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E-Filed and E-Served - In the Appeal of: Guahan Ventures - OPA-PA-21-003 - Findings of Fact and Conclusions of Law

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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

IN THE APPEAL OF:)	DOCKET NO. OPA-PA-21-003
)	
)	
Guahan Ventures, Inc. dba Turfco)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
Appellant.)	
)	
)	

I. INTRODUCTION.

The hearing on the merits of this appeal was held before the Public Auditor on December 16, 2021. In accordance with Guam Rule of Civil Procedure 52(a) and having reviewed the parties' pre- and post-hearing submissions as well as the entire record, the Public Auditor now makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Starting on or about June 14, 2021, the General Services Agency (GSA) initiated an emergency procurement on behalf of the Guam Homeland Security/Office of Civil Defense (GHS/OCD) and the Department of Public Health and Social Service (DPHSS) by sending out a Request for Quote (RFQ) RFQ21002179, Requisition Number Q210280170 for Golf Cart (Emergency) by email to four vendors.

2. The RFQ email stated that the responses were due “as soon as possible but no later than Thursday, 06/17/2021 before close of business at 5pm.”¹

3. Also on June 14, 2021, approximately two hours after receiving the RFQ from GSA, Turfco’s representative, Mr. Carlo Pangelinan, spoke with the GSA Buyer to request more information. The GSA buyer sent a follow-up email with a brochure of the type of golf carts and a RFQ due date that stated “preferred ETA is 30 days from the date of purchase order award.”²

4. On June 15, 2021, GHS/OCD personnel spoke with Mr. Pangelinan, provided additional information, and informed Turfo that the golf carts were needed for “immediate response for the Covid event for GMH and UOG.”³

5. Also on June 15, 2021, Autospot sent a quote to GSA indicating an “Immediate” delivery.

6. On June 16, 2021 at 5:43pm, GSA sent the four vendors a clarification email that amended the RFQ indicating that this was an “Emergency Procurement” and Delivery Requirement is “IMMEDIATE”.⁴

7. The RFQ number did not change and remained RFQ21002179, Requisition Number Q210280170, and the specifications were not changed.⁵

¹ Turfco Exhibit 10.

² Turfco Exhibit 11.

³ GSA Exhibit E.

⁴ Turfco Exhibit 9.

⁵ Procurement Record, Tab 5.

8. Autospot sent another quote in response to the amended RFQ the evening of June 16, 2021 that indicated an immediate delivery.

9. On June 17, 2021, GSA received a quote from Yamaha with a 45-day delivery. That same day, at approximately 1:30pm, Turfco submitted its quote to GSA Procurement and the GSA Buyer through email. Both email quotes indicated a 30-75 day delivery.⁶ Cycles Plus did not submit a quote.

10. Turfco's quote is dated 6/15/21, but it was not submitted to GSA until June 17, 2021.⁷

11. On June 18, 2021, GSA conducted a review of the quotes received. Autospot's quote was \$73,970.00 with a immediate delivery and Turfco's quote was \$52,150 with a 30-75 day delivery. GSA accepted the quote from Autospot based on their ability to meet the immediate delivery requirement.⁸

12. On June 19, 2021, GSA issued a Purchase Order to Autospot.⁹

13. On June 22, 2021, Autospot issued a Bill of Sale to GSA.¹⁰

14. Also on June 22, 2021, Turfco requested information from GSA regarding the status of the procurement.¹¹

15. On June 23, 2021, OHS/OCD accepted delivery of the golf carts.¹²

⁶ GSA Exhibits C and D

⁷ Testimony of Mr. Pangelinan.

⁸ Procurement Record, Tab 6.

⁹ GSA Exhibit F.

¹⁰ GSA Exhibit G.

¹¹ Notice of Appeal, page 3.

¹² GSA Exhibit H.

16. On June 24, 2021, Turfco formally protested GSA’s decision to award the RFQ based on the “immediate delivery” requirement and not on the factor of choosing the lowest cost quote to the government. Turfco further stated that the “immediate” delivery requirement was not part of the first RFQ issued on June 14, 2021 at 1:24PM.¹³

17. On June 25, 2021, GSA denied Turfco’s protest stating that the June 16th email with the “Immediate” delivery requirement superseded the June 14th email and that immediate delivery was a factor in the bid.¹⁴

18. On July 9, 2021, Turfco filed this appeal.¹⁵

III. CONCLUSIONS OF LAW

A. GSA’s Emergency Procurement Did Not Violate Guam Procurement Law.

19. Under Guam Procurement Law, an Emergency Procurement shall include:

1) Declaration of Emergency made by Executive Order duly issued by the Governor, and expressly authorizing emergency procurement of supplies, services . . . (5 GCA §5215(b)(1)), and a 2) Determination of Need for Emergency Procurement. (5 GCA §5215(c)).

¹³ GSA Exhibit A.

¹⁴ GSA Exhibit B.

¹⁵ Notice of Appeal.

20. The Emergency Procurement “shall be made and conducted with competition and utilize competitive procedures used in this Chapter as is practicable under the circumstances, in the good faith discretion of the person authorized to make such emergency procurement. . .” (5 GCA §5215(d)).

21. The governor issued Executive Order (E.O.) 2021-12 on May 28, 2021 extending the public health emergency until July 1, 2021. (Executive Order No. 2021-12; Relative to Extending the Public Health Emergency Declared to Respond to Novel Coronavirus (COVID-19)). E.O. 2021-12 stated that all other Executive Orders remained in full force and effect, including E.O. 2021-09.¹⁶

22. On June 12, GSA received a Justification for Emergency Procurement request from the GHS/OCD with concurrence from DPHSS for the golf carts citing E.O. 2021-12.

23. Under 5 GCA §5215(d), the solicitation and competition for an award of an emergency procurement contract should include:

(1) sending a Notice of Request for Interest to contractors on a qualified bidders list, and others known to the government, who have provided responsive supplies, services, or emergency construction works to the government, within the preceding twelve (12) months, of the type needed to meet the particular emergency;

(2) a request for prompt expression of interest;

¹⁶ E.O. 2021-09: Relative to Extending the Public Health Emergency Declared to Respond to Novel Coronavirus (COVID-19) issued on April 30, 2021, Paragraph 5(a) states that “this Executive Order authorizes the hiring, overtime, and ***any procurement or purchases related to this public health emergency for all government of Guam agencies responding to this emergency.***” (emphasis added).

(3) at least three (3) Positive Written Quotations, which shall be solicited, recorded, and placed in the procurement file, for the acquisition of supplies, services, or emergency construction works needed, unrestricted by the qualified bidders list; provided, that all quotations are not required to be positive if accompanied by written certification that to the maximum extent practicable, such positive quotations could not be obtained from known or potential vendors; and

(4), an award an emergency procurement “may allow for, to the responsible contractor shown to provide the lowest price and most expeditious delivery time, in accordance with § 5010 of this Chapter.”

24. On June 14, 2021, GSA commenced the emergency procurement by sending an RFQ to four potential vendors, Yamaha, Cycles Plus, Turfco, and Autospot.

25. Mr. Pangelinan from Turfco testified that he had received the RFQ email with the subject “Quote Request RFQ21002179 to T0036611 - Golf Cart **(Emergency)**”¹⁷ on June 14.

26. Mr. Pangelinan from Turfco further testified that he saw that the RFQ had “Emergency” in the subject, but did not know what “emergency” meant.

27. Mr. Pangelinan from Turfco also testified that he had spoken with Ms. Krystel Tahimik from GSA and Ms. Michelle Galang from GHS/OCD prior to submitting his quote to GSA on June 17.

28. Mr. Pangelinan had several opportunities to clarify the meaning of “emergency” with both GSA and GHS/OCD, but did not.

¹⁷ Notice of Appeal, Attachment A.

29. Ms. Tahimik and Ms. Anita Cruz from GSA both testified that an email was sent to the four vendors on June 16 to clarify that the delivery requirement was “Immediate”.

30. Autospot was selected based on their ability to meet the “Immediate” delivery requirement.

31. Pursuant to 5 GCA §5010, “**Except in emergency situations**, lower price bids are generally preferable to shorten delivery or performance bids.” (Emphasis added).

32. Regardless of whether Turfco had a lower price, they were unable to meet the delivery requirements of the emergency procurement, and because this was an emergency situation, GSA was justified in awarding the Purchase Order to Autospot.

33. GSA followed the requirements of the Emergency Procurement Law and the award to Autospot was proper.

B. The Emergency Procurement Law did not require GSA to notify the unsuccessful offerors of the procurement status.

34. The Emergency Procurement law and Emergency Procurement Regulations are silent on providing notifications to non-winning offerors of the status of a procurement.

35. The only reference regarding notifications to an unsuccessful bidder is in the Procurement regulations for Competitive Sealed Bidding at 2 GAR, Div. 4

§3109(q), which states “[w]ritten notice of award shall be sent to the successful bidder. In procurement over \$25,000, **each unsuccessful bidder shall be notified of the award.** Notice of award shall be made available to the public.”

36. This Emergency Procurement was not a Competitive Sealed Bidding, and GSA was not required by 5 GCA §5215(d) to notify Turfco that it was not successful.

37. This office stated In the Appeal of TLK Marketing Co., Ltd. (OPA-PA-16-003), in finding that the automatic stay requirement of 5 GCA §5425 was not triggered because the appellant’s protest was filed after award, that the appellant “was deprived of any meaningful opportunity to protest the procurement prior to award or to receive the benefits of the automatic stay. This appears to be a trend with procuring agencies awarding contacts concurrently without notifying non-selected bidders, in an attempt to limit the protesting period and avoid the automatic stay.”¹⁸

38. Despite this finding, however, the Public Auditor concluded that “the resulting fundamental unfairness is an issue that will need to be addressed by the Guam Legislature in order to protect the rights of aggrieved parties.”¹⁹

39. On April 12, 2019, the 34th Guam Legislature introduced Bill 90-35 entitled “An Act to Repeal and Reenact § 5215, of Subarticle B, Article 3, Chapter 5, Title 5 of the Guam Code Annotated, Relative to Providing for Emergency

¹⁸ In the Appeal of TLK Marketing Co., Ltd., OPA-PA-16-003, Decision and Order, June 15, 2016, Page 3.

¹⁹ *Id.*

Procurement for Threats to the Environment, Increasing Transparency, and Otherwise Improving Emergency Procurement.”

40. Bill 90-35 passed on October 19, 2020 and became Public Law 35-109 when it was signed by the Governor on October 30, 2020.

41. The Legislature did not change the Emergency Procurement Law to require the notification to unsuccessful offerors.

42. Because there was no requirement for GSA to notify unsuccessful vendors regarding their status in an Emergency Procurement, no action can be maintained on this issued and Turfco’s protest is dismissed.

C. Clarification of the delivery requirement

43. Guam Procurement Regulations require that Invitations for Bid (IFBs) contain a “delivery or performance schedule” (2 GAR, Div. 4 § 3114(f)(1)) and Requests for Proposals (RFPs) “an estimate of when and for how long the services will be required.” 2 GAR, Div. 4 § 3109(c)(2)(B).

44. Although these regulations are specific to IFBs and RFPs, clarifications for delivery and/or performance schedule are critical in ensuring that the goods and services are promptly received by the Government.

45. GSA has broad discretion to amend a solicitation in order to obtain the best value and meet the needs of the territory.

46. Even if Turfco did not “acknowledge receipt of all amendments issued” as required by 2 GAR, Div. 4 3109(i)(1), the Procurement Officer has the authority “to waive informalities. . . [e]xamples include the failure of the bidder to. . . acknowledge receipt of an amendment to the Invitation for Bids; but only if. . . it is clear from the bid that the bidder received the amendment and intended to be bound by its terms”. 2 GAR, Div. 4 §3109(m)(4)(B)(1).

47. Mr. Pangelinan from Turfco testified that he had prepared his quote on June 15th, the day after receiving the first RFQ on June 14th.

48. Mr. Pangelinan also testified that he waited until June 17th to submit his quote.

49. Mr. Pangelinan further testified that he did not check his email on June 16th and did not see the amended RFQ email with the “Immediate” delivery requirement until June 17th.

50. Mr. Pangelinan testified that there was not enough time to prepare a new quote for submission on June 17th based on the amended RFQ from June 16th.

51. On June 17th, after seeing the amended RFQ, Mr. Pangelinan did not raise any objection or questions regarding the “Immediate” delivery requirement.

52. It is evident that Mr. Pangelinan received the amendment and intended to be bound by its terms, as Turfco’s quote submission to Ms. Anita Cruz on June 17th

at 1:32pm was in response to the amended RFQ email with the “Immediate” delivery requirement.²⁰

53. The short timeframe to prepare was no different than the timeframe Turfco had when they prepared the original quote. In his June 14th email to GSA at 3:42pm, Mr. Pangelinan stated “I am a distributor for the 827 model golf carts, and the description on the RFQ is too vague to provide an accurate quotation.”²¹

54. If Turfco was indeed a distributor, they ostensibly would have been able to prepare a quote quickly instead of arguing that it was too late to change their quote after receiving the June 16th clarification.

55. This inaction, despite their knowledge of an immediate delivery date, was at their own peril. Turfco still had time to change their first quote because they had until 5pm on June 17th to submit.

56. The late clarification of the delivery requirement was proper and even required under Guam Procurement Law.

D. The change in delivery date did not change the solicitation to a Sole Source Procurement

57. Guam Procurement Regulations at 2 GAR, Div. 4 §3112(b) states that a “sole source procurement is not permissible unless a requirement is available from

²⁰ GSA Exhibit D.

²¹ GSA Exhibit C.

only a single supplier.” See also 5 GCA §5214. The decision to use a Sole Source procurement must be made by the Chief Procurement Officer and must be in writing. 2 GAR, Div. 4 §3112(b).

58. Ms. Claudia Acfalle, Chief Procurement Officer, testified that this procurement was conducted as an Emergency Procurement.

59. GSA’s clarification of the delivery requirement was not a specification change.

60. A specification is “any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may include a description of any requirement for inspecting, testing or preparing a supply, service or construction item for delivery.” 5 GCA § 5260. See also 2 GAR, Div. 4 § 4101(a)(4).

61. “To the extent feasible, a specification **shall not** include any solicitation or contract term or condition such as a requirement for time or place of bid opening, **time of delivery**, payment, liquidated damages, or qualification of bidders.” 2 GAR, Div. 4 § 4103(b)(1)(c) (emphasis added).

62. None of the procurement records or hearing materials indicate a change in specifications.

63. None of the procurement records or hearing materials indicate an attempt to change the solicitation to a Sole Source Procurement.

64. The record shows that the RFQ was sent to four vendors, but only three quotes were submitted before the deadline.

65. The fourth vendor (Cycles Plus) had until 5pm on June 17th to submit their quote.²²

66. GSA did not know whether Cycles Plus was going to submit a quote by the deadline.

67. Cycles Plus could have met the immediate delivery requirement and been awarded the contract, instead of Autospot, if it had submitted prior to the 5pm deadline.

68. GSA's clarification of the delivery date was proper and did not change the procurement to a Sole Source Procurement.

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²² Procurement Record, Tab 6 (GSA evaluated CyclesPlus to have "No Response" and "No Quote".)

IV. CONCLUSION

In light of the findings of fact and conclusions of law, the Public Auditor ORDERS that this appeal be dismissed with prejudice in its entirety. Each party shall bear their own attorneys' fees and costs.

SO ORDERED this _____ day of January, 2022.

BENJAMIN J.F. CRUZ
Public Auditor of Guam