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OFFICE OF THE PUBLIC AUDITOR

In the Appeal of)	APPEAL NO. OPA-PA-007-009
)	
PACIFIC SECURITY ALARM, INC.,)	
)	
)	GUAM MEMORIAL HOSPITAL
)	AUTHORITY'S REBUTTAL OF
Appellant.)	APPELLANT'S COMMENTS
)	TO AGENCY REPORT
)	

Appellee Guam Memorial Hospital Authority ("GMHA"), by and through its counsel of record, Maria T. Cenzone-Duenas, Esq. of Mair, Mair, Spade & Thompson, hereby submits its rebuttal in support of its Agency Report and Statement filed with the Office of the Public Auditor ("OPA") on December 4, 2007.

I. Appellee Properly Cancelled GMHA Bid No. 023-2007.

Appellant Pacific Security Alarm ("PSA") asserts erroneously that GMHA's cancellation of the solicitation did not comply with the procurement law or GMHA Procurement Regulations. First, PSA states that the solicitation did not provide that the bid is subject to cancellation; next, Appellant contends that GMHA did not meet the

ORIGINAL

requirements that the cancellation be in the government's best interest. (Appellant's Response at p. 3).

PSA incorrectly states that the bid documents did not state that the bid could be cancelled or be subject to cancellation, as required under 26 GAR § 16316(c). On the contrary, the Sealed Bid Solicitation Instructions of the IFB provide unequivocally in Paragraph 23, page 3, as follows (quoted in relevant part):

23. AWARD, CANCELLATION & REJECTION: Award shall be made to the lowest responsible and responsive bidder, whose bid is determined to be the most advantageous to the Government, taking into consideration the evaluation factors set forth in this solicitation. No other factors or criteria shall be used in this evaluation. The right is reserved as the interest of the Government may be required to waive any minor irregularity in bid received. **The Hospital Administrator shall have the authority to award, cancel, or reject bids, in whole or in part for any on or more items if he determines it is in the public interest. . . .**

Consequently, Appellant's argument that the solicitation did not properly advise bidders that cancellation was available to GMHA is without merit.

Similarly, PSA contends that GMHA may only cancel a solicitation "prior to opening of the bids." (Appellant's Response at p. 4). This is patently wrong. Indeed, Section 3-301.2 of the GMHA Procurement Rules and Regulations states that a solicitation "shall give the status of funding for the Procurement" and contemplates that cancellation of a solicitation due to lack of funding is a possibility, providing further authority to GMHA to

cancel a solicitation "when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in the Hospital's best interest."

As discussed in the Agency Report and in documents filed with the OPA previously, GMHA cancelled the solicitation due to insufficient funding for the Project. Cancellation is wholly appropriate in this instant because it is of greater interest to the public that the government not enter into or award contracts which cannot be funded. It is also notable that compensation provisions in any final government contract also provide that payment of such compensation is "subject to the availability of funds." It is a compelling public interest that the government be able to satisfy its contractual obligations and GMHA acted responsibly and within the parameters of the Procurement Law by canceling the solicitation when it became evident that funding was not available for the Project.

Additionally, adequate notice of the cancellation as required under the GMHA Procurement Rules and Regulations was provided to each of the bidders. Contrary to PSA's response, GMHA is not mandated to detail or justify why there were insufficient funds. In fact, the Regulations do not mandate that GMHA detail the reasons for such cancellation; therefore, the notice issued by the Hospital Administrator stating that the solicitation was cancelled was sufficient under the regulations.

In the recent case of J&B Modern Tech vs. Guam International Airport Authority, decided in the Superior Court of Guam, the court was asked to issue an injunction to

require the Antonio B. Won Pat International Airport Authority to reverse the cancellation of a solicitation on the grounds that the notice was deficient because it stated only that the cancellation was based on the "inadequate specifications."¹ The court denied the bidder's request to reinstate the original solicitation, finding that, under Guam law, "all that is required is that the notice of cancellation **'briefly explain the reason for the cancellation.'**"² Similarly, the GMHA Procurement Rules and Regulations require only that GMHA "briefly explain the reason for the cancellation," which it did specifically by stating that there were insufficient funds for the project.

II. PSA Failed To Properly Allege Any Bad Faith By GMHA In Cancelling The Solicitation.

PSA claims that GMHA did not cancel the solicitation in good faith because it failed to offer any explanation why "it would not be appropriate to adjust quantities to come within available funds." (Appellant's Response at p. 6). Such a claim is patently absurd under the circumstances.

As discussed herein, the GMHA Procurement Rules and Regulations do not mandate that GMHA explain why there is a lack of funds for a certain project in order to properly cancel the solicitation. It is sufficient that GMHA advise and notify the bidders that the cancellation is due to a lack of funding. Without more than the unequivocal

¹ J&B Modern Tech vs. Guam International Airport Authority (GIAA), et al., Superior Court of Guam, Case No. CV0732-06, *Findings of Fact and Conclusions of Law* at p.5 (Barrett-Anderson, J.)(6/25/07)(a copy of which is attached for your easy reference).

² Id. at p. 6 (citing to 2 GAR § 3115(d)(1)(D)(ii)(emphasis in original).

statement that GMHA did not act in good faith -- a contention clearly unsupported by any allegations of specific facts of bad faith -- PSA's appeal on that basis must fail.

For these reasons, PSA's protest was properly denied by GMHA. GMHA, therefore, requests that the appeal be dismissed and GMHA awarded the relief it seeks as set forth in its Agency Report.

Dated this 28th day of December, 2007.

MAIR, MAIR, SPADE & THOMPSON
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Attorneys for Appellee
Guam Memorial Hospital Authority

By: 

MARIA T. CENZON-DUENAS

1 IN THE SUPERIOR COURT OF GUAM

2 J&B MODERN TECH,
3 Plaintiff,
4 vs.
5 Guam International Airport Authority
6 (GIAA), Government of Guam, and
7 Jesus Q. Torres, Executive Manager.
8 Defendant.

CASE NO. CV 0732-06

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

9 This matter came on regularly for Trial on April 6, 2007, before the HON. ELIZABETH
10 BARRETT-ANDERSON. Plaintiff was present and represented by Attorney Kevin J. Fowler.
11 Defendants Guam International Airport (GIAA), and Jesus Q. Torres, in his official capacity as
12 Executive Manager of the GIAA appeared through counsel Attorney R. Todd Thompson.
13 Defendant Government of Guam did not appear except through the GIAA. After testimony was
14 taken the Court DENIED Plaintiff's prayer for mandamus and injunctive relief. The Court
15 reserved on the issue of declaratory relief. The Court now issues these Findings of Fact and
16 Conclusions of Law.

17 I

18 Findings of Fact

19 1. This Court has jurisdiction over this case pursuant to Title 5 G.C.A. § 5707. The
20 Plaintiff appeals from an Invitation For Bid (hereinafter referred to as "IFB") issued by GIAA
21 on March 1, 2005, to provide service maintenance on five (5) specific pieces of equipment at
22 GIAA, namely: (a) Passenger Loading Bridges; (b) Main Terminal Generator; (c) Stationary and
23 Trailer-Mounted Generators; (d) Macerator/Triburator; and (e) Inbound Baggage Handling
24 System. The award was intended to made for each of the five separate items.

25 2. Several bids were received, including J&B's. After the bids were opened, but
26 prior to the award of any contract under this IFB, GIAA cancelled the IFB. GIAA's Executive

MAIR, MAIR, SPADE
& THOMPSON

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1 Manager determined, in writing, that the Specifications in the IFB were inadequate for the
2 following reasons:

3 (a) The original IFB required that the successful contractor provide only
4 preventive maintenance service of the equipment. However, after the solicitation had been issued,
5 but before the contract had been awarded, GIAA determined that it was "more economical" for
6 GIAA to combine the preventive service maintenance contract with the requirement that the
7 contractor also be responsible for carrying an inventory of spare parts. As such, the
8 Specifications which had been issued were inadequate and needed to be changed to allow for the
9 combination of parts and services;

10 (b) GIAA further determined in writing that it was necessary to amend the
11 Specifications to add the requirement that the contractor maintain an inventory of spare parts to
12 the IFB and to also require that the contractor implement a system of "bar coding to eliminate
13 using GIAA-purchased parts for vendor's other contracts;"

14 (c) GIAA also determined in writing that the following provisions needed to be
15 added to the Specifications to address inventory issues, which were not in the original
16 Specifications: quarterly inventory report mandates, audit provisions and a provision that the
17 contractor would be penalized for misuse of inventory for non-GIAA projects (including
18 cancellation of the contract, fines, etc.).

19 (d) Lastly, GIAA determined that the five (5) year term was too long, and that,
20 therefore, the Specifications were inadequate to meet GIAA's needs, which included the right to
21 mandate an "annual performance review" as a condition of the contract renewal – a factor that
22 was not indicated in the IFB.

23 4. GIAA concluded ultimately that it would be more cost-effective for the agency
24 to hire individuals to service the equipment in-house. Commencing on July 10, 2006, GIAA
25 management advertised for personnel to be hired by GIAA to perform the maintenance on these
26 contracts. In August, 2006, GIAA commenced the hiring and/or promotion of individuals to

1 perform maintenance on the equipment that was part of the IFB. GIAA has hired a total of seven
2 (7) individuals and promoted four (4) employees in-house to perform the services which would
3 have been provided by the successful contractor under the IFB.

4 5. In November, 2006, personnel from FMC Jetway Systems arrived in Guam in
5 order to provide training to these personnel on the maintenance of the passenger loading bridges,
6 at an estimated cost to GIAA of \$20,000.00. The employees who underwent training by FMC
7 Jetway were certified to perform the maintenance of this proprietary equipment. Since the
8 implementation of GIAA's in-house maintenance programs the agency has realized a cost-
9 savings, and fewer complaints from the carriers.

10 6. GIAA's Torres concluded that "[c]ancellation of the IFB was and is in the best
11 interest of the Territory in terms of cost-savings, efficiency of services and fortification of the
12 skills of GIAA employees." He continued, "[i]f the bid were not cancelled, GIAA would end up
13 with services it does not need and cannot use because similar services are currently being
14 provided in a more efficient and less costly manner."

15 CONCLUSIONS OF LAW

16 I.

17 J&B announced at trial that it would not be seeking damages, namely recovery of
18 costs or bid preparation costs, in the instant action. What J&B is seeking is to have the Court
19 declare that GIAA cannot cancel an invitation to bid without providing a meaningful reason for
20 the cancellation. Simply stating that the bid is cancelled due to "inadequate specification" does
21 not provide the bidder a reasonable understanding of the reasons for the cancellation. In so
22 declaring, J&B seeks injunctive relief that would require GIAA to "undo" that which has already
23 been done.

24 Federal authorities make it plain that a party seeking injunctive relief faces a
25 difficult burden. Injunctive relief is not a matter of right but is an "extraordinary" and "drastic"
26 remedy which should not be granted unless the movant, by clear showing, carries the burden of

1 persuasion. 11A Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d §2948, at pp.
2 129-130 (1995); Huang v. Holiday Inns, Inc., 594 F. Supp. 352, 355 (C. D. Cal. 1984). Thus, it
3 is J&B's burden to show that it is entitled to injunctive relief in this case. However, in the instant
4 case the movant's burden is particularly high due to the nature of the injunctive relief being
5 requested. In this instance, J&B requests to enjoin the cancellation of the subject bid. Yet it is
6 undisputed that the **bid invitation has *already* been cancelled**. Thus, the requested injunction,
7 though phrased as prohibitory in nature, is in fact "mandatory" because it would require GIAA
8 to affirmatively *undo* what has already been done. "Such 'mandatory preliminary relief' is subject
9 to heightened scrutiny and should not be issued unless the facts and law clearly favor the moving
10 party." Dahl v. HEM Pharmaceuticals Corp., 7 F.3d 1399, 1403 (9th Cir. 1993); *quoting*
11 Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir.1980).

12 Courts have a limited role to play in the procurement process; and they do not sit
13 to tell agencies what their needs are or to whom they should award contracts. Parcel 49C Ltd.
14 Partnership v. United States, 31 F.3d 1147, 1153 (Fed. Cir. 1994). If GIAA is forced to "cancel
15 the cancellation," then GIAA would effectively be left with no choice but to undo months of
16 alternative planning. In addition, J&B is obligated in this case to show that the factors favoring
17 injunctive relief weigh "heavily and compellingly" in its favor because it seeks to disrupt the
18 *status quo*. Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001). As indicated, here the bid
19 has already been cancelled and, moreover, GIAA has long ago implemented an alternative means
20 of meeting its needs, including the hiring and training of new employees.

21 The disappointed or frustrated bidder has an especially formidable task. The
22 aggrieved bidder bears the burden of showing that cancellation of the bid was "arbitrary or
23 capricious." Parcel 49C Ltd. Partnership v. United States, 31 F.3d 1147, 1153 (Fed. Cir. 1994).
24 "A necessary corollary to that burden is consideration of the discretion accorded to procurement
25 officials." Id. The aggrieved bidder must demonstrate that the challenged agency decision is
26 either irrational or involved a clear violation of applicable statutes and regulations. Banknote

1 Corp. of America, Inc. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004). Moreover, "to
2 prevail in a protest the protestor must show not only a significant error in the procurement
3 process, but also that the error prejudiced it." Data General Corp. v. Johnson, 78 F.3d 1556, 1562
4 (Fed. Cir. 1996). To demonstrate prejudice, "the protestor must show 'that there was a substantial
5 chance it would have received the contract award but for that error.'" Alfa Laval Separation, Inc.
6 v. United States, 175 F.3d 1365, 1367 (Fed. Cir. 1999) (quoting Statistica, Inc. v. Christopher,
7 102 F.3d 1577, 1582 (Fed. Cir. 1996)). "Finally, because injunctive relief is so drastic in nature,
8 a plaintiff must demonstrate that its right to such relief is clear." See WIT Assocs. v. United
9 States, 62 Fed. Cl. 657, 660-661 (Ct. Cl. 2004). The bid protestor must produce "clear and
10 convincing evidence"; and it must further show that the benefits of the injunction outweigh the
11 harm to the government, and that the award of injunctive relief is in the public interest:

12 To warrant injunctive relief, the movant must demonstrate, by
13 **clear and convincing evidence**, that either: (1) the agency lacked
14 a rational or reasonable basis for its cancellation decision; or (2)
15 the procurement involved a clear and prejudicial violation of
16 applicable statutes and regulations. See 126 Northpoint Plaza, 34
17 Fed. Cl. at 107; Logicon, Inc. v. United States, 22 Cl. Ct. 776, 782
18 (1991); CACI Field Servs., Inc. v. United States, 13 Cl. Ct. 718,
19 725 (1987), *aff'd* 854 F.2d 464 (Fed. Cir. 1988). Additionally,
injunctive relief is appropriate only where the plaintiff can
demonstrate that it will suffer irreparable harm, that the harm to
plaintiff outweighs the harm to the government, and that the award
of injunctive relief is in the public interest. See FMC Corp. v.
United States, 3 F.3d 424, 427 (Fed. Cir. 1993); ATA Defense
Indus., Inc. v. United States, 38 Fed. Cl. 489, 505 & n.10 (1997).

20 Wetsel-Oviatt Lumber Co. v. United States, 43 Fed. Cl. 748, 753 (Ct. Cl. 1999) (emphasis added).

21 J&B maintains that GIAA's March 15, 2006 "Bid Status" letter, which cancelled
22 the bid invitation inadequately specified the reason for the cancellation. J&B claims that while
23 the notice stated that the cancellation was due to "inadequate specifications," it was somehow
24 deficient because it "did not identify any specification it deemed to be inadequate." This
25 contention falls well wide of the mark.

26 GIAA contends that Guam law does not support J&B's interpretation, and that

1 nothing requires GIAA or any other agency to specify “cogent and compelling” reasons *in the*
2 *cancellation notice*.. Section 5225 provides for bid cancellation “when it is in the best interests
3 of the Territory” and it merely requires that “[t]he reasons therefor shall be made part of the
4 contract file.” The only other provision that applies is GAR Section 3115, which expressly
5 governs the matter of a cancellation notice to the bidders. Section 3115 does not in any manner
6 require any detailed explanation of the reasons for cancellation. To the contrary, all that is
7 required is that the notice of cancellation “**briefly explain the reason for the cancellation.**” 2
8 GAR § 3115(d)(1)(D)(ii).

9 Here, GIAA briefly explained the reason for the cancellation by filling in the
10 following on the appropriate blank on its standard “Bid Status” form: “Inadequate specifications;
11 to be RE-BID.” No statute or rule requires any further discussion of the matter in such a notice
12 of cancellation. Likewise, no statute or rule requires GIAA to state “cogent or compelling”
13 reasons in any notice of cancellation of a bid. The “cogent and compelling reasons” standard is
14 not part of Guam’s procurement statutes, found at Title 5 of the Guam Code Annotated. Instead,
15 this language is found only in the Administrative Rules and Regulations (at 2 GAR § 3115(b)).
16 This language is expressly cast in terms of overall “policy;” and it does not furnish the basis for
17 attacking the sufficiency of reasons stated in the notice of cancellation. The provision does not
18 state that cogent or compelling reasons must be given to the disappointed bidders – it merely
19 states, as a matter of policy, that there *exist* such reasons.

20 GIAA’s notice of cancellation was sufficient on its face. The reason stated,
21 “inadequate specifications” is plainly sufficient to justify cancellation of a bid. Title 5 G.C.A.
22 section 5225 of the Guam Procurement Law vests GIAA with the authority to cancel a
23 solicitation. The Bid Specifications issued in the instant case indicated that GIAA “**reserves the**
24 **right to cancel the award of any contract at any time before the execution of same.**” IFB,
25 Instructions to Bidders at ¶ 9, p. 6. This notice complies with the requirements of Section 3115
26 of the Guam Procurement Regulations, as codified in Title 2, Guam Administrative Regulations,

1 Division 4, Chapter 3.

2 Section 3115(d)(2) of the Guam Procurement Regulations dictates the procedure
3 by which a solicitation may be cancelled after bid opening but prior to award, as in this instance;
4 and it allows GIAA, as the Purchasing Agency, to cancel the solicitation by rejecting all of the
5 bids, if doing so is "in the territory's best interest." The Procurement Regulations expressly
6 recognize that canceling a bid due to "ambiguous or otherwise inadequate specifications," as was
7 the case here, satisfies the "best interest" requirement. 2 GAR § 3115(d)(2)(A)(ii).

8 The Court is not persuaded by In re: Protest of Singleton Electric Company, Inc.,
9 1994 WL 780923 (D.C.C.A.B. 1994), for the proposition that inadequate or ambiguous bid
10 specifications do not constitute a "cogent or compelling reason" for cancelling a bid. The
11 Singleton court, noted that cancellation is generally not appropriate where there is no prejudice
12 to others AND "when an award under the solicitation would serve the actual needs of the
13 government." Id. In Singleton, in contrast to the instant case, the government agency did not
14 dispute that an award under the deficient solicitation would meet the agency's actual needs. Id.
15 Here, J&B seeks to advance the result of, in effect, compelling GIAA to proceed with a bid
16 proposal that would not benefit public interest.

17 Even if all of the foregoing could be overcome, J&B still bears the burden of
18 showing its entitlement to injunctive relief by demonstrating that "had it not been for the alleged
19 error in the procurement process, there was a reasonable likelihood that [it] would have been
20 awarded the contract." Data General Corp., 78 F.3d 1556,1562 (Fed. Cir. 1996); *see also* Maint.
21 Eng'rs v. United States, 50 Fed. Cl. 399, 426 (2000) (assuming *arguendo* agency's evaluation of
22 factor was defective, no prejudice as other low ratings made the award of a contract unlikely);
23 WIT Assocs. v. United States, 62 Fed. Cl. 657, 664 (Ct. Cl. 2004). No such showing has been
24 made here.

25 It remains for the court to balance the respective hardships to the parties and the
26 public. Fort Sumter Tours, Inc. v. Andrus, 564 F.2d 1119, 1124 (4th Cir. 1977). The court must

1 bear in mind the practical considerations of efficient execution and performance of government
2 contracts, the public interest in avoiding excessive or unnecessary costs, and the contractor's
3 entitlement to fair treatment. Princeton Combustion Research Labs., Inc. v. McCarthy, 674 F.2d
4 1016, 1022 (3rd Cir. 1982); Housing Auth. v. Pittman Constr. Co., 264 F.2d 695, 697-98 (5th Cir.
5 1959). The court may not substitute its judgment for that of the awarding authority, but may only
6 act where the authority's decision is irrational or arbitrary. Princeton, id.; Pittman Constr., id. at
7 703 (recognizing right of awarding authority "to be wrong, dead wrong; but not unfairly,
8 arbitrarily wrong").

9 The Court holds that J&B has not met it's burden under injunctive and declaratory
10 relief. The Court finds GIAA's actions legal and appropriate. Although it would be reasonable to require
11 government agencies to provide greater explanation to bidders in circumstances of cancellation of the bid
12 invitation, particularly considering that vendors generally go through great expense, and good faith effort
13 in reliance upon the government's invitation, Guam law does not require a governmental agency to do so
14 in the cancellation notice. Nothing restricts an agency from providing more than the required minimum
15 explanation in other ways based on administrative policies and procedures of the agency. In many ways
16 this would improve public relations with its vendors. But to judicially order an agency to provide a
17 detailed recitation of reasons and causes for the cancellation in the notice document is beyond this Court's
18 jurisdiction. This Court leaves such matters to GIAA the Board of Directors of GIAA, and overall public
19 scrutiny of governmental action.

20 CONCLUSION

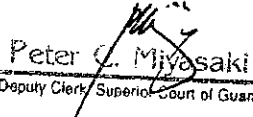
21 For the foregoing reasons, and in accordance with these standards, judgment is
22 rendered in favor of GIAA, Jesus Q. Torres, and the Government of Guam. All parties to assume
23 their own attorneys fees and costs. GIAA to submit a JUDGMENT for the Court's signature.

24
25 
26 HONORABLE ELIZABETH BARRETT-ANDERSON
 Judge, Superior Court of Guam

I do hereby certify that the foregoing
is a full true and correct copy of the
original on file in the office of the
clerk of the Superior Court of Guam.

JUN 25 2007

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Peter C. Miyasaki
Deputy Clerk, Superior Court of Guam