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11 OFFICE OF THE PUBLIC AUDITOR
12 PROCUREMENT APPEALS

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15 IN THE APPEAL OF) DOCKET NO. OPA-PA-09-008
16)
17 O&M ENERGY, S.A.) MOTION FOR SUMMARY JUDGMENT
18) and MEMORANDUM OF POINTS AND
19 Appellant.) AUTHORITIES IN SUPPORT THEREOF
20 _____)
21)

22 Appellee GUAM POWER AUTHORITY (GPA), by and through its attorney, D.
23 GRAHAM BOTHA, ESQ., hereby files its motion for summary judgment against Appellant,
24 O&M Energy, S.A., pursuant to GRCP 56 (c). The Motion for Summary Judgment is scheduled
25 for hearing before the Office of the Public Auditor on January 7, 2010 at 9:00 a.m.

26 Statement of Facts

27 On April 21, 2009, Guam Power Authority (“GPA”) issued Invitation for Multi-
28 Step Bid, GPA-013-07, Re-Bid Performance Management Contract (PMC) for Cabras I and II
29 Steam Power Plant. Procurement Record, Tab”B”. The IFB was a two step bid process
30 consisting of the technical bid and submission of a sealed price proposal. Three companies
31 submitted bids in response to the IFB, TEMES, Korea East West Power, and O&M Energy, and
32 all three companies were qualified in the phase I technical bid review process. On July 22, 2009,
33 at 2:00 p.m., the sealed bid proposals of the three qualified bidders were opened in the presence

COPY

1 of company representatives. The representatives were provided a copy of the Abstract of Bids
2 which lists the Net Present Value (NPV) of the three bidders. TEMES had the highest 5 year
3 NPV (\$9,394,142.33) followed by O&M (\$5,353,457.28), and then Korea East (\$4,939,222.46).
4 The bid abstract, O&M, TEMES, and Korea East West Power Price Proposals, are contained in
5 the procurement record at Tab "I." Each of the three bidders submitted detailed price proposals
6 in accordance with the bid documents.

7 On September 9, 2009, GPA provided the bidders with a Notice of Intent of Possible
8 Award to TEMES, and advised O&M and Korea East that their bids were rejected due to Low
9 Positive Net Present Value (NPV). Procurement Record, Tab "J". On September 18, 2009,
10 O&M sent a letter of protest to GPA. GPA denied the procurement protest, and O&M filed a
11 protest with the Office of Public Auditor on October 23, 2009.

12 ARGUMENT

13 SUMMARY JUDGMENT SHALL BE RENDERED IF THERE IS NO
14 GENUINE ISSUE AS TO ANY MATERIAL FACT.

15 Rule 56© of Guam's Rules of Civil Procedure (GRCP) provides in pertinent part, that:
16

17 . . . The judgment sought shall be rendered forthwith if the pleadings, depositions,
18 answers to interrogatories, and admissions on file, together with the affidavits, if
19 any, show that there is no genuine issue as to any material fact and that the
20 moving party is entitled to judgment as a matter of law. . .
21

22 When there is no genuine issue of material fact, as here, then Plaintiff is entitled to summary
23 judgment upon a determination of the legal issues. This is supported by Guam's Lamkin v.
24 Brown & Root, 233 F.2d 320 (1956), which held that "[w]here no genuine issue of fact existed,
25 motion for summary judgment of dismissal was properly granted." Appellee, O&M Energy does

1 not dispute the fact that TEMES submitted the lowest price, based on the highest Net Present
2 Value (NPV) for the five year proposed contract period. TEMES had the highest 5 year NPV
3 (\$9,394,142.33) followed by O&M (\$5,353,457.28), and then Korea East (\$4,939,222.46). The
4 bid abstract, O&M, TEMES, and Korea East West Power Price Proposals, are contained in the
5 procurement record at Tab "I."

6 In Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-2553, 477 U.S. 317, 91 L.Ed.2d 265
7 (1986), the Supreme Court sets out guidelines for the granting of summary judgment motions. In
8 Celotex the Supreme Court ultimately granted summary judgment based upon, inter alia, the
9 following pertinent grounds:

10 In our view, the plain language of Rule 56© mandates the entry of summary
11 judgment, after adequate time for discovery and upon motion, against a party who
12 fails to make a showing sufficient to establish the existence of an element
13 essential to that party's case, and on which that party will bear the burden of proof
14 at trial. In such a situation, there can be "no genuine issue as to any material fact,"
15 since a complete failure of proof concerning an essential element of the
16 nonmoving party's case necessarily renders all other facts immaterial. The
17 moving party is "entitled to a judgment as a matter of law" because the
18 nonmoving party has failed to make a sufficient showing on an essential element
19 of her case with respect to which she has the burden of proof. "[T]h[e] standard
20 [for granting summary judgment] mirrors the standard for a directed verdict under
21 Federal Rule of Civil Procedure 50(a). . . ." Anderson v. Liberty Lobby, Inc., 477
22 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).
23

24 In Fetter v. United States, 649 F.Supp. 1097, 1098 (S.D.Cal. 1986), the Court stated that:

25 Summary judgment is a proper remedy when there are no genuine issues of
26 material fact and the moving party is entitled to prevail as a matter of law.
27 Fed.R.Civ.P. 56©. The burden is on the moving party to demonstrate the absence
28 of a genuine issue of material fact. If met, the opposing party must come forward
29 with specific factual allegations in contradiction. Semegen v. Weidner, 780 F.2d
30 727, 732 (9th Cir. 1985). On the issues included in this motion, there are no
31 genuine issues of material fact and summary judgment is appropriate.
32

33 In this case, as in the referenced cases, there is no genuine issue of material fact. Appellee,
34 Guam Power Authority, is entitled to judgment as a matter of law, based on the facts alleged by

1 Appellant in its letter of appeal. Nowhere does it claim that it is the lowest bidder, but that
2 instead that “we ... believe that such a proposal must be consider irresponsible ... since O&M
3 costs can differentiate can differentiate on a certain range.” It complains that “TEMES commits
4 to achieve 90% availability with a budget of only 1 million USD.” Other then speculation on the
5 part of O&M, no facts are presented in its appeal that substantiate its claims that TEMES is not a
6 responsive bidder. A responsive bidder is a person who has submitted a bid which conforms in
7 all material respects to the Invitation for Bid. 5 GCA §5201(g) and 2 GAR, Div. 4, Chap. 3,
8 §3109(n)(2). In Avia Group Int'l, Inc. v. L.A. Gear California, Inc., 853 F.2d 1557 (C.A. Cal.
9 1988), the court in quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91
10 L.Ed.2d 202 (1986), stated that:

11 In the Supreme Court case of Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106
12 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the Court expanded the group of situations in
13 which summary judgment is appropriate. To create a genuine issue of fact, the
14 nonmovant must do more than present some evidence on an issue it asserts is
15 disputed. The Court stated:

16
17 [T]here is no issue for trial unless there is sufficient evidence
18 favoring the nonmoving party for a jury to return a verdict for that
19 party. If the evidence [of the nonmovant] is merely colorable, or is
20 not significantly probative, summary judgment may be granted.

21
22 477 U.S. at 249-50, 106 S.Ct. at 2511 (citations omitted); see also Celotex Corp.
23 v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265
24 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87,
25 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). . . [A] movant must do more than
26 merely raise some doubt as to the existence of fact; evidence must be forthcoming
27 from the nonmovant which would be sufficient to require submission to the jury
28 of the dispute over the fact. . . . Further, the movant bears the burden of
29 demonstrating the absence of all genuine issues of material fact. [Citations
30 omitted.] On that point, however, the burden is not as heavy as some decisions
31 have held. The moving party need not "produce evidence showing the absence of
32 a genuine issue of material fact"; rather, "the burden on the moving party may be
33 discharged by 'showing' - that is, pointing out to the district court - that there is an

1 absence of evidence to support the nonmoving party's case." Celotex Corp., 477
2 U.S. at 325, 106 S.Ct. at 2554.

3
4 Guam Power Authority is entitled to judgment as a matter of law. From the documents contained
5 in the procurement record, the agency report, and the appellant's notice of appeal, it is not
6 disputed that TEMES submitted the overall lowest bid of the three bidders. Appellee, Guam
7 Power Authority, is therefore entitled to summary judgment against appellant as a matter of law.

8 In Manvil Corporation vs. E.C. Gozum & Co., Inc. et. al., 1998 Guam 20, the Guam
9 Supreme Court stated that:

10 "The court may grant summary judgment pursuant to Rule 56 when the pleadings,
11 depositions, answers to interrogatories, and admissions on file, together with the
12 affidavits, if any, show that there is no genuine issue as to any material fact and
13 that the moving party is entitled to judgment as a matter of law." Guam R. Civ. P.
14 56(c). There is a genuine issue of fact if there is sufficient evidence which
15 establishes a factual dispute requiring resolution by a fact finder. T.W. Elec.
16 Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).
17 The court must view evidence and draw inferences in the light most favorable to
18 the non-moving party. Castro v. Peck, dba B.B.H.S. Contracting and Standard
19 Plytrade Corp., 1998 Guam 2, at paragraph 4.

20
21 The Guam Supreme Court also addressed the standard for summary judgment motions in
22 Iizuka Corporation vs. Kawasho International (Guam), Inc., et.al., 1997 Guam 10, and citing
23 T.W. Elec. Serv., Inc. the court in Iizuka stated:

24 "To grant summary judgment, there must not be a "genuine issue." There is a
25 genuine issue, if there is "sufficient evidence" which establishes a factual dispute
26 requiring resolution by a fact-finder. T.W. Elec. at 630. However, the dispute
27 must be as to a "material fact." A 'material' fact is one that is relevant to an
28 element of a claim or defense and whose existence might affect the outcome of
29 the suit. ... Disputes over irrelevant or unnecessary facts will not preclude a grant
30 of summary judgment. Id. [Iizuka, para. 7.]

31
32 Applying the summary judgment standard set forth in Iizuka, there is no genuine issue which
33 establishes a factual dispute. Taking the facts as presented in the appeal, there are no factual

1 disputes that TEMES submitted the lowest price proposal of the three bidders, or that TEMES is
2 a responsive bidder as defined in 5 GCA §5201(g). O&M in its appeal speculates that somehow
3 TEMES would have difficulty performing the contract, but offers no independent facts to justify
4 this allegation.

5 The court in Iizuka further set forth the inquiry which the trial court should make in
6 ruling on summary judgment motions, and stated that:

7 “If the movant can demonstrate that there are no genuine issues of material fact,
8 the non-movant cannot merely rely on allegations contained in the complaint, but
9 must produce at least some significant probative evidence tending to support the
10 complaint. Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986). In addition,
11 the court must view the evidence and draw inferences in the light most favorable
12 to the nonmovant. E.E.O.C. v. Local 350, Plumbers and Pipefitters, 982 F.2d
13 1305, 1307 (9th Cir. 1992). The “court’s ultimate inquiry is to determine whether
14 the “specific fact” set forth by the nonmoving party, coupled with undisputed
15 background or contextual facts, are such that rational or reasonable jury might
16 return a verdict in its favor based on that evidence. T.W. Elec. Serv., 809 F.2d at
17 631. [Iizuka at para. 8]

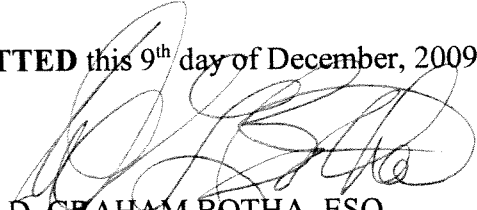
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19 Drawing all the possible inferences in favor of the nonmovant, appellant, the facts are not
20 disputed that TEMES submitted the lowest price proposal. Therefore as a matter of law,
21 appellee, Guam Power Authority, is entitled to summary judgment against appellant, O&M
22 Energy.

23 CONCLUSION

24 Appellee, Guam Power Authority, is entitled to summary judgment against appellant,
25 O&M Energy, as a matter of law. It is not controverted that GPA awarded the bid to the lowest
26 responsive bidder, TEMES, and that TEMES was a responsive bidder as defined in 5 GCA
27 §5201(g). There are no factual disputes to be resolved, based on the evidence and pleadings as
28 filed, even after resolving all inferences in favor of appellant, and therefore appellee is entitled to

1 summary judgment as a matter of law. Guam Power Authority's motion for summary judgment
2 should be granted, O&M Energy's appeal should be dismissed, and judgment entered in favor of
3 Guam Power Authority.

4 **RESPECTFULLY SUBMITTED** this 9th day of December, 2009, by:



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8 D. GRAHAM BOTHA, ESQ.
9 Legal Counsel for the Guam Power Authority
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