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OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEALS  
 AUG 29 2011  
 FILE NO. OPA-PA-11-012

**THE OFFICE OF PUBLIC ACCOUNTABILITY  
 HAGÄTÑA, GUAM**

In the Appeal of: ) DOCKET NO. OPA-PA-11-012  
 )  
 JOETEN DEVELOPMENT INC. )  
 )  
 Appellant. ) GOVERNMENT OF GUAM'S BRIEF  
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**I. STATEMENT OF FACTS:**

The General Services Agency ("GSA") filed the OPA-PA-11-012 Procurement Record on July 11, 2011, as a result of an appeal filed by Joeten Development, Inc ("Joeten"). As the Procurement Record indicates, the controversy stems from IFB No. GSA-047-11 ("IFB") issued March 29, 2011 and due April 14, 2011.<sup>1</sup> The IFB requested office space for a three (3)

<sup>1</sup> Procurement Record, Tab 4 - Invitation for Bid



year term with a two (2) year renewal option, contingent upon availability of funds.<sup>2</sup> The IFB sought to meet the office needs of the Department of Revenue and Taxation ("DRT").

Although five (5) potential bidders reviewed the IFB,<sup>3</sup> only one (1) bidder, Joeten, submitted a bid.<sup>4</sup> A review of the Procurement Record indicates Joeten's bid submission met the terms and conditions of the specification. Joeten's bid offered office space for eighty-one thousand five hundred forty-nine dollars (\$81,549.00) a month and nine hundred seventy-eight thousand five hundred eighty-eight dollars (\$978,588.00) a year. The DRT requisition for funding<sup>5</sup> encumbered one hundred thousand dollars (\$100,000.00) for anticipated costs associated with the IFB in the current fiscal year.

On May 2, 2011, DRT informed GSA the agency lacked sufficient funding to proceed with the solicitation.<sup>6</sup> Based on this notification, GSA personnel recommended the Chief

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<sup>2</sup> Procurement Record, Tab 4 - Invitation for Bid

<sup>3</sup> Procurement Record, Tab 5 - Bid Abstract & Bid Register

<sup>4</sup> Procurement Record, Tab 11 - Bid Analysis

<sup>5</sup> Procurement Record, Tab 11 - Bid Analysis

<sup>6</sup> Procurement Record, Tab 14 - Requisition

<sup>7</sup> Essentially, this is a one (1) month period. Anticipated funding for FY 2012 would cover eleven (11) months of rent of year one (1) of the lease.

<sup>8</sup> A copy of this notification is included in the Procurement Record, Tab 10 - Letter from Revenue and Taxation Cancellation

Procurement Officer cancel the IFB.<sup>12</sup> The Chief Procurement Officer agreed with this assessment,<sup>13</sup> and notified Joeten.<sup>14</sup>

On May 25, 2011, Joeten submitted a bid protest alleging grounds for contesting GSA's decision.<sup>15</sup> Additionally, Joeten requested copies of documents and correspondences pertaining to the IFB and the cancellation of the IFB.<sup>16</sup> In response to a request for IFB documents and correspondences, the Chief Procurement Officer forwarded Joeten the relevant information.<sup>17</sup> After reviewing bid protest, the Chief Procurement Officer denied the request and notified Joeten on June 22, 2011.<sup>18</sup> In response, Joeten filed an appeal with the Office of the Public Accountability (OPA) on July 6, 2011.<sup>19</sup> On July 20, 2011, the Government filed the Agency Report.

## **II. LAW AND ARGUMENT:**

### **A. Inadequate Funding and Cancellation of IFB**

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<sup>12</sup> Procurement Record, Tab 11 – Bid Analysis.

<sup>13</sup> Procurement Record, Tab 11 – Bid Analysis.

<sup>14</sup> Procurement Record, Tab 9 – Bid Status.

<sup>15</sup> Procurement Record, Tab 1 – Protest. Additionally, Joeten requested copies of documents and correspondences pertaining to the IFB and the cancellation of the IFB.

<sup>17</sup> Procurement Record, Tab 12 – Sunshine Reform Act Request.

<sup>18</sup> Procurement Record, Tab 13 – Freedom of Information Response.

<sup>19</sup> Procurement Record, Tab 2 – Protest Response.

<sup>20</sup> Joeten's OPA appeal contains several grounds. First, Joeten claims GSA's cancellation of the IFB allowed any interested parties the ability to review Joeten's submission. Second, Joeten notes its attempt to discuss its initial protest filed May 25, 2011, never received a response from the GSA, DRT, or the Department of Administration. Third, Joeten reviewed DRT's existing lease and noted the amount paid in rent under the existing contract exceeds Joeten's Bid by approximately seventeen thousand four hundred fifty-one dollars (\$17,451.00) a month.

Under Guam procurement law and regulations, GSA acted appropriately. After determining Guam law required a competitive seal bid,<sup>17</sup> the Chief Procurement Officer initiated the IFB per 5 G.C.A. § 5211. After opening all bids received, but prior to awarding a contract, GSA received a letter from DRT requesting cancellation due to insufficient funds.<sup>18</sup> Based on this information, GSA cancelled the invitation for bid and provided notice to Joeten.<sup>19</sup> GSA's cancellation of the IFB was consistent with the requirements of 5 G.C.A. § 5225, Cancellation of Invitation for Bids or Requests for Proposals. Under the law, issuance of a solicitation does not compel award of a contract and there is no requirement to provide bidders with a rationale.<sup>20</sup>

In its appeal, Joeten, citing 2 G.A.R. Div. 4 § 3115(d)(2)(A),<sup>21</sup> questions DRT's determination regarding insufficient funding, since the current rent exceeds the bid price submitted. Notwithstanding this observation, the Government need not enter into a contract when its funding is uncertain. GSA received notice from DRT that the agency lacked funding and acted by cancelling the solicitation. Therefore, the Chief Procurement Officer's decision to cancel the IFB follows 5 G.C.A. 22401, which prohibits an employee of the government of

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<sup>17</sup> 5 G.C.A. § 5210.

<sup>18</sup> A copy of this notification is included in the Procurement Record, Tab 10 – Letter from Revenue and Taxation – Cancellation.

<sup>19</sup> A copy of this notification is included in the Procurement Record, Tab 9 – Bid Status.

<sup>20</sup> See 2 G.A.R. Div. 4 § 3115(b). However, GSA provided Joeten with its rationale.

<sup>21</sup> Mistakenly citing 26 G.A.R. Div. 2, § 16316(d)(2)(A).

Guam entering into a contract in advance of the appropriation.<sup>12</sup> Even if the Public Auditor makes a finding that adequate funding existed to award a contract to Joeten, cancelling the bid was an appropriate action by GSA because only one bidder responded to IFB No. GSA-047-011.<sup>13</sup>

### III. REMEDIES:

#### A. GSA Decision to Cancel Stands –

As discussed in Section II Above, GSA correctly cancelled the IFB. As such, Joeten's appeal should be rejected and GSA should re-solicit the IFB. Under 5 G.C.A. 5425(h)(2), the government is entitled to reasonable costs and attorney fees if the Public Auditor finds the protest was made, "fraudulently, frivolously or solely to disrupt the procurement process." The procurement record demonstrates GSA acted openly and in accordance with Guam procurement law when it cancelled the IFB.<sup>14</sup> Upon request, the Government will provide costs and fees expended for further determination.

#### B. OPA Sustains Appeal –

5 G.C.A. § 5451 determines pre-award remedies. According to this statute, the solicitation shall be "cancelled or revised to comply with the law." If the Public Auditor sustains Joeten's appeal, the existing facts and circumstances dictate the IFB remain cancelled. Cancelling the bid was an appropriate action by GSA because only one bidder responded to

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<sup>12</sup> But see 5 G.C.A. § 5237.

<sup>13</sup> 2 GAR Div. 4 s. 3102(c).

<sup>14</sup> The procurement record supports the contention Joeten's appeal was frivolous.

IFB No. GSA-047-011.<sup>25</sup> Under the facts and circumstances, cancellation of IFB No. GSA-047-11 is consistent with the underlying tenets of the Guam procurement law<sup>26</sup> which require a procurement: "... to maximize to the fullest extent practicable the purchasing value of public funds of the (Island) ... to foster effective broad-based competition within the free enterprise system; and ... to provide safeguards for the maintenance of a procurement system of quality and integrity."

Further, 2 GAR Div. 4 § 3102(c)(1) provides that if the government receives only one (1) bid in response to an invitation for bid, "... an award may be made to the single bidder if the Chief Procurement Officer finds the price submitted *fair and reasonable* ... Otherwise, the bid may be rejected pursuant to the provisions of § 3115 and, new bids may be solicited; the proposed procurement may be cancelled, or the procurement may be conducted under § 3112 (Sole Source Procurement)."

The Bid Status provided to the Protestor (cancelling the bid in its entirety)<sup>27</sup> follows the provisions of § 3102(c)(1) and § 3115. Since only one (1) bid was received, the bid may be rejected unless it is fair and reasonable. When one (1) bid is received in a solicitation, barring a finding of a fair and reasonable price, a compelling reason exists to cancel the solicitation in the best interests of the island. After all, the purpose of the information for bid process is to promote competition to obtain a fair and reasonable price. Without multiple bids or the ability

<sup>25</sup> Therefore, under 5 G.C.A. § 4150(b) bawen should be ineligible for costs.

<sup>26</sup> Codified under 5 G.C.A. § 8001(b)(5)(vi) and (7).

<sup>27</sup> Procurement Record - Tab 9 - Bid Status.

to negotiate with the lowest bid<sup>28</sup> making a determination based on the receipt of one (1) bid is difficult.

Alternatively, due to timing constraints and the existence of a bid process that resulted in one (1) bid, the Government requests the Public Auditor to use her power<sup>29</sup> to review the procurement process and make a determination that either: 1) Joeten's bid was fair and reasonable; or 2) the procurement record supports a sole source procurement that allows GSA to further negotiate price.

Respectfully submitted this 29<sup>th</sup> day August, 2011.

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By:   
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<sup>28</sup> 2 G.A.R. Div. 4, § 5105(m)(5).

<sup>29</sup> S.G.C.A. § 5703.