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PROCUREMENT APPEALS

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OFFICE OF THE PUBLIC AUDITOR

In the Appeal of)	APPEAL NO. OPA-PA-07-004
)	
TEAL PACIFIC LLC)	
)	
)	AGENCY REPORT OF
)	GUAM MEMORIAL HOSPITAL
Appellant.)	AUTHORITY
)	
)	

Appellee Guam Memorial Hospital Authority, by and through its counsel of record, Maria T. Cenzon-Duenas, Esq. of Mair, Mair, Spade & Thompson, hereby submits its Agency Report in the form required under 2 G.A.R. §12105:

(a) A copy of the protest: *Please see Tab 8 of Procurement Record, filed with the OPA on June 18, 2007.*

(b) A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer that is being considered for award or whose bid or offer is being protested, if any had been submitted prior to the protest: *With regard to GMHA Bid No. 008-2007, please see Tab Nos. 3A, 3B and 3C of Procurement Record. With regard to GMHA Bid No. 016-2007, no bids or offers were submitted because Appellant's protest was filed prior to the deadline for submission of bids. As such, no offers were submitted in response to the later solicitation.*

(c) A copy of the solicitation, including the specifications or portions thereof relevant to the protest: *Please see Tabs 1 and 7 of Procurement Record, filed with the OPA on June 18, 2007.*

COPY

(d) A copy of the abstract of bids or offers or relevant or portions thereof relevant to the protest: *With regard to GMHA Bid No. 008-2007, please see Tab No. 4 of the Procurement Record. With regard to GMHA Bid No. 016-2007, please see response to (b), above.*

(e) Any other documents which are relevant to the protest; including the contract, if one has been awarded, pertinent amendments, and plans and drawings: *Please see Procurement Record, filed with the OPA on June 18, 2007.*

(f) The decision from which the Appeal is taken, if different than the decision submitted by Appellant: *Please see Tab 10 to Procurement Record, filed with the OPA on June 18, 2007.*

(g) A statement answering the allegation of the Appeal and setting forth findings, actions, 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: *Please see Tab 1.*

(h) If the award was made after receipt of the protest, the report will include the determination required under 2 GAR § 9101(e): *Not applicable. GMHA Bid No. 008-2007 was cancelled prior to award and the protest of GMHA Bid No. 016-2007 was filed prior to deadline for submission of bids. No offers were submitted in response to No. 016-2007.*

(i) A statement in substantially the same format as Appendix B to this Chapter, indicating whether the matter is the subject of a court proceeding: *Please see Tab 2.*

Dated this 22nd day of June, 2007.

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

By: 

MARIA T. CENZON-DUENAS

STATEMENT ANSWERING ALLEGATIONS OF APPEAL

(As required by 2 G.A.R. §12105(g))

1. Relevant Background.

GMHA Bid No. 008-2007 (the "Original IFB") was issued on January 25, 2007, and sought "General Electric (GE) AMX-4 Plus Mobile or Equivalent." On February 23, 2007, however, the bid was cancelled in the best interests of GMHA because the solicitation did not provide for consideration of all factors of significance to the Hospital. A letter to this effect was sent to all bidders of the Original IFB, including Mr. Roy Salvador Adonay of Teal Pacific LLP, who acknowledged receipt of the cancellation on March 8, 2007. (See Letter dated February 28, 2007 addressed to Mr. Roy Salvador Adonay, General Manager for Teal Pacific LLC, from GMHA).

Subsequent to the cancellation of the Original IFB, on March 21, 2007, GMHA issued Bid Invitation No. GMHA 016-2007 (the "Reissued IFB"). Although the page entitled "Guam Memorial Hospital Authority Bid Specifications" identified the solicited equipment as a "General Electric (GE) AMX-4 Plus Mobile or Equivalent," Page 1 of the Specifications with the footnote "AMX-4 Specification 3/12/07" indicated that the bid "must be for a AMX-4 plus Mobile" and *not* its equivalent due to standardization of existing parts, software and training of GMHA's equipment. (See Page 1, AMX-4 Specification)(dtd. 3/12/07)(Tab No. 7 of Procurement Record). In order to correct the error on the Bid Specification page, on March 26, 2007, GMHA issued Amendment No. 2 for Bid 016-2007, indicating that the words "Or Equivalent" should be removed from the Bid Specifications. Teal Pacific filed its protest to GMHA 016-2007 and GMHA 008-2007 on March 29, 2007.

2. Rejection of Teal Pacific's Protest is Appropriate.

Teal Pacific's appeal fails to set forth any valid basis for its claims that GMHA's cancellation of Bid No. 008-2007 was "illegal, an abuse of discretion, arbitrary and capricious and contrary to 5 GCA section 5525." (Teal Pacific's Appeal at p. 3). In the first instance, Teal Pacific's protest of the cancellation of GMHA Bid No. 008-2007 is untimely, as discussed further herein. Next, Teal Pacific's appeal alleges that there is no difference between Bid No. 008-2007 and 016-2007, a position which is clearly contradicted by the evidence; specifically, the Specifications set forth in Bid No. 016-2007 and the Amendment No. 2 to that solicitation. For these reasons, Teal Pacific's appeal should be dismissed.

A. Protest of Original IFB is Untimely.

GMHA Bid No. 008-2007 (the "Original IFB") was cancelled on February 23, 2007. At the very latest, Teal Pacific acknowledged receipt of the notice of cancellation on March 8, 2007. Pursuant to Section 9-101.03.1, a protest must be made in writing to the Hospital Administrator "within fourteen (14) days after the protestor knows or should

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(As required by 2 G.A.R. §12105(g))

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have known of the facts giving rise thereto . . . Protests filed after the fourteen (14) day period *shall not be considered.*" (Emphasis added).

The fourteen (14) day deadline in which to file the protest passed on March 22, 2007. Because the protest of GMHA Bid 008-2007 was not received until March 29, 2007, by law GMHA may not consider it and it was therefore rejected appropriately.

2. GMHA's Rejection of Teal Pacific's Protest Was Appropriate.

Although Teal Pacific's protest of the Original IFB was rejected as untimely, the reason for the cancellation of that IFB is relevant to GMHA's determination to issue GMHA No. 016-2007 (the "Reissued IFB"). As discussed herein, adequate reasons supported the cancellation of the Original IFB, therefore the Reissued IFB was valid. Moreover, as discussed in greater detail herein, the Reissued IFB was substantially different in its requirements; therefore, Teal Pacific is not entitled to any relief.

5 G.C.A. § 5225 of the Guam Procurement Law provides GMHA the authority to cancel the solicitation and states as follows:

§ 5225. Cancellation of Invitations for Bids or Requests for Proposals. An Invitation for Bids, a Request for Proposals, or other solicitation may be cancelled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, *when it is in the best interests of the Territory* in accordance with regulations promulgated by the Policy Office. The reasons therefor shall be made part of the contract file.

Additionally, the Bid Specifications states that the Hospital Administrator "shall have the authority to award, cancel, or reject bids, in whole or in part for any one or more items if he determines it is in the public interest." IFB, General Terms and Conditions Sealed Bid Solicitation and Award at ¶ 25.

Moreover, Section 3-301.04.02 of the GMHA Procurement Rules & Regulations allows for the cancellation, *after bid opening*, of the solicitation when "the solicitation did not provide for consideration of all factors of significance to the Hospital." Notice of such cancellation "should then be sent to all businesses that submitted bids or proposals." § 3-301.04.02.2.

In this instance, the Original Bid was issued on January 25, 2007. On February 23, 2007, GMHA cancelled the solicitation because "the solicitation did not provide for consideration of all factors of significance to the Hospital." When the solicitation was re-issued, the description of GMH's need as set forth in the Specifications was substantially

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different from that contained in the Original IFB. Specifically, the Original IFB stated, in relevant part, as follows:

Guam Memorial Hospital Authority is hereby soliciting proposals from qualified companies to provide an **AMX-4 PLUS Mobile** X-Ray System along with related supplies. Equipment, supplies and accessories must be FDA, NEC and UL approved and meets the medical electrical equipment standards.

(See Page 1 to AMX-4 Specification (1/10/07), GMHA Bid No. 008-2007)(Tab 1 of Procurement Record filed on 6/18/07).

In marked contrast is the description of the equipment in the Reissued IFB, which states, as follows:

Guam Memorial Hospital Authority is hereby soliciting proposals from qualified companies to provide an **AMX-4 PLUS Mobile** X-Ray System along with related supplies. Equipment, supplies and accessories must be FDA, NEC and UL approved and meets the medical electrical equipment standards.

Requirement of the Bid: Radiographic equipment must be for a AMX-4 plus Mobile due to the following reason:

1. Product and equipment standardization -- The Hospital has been utilizing General Electric (GE) Imaging System products for over fifteen (15) years and have proven to be durable and reliable. The hospital had just recently completed the replacement our CT, Angio and Rad/Flour equipment with GE their most current state-of-art imaging systems which assist the Hospital in delivering the best possible care to the crucial and non-crucial patients.
2. Standardizing Hospital equipment is advantageous for the Facility to obtain compatible accessories and replacement parts.
3. Software and replacement Parts are compatible with the existing radiology GE equipment.
4. GMHA's Radiology staff was trained by General Electric application personnel and is familiar with GE Imaging systems.

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(As required by 2 G.A.R. §12105(g))

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5. Technical competency and support of 24-hours 7-days a week is available locally for immediate response resulting to minimal equipment down time and clinical [sic].

(See Page 1 to AMX-4 Specification (dtd. 3/12/07), GMHA Bid No. 016-2007)(Tab No. 7 of Procurement Record filed on 6/18/07).

It is clear by the revised Specifications that the Reissued IFB was amended to reflect the needs of GMHA to obtain equipment that was compatible with the existing equipment at the Hospital. Thus, notwithstanding the fact that the page entitled "Guam Memorial Hospital Authority Bid Specifications" identified the brand as "General Electric (GE) AMX-4 Plus Mobile or Equivalent," the more detailed specifications required only GE equipment. When the mistake on the "Bid Specifications" page for GMHA Bid No. 016-2007 was discovered after inquiries were made regarding the description which included the "equivalent" of the GE system, GMHA immediately issued Amendment No. 2 which changed the Bid Specifications to remove the words "Or Equivalent," signifying that only a GE system would satisfy GMHA's need. After this amendment was issued to all persons who had picked up a package -- including Teal Pacific -- it was clear that the Hospital was only interested in GE Equipment.

In its appeal, Teal Pacific argues that GMHA's "rejection letter/decision cites to no specifications that appear in one IFB that do not appear in the other." It is incontrovertible that the Amendment No. 2 to Bid No. 016-2007 amended the specifications so that only GE equipment, and not its equivalent, would satisfy the agency's needs. Teal Pacific's appeal completely ignores the changes made to the specifications by Amendment No. 2.

CONCLUSION

Under the circumstances, in canceling the Original IFB, GMHA properly determined that the Bid Specifications under the Original IFB did not consider all factors of significance to the Hospital; specifically, that other equipment at the Hospital would only be compatible with GE equipment. The Reissued IFB contained specifications that would limit the bidders to providing GE equipment and stated the rationale for mandating the specific brand of portable x-ray machine.

Based on the facts and legal authorities cited herein, GMHA determined that there was no evidence to support the claims presented in Teal Pacific's Protest and, therefore, rejected it. Teal Pacific's appeal provides no justification for reversing the agency's determination. As such, Teal Pacific's appeal should be denied and GMHA be permitted to proceed with the solicitation.

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GMHA requests further that the Public Auditor award GMHA all legal and equitable remedies that GMHA may be entitled to as a result of a denial of Teal Pacific's appeal, to include, but not be limited to, GMHA's reasonable costs and attorney's fees, if permissible.

****** END OF AGENCY STATEMENT ******

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OFFICE OF THE PUBLIC AUDITOR

In the Appeal of)	APPEAL NO. OPA-PA-07-004
)	
TEAL PACIFIC LLC)	
)	DECLARATION REGARDING
)	COURT ACTION
Appellant.)	
)	
)	
)	

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 22nd day of June, 2007.

GUAM MEMORIAL HOSPITAL AUTHORITY

By: *Peter John D. Camacho* M.P.H.
PETERJOHN D. CAMACHO, M.P.H.