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TeleGuam Holdings, LLC ("GTA")

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OFFICE OF PUBLIC ACCOUNTABILITY

GUAM

IN THE APPEAL OF

TELEGUAM HOLDINGS, LLC AND ITS
WHOLLY OWNED SUBSIDIARIES, GTA
TELECOM, LLC; GTA SERVICES, LLC;
AND PULSE MOBILE LLC.

Appellant.

APPEAL NO. OPA-PA-12-018

COMMENTS TO AGENCY REPORT

An agency report shall be "detailed" and answer the allegations of the appeal. 2 GAR Div. 4 § 12104(c)(3). The agency report shall also include a "statement answering the allegation of the Appeal and setting forth findings, action, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the Appeal. The statement shall be fully responsive to the allegations of the Appeal." 2 GAR Div. 4 § 12105(g) (emphasis added).

GSA's "detailed" response to GTA's Procurement Appeal is that GTA's bid on the 1 Gbps service is "only one part of the overall bid form and that they did not win the overall submission for bid for bid form 11." GSA ignores GTA's second issue on appeal, which is that GSA did not

provide objectively measurable criteria for the 10 Gbps service. Without an agency report meeting the requirements of sections 12104 and 12105, the OPA lacks findings or information upon validating GSA's denial of GTA's protest on objectively measurable criteria.

Moreover, the record supports GTA's grounds for protest. The first ground for appeal presented by GTA was that GTA was the lowest responsible bidder for the 1 Gbps service and should have been awarded to provide services for the 1 Gbps service. GSA acknowledges that GTA was the lowest responsible bidder for the 1 Gbps service. Rather than award the 1 Gbps service to GTA, GSA instead states that GTA's bid for the 1 Gbps service was too high because when combined with the GTA's price for a separate service (10 Gbps), its overall bid is greater than that of Pacific Data Systems ("PDS").

GSA's comments are not justified under the terms and specifications of the IFB. The IFB states that the purpose of the IFB "is to enable the Government of Guam to establish a Price List for Telecommunication Services (PLTS)." IFB at 25 (II). Section III, Part E of the IFB states that GovGuam is seeking dedicated fiber based capacity of 1 or 10 Gpbs that would be used only by authorized GovGuam agencies." IFB at 26 (III)(E) (emphasis added). Additionally, the IFB states that "the IFB will result in multiple Price Lists for Telecommunication Services or Equipment established through a Fixed Price Contract in accordance with the terms of the IFB. Section IV (E)." IFB at 29 (IV)(E). A final determination of the quantity or type of services will be made by the individual GovGuam agencies after the agency conducts an analysis of the price and the availability of funds. IFB at 29 (IV)(G). GovGuam agencies are not obligated to purchase all or any of the services listed in the IFB. *Id.*

Neither the IFB nor Bid Form 11 states that an award for the GGWAN services will be made to the bidder that provides the lowest combined price for the 1 Gbps and 10 Gbps services. GSA's rejection of GTA's bid for the 1 Gbps service violates Section 5211(g) of the Guam

Procurement Law requiring that GSA award the 1 Gbps service to GTA, the lowest most responsible bidder. GovGuam agencies requiring or only having sufficient funds for the 1 Gbps service should not be forced to pay a higher price simply because another bidder submitted a lower aggregate price for the 1 Gbps and 10 Gbps services. GSA's response would result in agencies with smaller budgets paying a higher price for the 1 Gbps service simply because the bidder submitted a lower overall price for both the 1 and 10 Gbps services.

GTA's second ground for appeal was that GSA failed to apply objectively measurable criteria in evaluating technical bids for the 10 Gbps services. PDS submitted a price of \$1,500 per node per month for a total of \$648,000 for 24 months. GTA submitted the following; installation price of \$48,832 per node, \$9,400 per node per month for a total of \$ 4,939,776 for 24 months. PDS's bid price for the 10 Gbps service is \$4,291,776 less than GTA's bid price.

In In the Appeal of O&M Energy, S.A., OPA-PA-08-004, the OPA found that a price disparity of six million dollars (\$6,000,000) would indicate that the agency did very little to evaluate the bids before deciding to award the contract. In the Appeal of O&M Energy, S.A., OPA-PA-08-004 at 4. Specifically, the OPA found that the agency favored an incumbent contractor by failing to properly evaluate the incumbent's technical specifications offered by the incumbent. OPA-PA-08-004 at 5. In other words, the agency failed to employ objectively measurable criteria set forth in the IFB to determine whether the lowest bidder did in fact meet the criteria set forth in the IFB. OPA-PA-08-004 at 5. In her decision, the OPA found that the proposed award was not adequate under the procurement law and regulations because the agency failed to evaluate the bids based on objectively measurable criteria and thus cancelled the procurement in its entirety. OPA-PA-08-004 at 6.

In the appeal at bar, GSA could not have reviewed PDS's technical specifications to evaluate whether PDS's bid was responsive because PDS did not submit its technical

specifications as required by the IFB. Instead GSA relied solely on the price for the 10 Gbps service in violation of the Guam Procurement Law and its related rules and regulations. Failure to objectively evaluate all bids is a violation of the Guam Procurement Law.

Section IV(D)(2) of the IFB states that "Technical Information is required for the following parts of the IFB -- Part D GG Wide Area Network (1 or 10 Gbps)." IFB at 28 (IV)(D)(2). On May 4, 2012 GTA submitted a request pursuant to the Freedom of Information Act for a copy of PDS's Technical Information to determine if the disparity in the bid prices submitted by GTA and PDS were based on the different technology or equipment. GSA immediately responded by providing a only a copy of PDS's Bid Form 11. Further the Procurement Record submitted in the appeal does not include any technical specifications as required by the IFB. Failure to submit technical specification renders PDS's Bid Form 11 as non-responsive. Thus the award for the 10 Gbps to PDS must be cancelled.

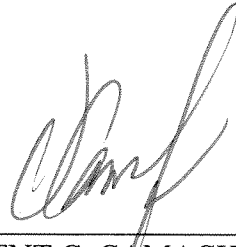
In conclusion GSA's award of the 1 Gbps service to a higher priced bidder is a clear violation of the Guam Procurement law and its response is contrary to the Guam Procurement Law. GSA's award of the 1 Gbps to PDS should be vacated awarded to GTA.

As for GTA's second grounds for appeal, GSA's Agency Report was non-responsive. GTA has demonstrated that (1) due to the significant, four million dollar (\$4,000,000), difference in the bids, GSA failed to perform a sufficient evaluation to determine if GSA properly employed objectively measurable criteria to evaluate the bids; and (2) GSA could not have performed a fair evaluation of the bids without PDS's technical specifications. Had GSA sufficiently reviewed PDS's bid it would have found that PDS failed to submit its technical specifications as required by the IFB, making PDS's bid non-responsive. Failure to employ objectively measurable criteria in evaluating bid submissions is a violation of the Guam Procurement Law.

Accordingly, GSA's denial of GTA's protest must be denied in its entirety because GSA did not comply with the procurement rules and regulations.

DATED: Hagåtña, Guam, December 3, 2012.

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