTA") summarize its position on the issues in this Appeal as follows:

1. **Appellant Pacific Data Systems' ("PDS") appeal of the Government of Guam General Services Agency's ("GSA") denial of its Protest in GSA IFB 064-11 is limited to Bid Form 10.**

PDS incorrectly contends that its appeal in OPA-PA-12-017 can apply to all other parts ("Bid Forms") in GSA IFB-64-11. The Appeal in OPA-PA-12-017 must be limited to Bid Form 10 of GSA IFB-064-11 because PDS' protest to GSA was limited to Bid Form 10. *See* Agency Report, Tab 16. PDS is precluded subsuming the OPA's jurisdiction in its Appeal relative to Bid Form 10 to other Bid Forms because PDS has not filed a protest and GSA has not

issued a decision relative to any other Bid Forms. Thus the OPA's jurisdiction in this Appeal apply solely to review the merits in GSA's denial of PDS's May 9, 2012 protest as it relates to Bid Form 10.

Only decisions rendered by the Chief Procurement Officer as a result of a procurement protest may be appealed to the OPA. 5 G.C.A. § 5425(e). The IFB specifically states that, "[e]ach part of the IFB shall be treated separately for bid submission and shall not affect other Parts of the bid." Agency Report , Tab 6 at 25. PDS submitted its Protest to GSA IFB-064-11 on May 9, 2012, wherein PDS protested the award of Bid Form 10 to GTA.<sup>1</sup> GSA denied PDS' protest on October 5, 2012. In its appeal before the OPA, PDS' now asserts that the OPA may extend her jurisdiction to all other Bid Forms without filing the appropriate protest with GSA and filing a subsequent appeal of GSA's denial is a violation of 5 G.C.A. § 5425. Because PDS' May 9, 2012 protest was limited to GSA's award to GTA for Bid Form 10, the OPA's jurisdiction in OPA-PA-12-017 is limited to reviewing GSA's decision as it relates to Bid Form 10. The OPA should find that its jurisdiction is limited to PDS' original protest limiting this appeal exclusively Bid Form 10.

**2. GTA submitted an Affidavit Disclosing Ownership and Commission ("Affidavit") in compliance with 5 G.C.A. § 5233 as part of its bid packet submitted on December 9, 2011.**

PDS incorrectly contends that GTA's bid should be rejected and the intent to award to GTA should be vacated because there was an error in GTA's Affidavit. PDS alleges that GTA's bid was non-responsive. PDS relies on an OPA decision in *In the Appeal of Pacific Data Systems, Inc.*, OPA-PA-10-005 (Decision Jan. 12, 2011). In the GCC appeal, GCC was not

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<sup>1</sup> *In the Appeal of Pacific Data Systems, Inc.*, OPA-PA-12-017 (October 19, 2012) at Exhibit A.

aware of GTA's erroneous Affidavit until after GCC awarded the contract to GTA and PDS filed its protest. The OPA was correct in finding GTA was not permitted to make a correction to the Affidavit after an award was made without making a written determination that it would be unconscionable not to allow the mistake to be corrected. GCC instead conducted a responsibility inquiry. Thus, the OPA's decision in the GCC Appeal was not inconsistent with the procurement statute and its related rules and regulations.

The facts of the GCC case are distinguishable from the facts in this appeal. First, GSA was aware of the error prior to the award. Agency Report, Tab 16. Second, GSA concluded that a mistake had been made, and requested GTA to confirm its bid as allowed by procurement regulations. *Id.* Third, GSA also correctly determined in writing that GTA's mistake was an insignificant mistake that could be waived or corrected without prejudice to PDS as a minor informality. *Id.*

A "responsive bidder" is defined as one who has submitted a bid which conforms in all material respects to the IFB. 5 G.C.A. § 5201(g); 2 G.A.R. § 1106(28). Material conditions involve price, quantity, quality, delivery, or contractual conditions. 2 G.A.R. § 3109(m)(4)(B). There is no dispute that GTA submitted an Affidavit with its bid on December 9, 2011. *See* Agency Report, Tab 5. Other than the error on the Affidavit, GTA met all material conditions (i.e., price, quantity, quality, delivery or contractual obligations) as required by the IFB.

Guam Procurement Law requires as a condition of a submitting a bid the bidder include an Affidavit but does not mandate that an error in the Affidavit automatically deem the bid non-responsive so as to disqualify the bid. *See* 5 G.C.A. § 5233. Interpreting the statute as such contravenes Section 5211(f) of the Guam Procurement Law which provides,

"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.***"

5 G.C.A. § 5211(f) (*emphasis added*).

The Guam Administrative Rules and Regulations generally provide that a correction of a bid because of inadvertent, nonjudgmental mistakes in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. 2 G.A.R. § 3109(m)(1). The regulations also provide that a *procurement officer should request a bidder to confirm* its bid in cases where the procurement officer knows or has reason to conclude that a mistake has been made. 2 G.A.R. § 3109(m)(3). Cases where confirmations are required include obvious, apparent errors on the face of the bid. *Id.* In the instant Appeal, the Chief Procurement Officer ("CPO")<sup>2</sup> determined that GTA's Affidavit contained an error and as a result sent a letter to GTA dated April 18, 2012 *before the Intent to Award was made*, requesting GTA confirm its Affidavit. Agency Report, Tab 16. GTA responded on April 19, 2012 with the corrected Affidavit.<sup>3</sup> Agency Report, Tab 16.

In cases where mistakes are discovered after opening but before an award is made, minor informalities *or* insignificant mistakes may be corrected without prejudice to other bidders; that is, *the effect on price, quantity, quality, delivery or contractual obligations is negligible.* 2 G.A.R. § 3109(m)(4)(B).<sup>4</sup> In such cases, the *procurement officer shall allow the bidder to correct* them if in the best interest of the Territory. *Id.* In the instant appeal, GTA's

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<sup>2</sup> Determination delegated to Buyer Supervisor due to conflict of interest with the CPO due to pending litigation between PDS and GSA. Agency Report, Tab 16.

<sup>3</sup> PDS does not dispute the accuracy of the corrected Affidavit.

<sup>4</sup> Mistakes discovered after award shall not be corrected after award of the contract except where the CPO, makes a written determination that it would be unconscionable not to allow the mistake to be corrected. 2 G.A.R. § 3109(m)(5). In the GCC case, GCC only became aware of the GTA's error after the award was made and GCC did not make a written determination that it would be unconscionable not to allow GTA to correct the mistake. Thus, the OPA's finding that GTA's Affidavit was non-responsive is consistent with the regulations.

correction occurred before the award and such correction did not have any effect on price, quantity, quality, delivery, or contractual obligations; thus the CPO was well within her authority to allow GTA to make the correction to the Affidavit in the best interest of the Territory. The OPA should find that GTA's correction to its Affidavit was done in conformance with the Guam Procurement Law and its related regulations and find that GTA's bid was responsive to all material conditions.

**3. GTA's submission of additional Terms and Conditions did not violate the procurement law, regulations, or the terms of the IFB.**

GSA IFB-064-11 states that the bidder shall comply with all the terms and conditions of the IFB, and the Government of Guam General Terms and Conditions for Sealed Bids. *See* Agency Report, Tab 6 at 27. By signing the IFB GTA agreed to perform under the terms and conditions of the IFB.

*In In the Appeal of Town House Dept. Stores, Inc. dba Island Business Sys. & Supplies*, OPA-PA-11-02 (Decision and Order filed Aug. 8, 2012), at 15-16, the OPA found that the inclusion of additional terms were merely offers which the agency had the right to reject and that the bidder remained bound to the specific terms specified in the IFB and not to any additional offered terms.

In the instant appeal, GTA is bound to perform according to the IFB's terms and conditions. GSA is free to reject any additional terms offered by any bidder, including those additional terms mistakenly submitted by GTA. Applying the OPA's decision in OPA-PA-11-02, where she concluded that the submission of additional terms did not render a bidder non-responsive, the OPA must also find that GTA remains bound by the terms of the IFB and its bid was not otherwise non-responsive.

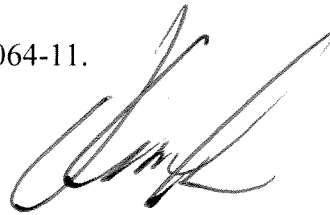
4. **GTA's bid in the collective name of "Teleguam Holdings, LLC and its wholly owned subsidiaries" is not prohibited by the Guam Procurement Law, its related regulations, or the IFB.**

PDS contends that GTA may not and GSA could not allow separate entities to submit a single bid in this procurement and that GTA's submission should be rejected. PDS fails to point to any specific statute, regulation, or any IFB specification which precludes separate entities from submitting a single bid because none exist. Teleguam Holdings and its wholly owned subsidiaries are appropriately licensed to conduct business in the Territory. All subsidiaries are considered disregarded entities and as a result are treated as divisions of Teleguam Holdings LLC. More significant is the fact that GSA did not deem GTA's submission a violation of the IFB. The OPA should find here that GTA's collective submission does not violate the procurement law, regulation, or the terms of the IFB and PDS' Appeal should be denied.

Based on the foregoing, GSA's denial of PDS' appeal should be upheld because the issues raised were minor or insignificant informalities and because GSA took proper steps to cure any deficiencies in GTA's submission. More importantly, GTA's bid was responsive because it conformed with all material aspects of GSA IFB064-11.

Submitted this 8th day of January, 2013.

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