

**LAW OFFICE OF G. ANTHONY LONG**

P. O. Box 504970  
Beach Road  
San Jose, Saipan, MP 96950

Telephone: (670) 235-4802  
Fax: (670) 235-4801  
e-mail: gal@nmilaw.com

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**TO:**

**FAX NO.:**

**Anthony R. Camacho, Esq.**  
**OPA Hearing Officer**

(671) 472-7951 and email

**Aaron R. Jackson, Esq.**  
**Attorney for GMHA**

Via Email

**FROM:** G. Anthony Long

**DATE:** February 19, 2008

**RE:** PSA's Hearing Memorandum

8 Pages including cover sheet

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Facsimile No. (670) 235-4801

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Attorney for Pacific Security Alarm, Inc.

**OFFICE OF THE PUBLIC AUDITOR**

IN THE APPEAL OF	) APPEAL NO: OPA-PA-007-009
	)
PACIFIC SECURITY ALARM, INC.	) PSA'S HEARING MEMORANDUM
	)
Appellant	)
_____	)

**I. GOVERNING LAW AND REGULATIONS**

Guam's Procurement Law controls GMHA's procurement activities. *Guam Imaging Consultants, Inc., v. Guam Memorial Hospital Authority*, 2004 Guam 15 at ¶ 22. However, GMHA's enabling legislation authorizes it to adopt and implement its own procurement Rules and Regulations. *Id.* Subsequently, GMHA adopted procurement rules and regulations and the administering of the rules and regulations were vested in GMHA. *Id.* Thus, GMHA procurement activities are "governed by both the Guam Procurement Law and GMHA's own Procurement Regulations." *Id.* Accordingly, GMHA's procurement regulations controls its procurement activities unless a conflict exists between GMHA's regulations and the Procurement law. *See Id* at ¶ 41. When such a conflict exists, the Procurement Law controls. *Id.*

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## II. PSA'S PROTEST WAS TIMELY

The Procurement Law sets a time limitation for filing a protest of 14 days from when the aggrieved person knew or should have known of the facts supporting the protest. 5 GCA § 5425(a). GMHA regulations also provides for filing a protest within 14 days of when the protestor knew or should have known of the facts supporting the protest. 26 GAR 16901(c)(1). The evidence will show that PSA received the notice of cancellation on August 9, 2007 and that fourteen days from August 9, 2007 is August 23, 2007. The evidence will further show that PSA filed its protest on or before August 23, 2007. Accordingly, PSA's protest is timely. *See Guam Imaging Consultants, Inc.*, 2004 Guam 15 at ¶ 33.

## III. THE AGENCY ACTION AT ISSUE MUST BE SET ASIDE AS IT DID NOT COMPLY WITH THE PROCUREMENT LAW OR GMHA REGULATIONS

Agency action contrary to or in derogation of its own regulations must be set aside as improper and contrary to law. *See Guam Imaging Consultants, Inc.*, 2004 Guam 15 at ¶ 41. GMHA regulations mandate that the provisions of 26 GAR §16316 "shall govern the cancellation of any solicitations whether issued by the hospital under competitive sealed bidding, small purchases, or any other selection method, and rejection of bids or proposals in whole or in part. 26 GAR §16316(a). The Procurement Law specifically provides that the word "[s]hall denotes the imperative." 5 G.C.A. § 5030(t). Imperative means mandatory. *See In re Conservatorship of Whitley*, 155 Cal.App.4th 1447, 1462 66 Cal.Rptr.3d 808, 818 (Cal.App. 2007). Thus, GMHA, through its procurement regulatory power and authority, makes compliance with 26 GAR §16316 mandatory when the agency cancels a bid or rejects all bids.

The evidence will show that GMHA's action at issue was contrary to or in derogation of 26 GAR §16316.

**A. A BID CANCELLATION IS DISTINCT FROM REJECTION OF A BID PURSUANT TO GMHA PROCUREMENT REGULATIONS**

GMHA Regulations contain specific provisions for cancellation of a bid, *see* 26 GAR § 16316 (a) - (d) and separate provisions for rejection of bids, 26 GAR § 16316(d) - (f). This can only mean that cancellation of a bid is separate and distinct from rejection of bids. The evidence will show that GMHA recognizes the distinction between bid cancellation and rejection of bids in its procurement practice.

**B. THE BID CANCELLATION CASE WAS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION AND CONTRARY TO LAW**

The Procurement Law allows for cancellation of a bid "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." 5 GCA § 5225. Thus, a bid cancellation involves two distinct requirements. First, the solicitation must provide that the bid is subject to cancellation. Secondly the cancellation must be in the government's best interest as provided by the applicable regulations. Neither requirement was satisfied in this case.

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**1. CANCELLATION WAS NOT IN GOVERNMENT'S BEST INTEREST**

The Procurement Law's second prong for cancelling a bid is that it must be in the government's best interest as determined by the applicable regulations. 5 GCA § 5225. GMHA regulations expressly recognize that "although issuance of a solicitation does not compel award of a contract, a solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in the hospital's best interest" 26 GAR §16316(b)(emphasis added). GMHA Regulations further require that "[t]he reasons for cancellation" be made "part of the procurement file and shall be available for public inspection." 26 GAR §16316(d)(3). Accordingly, GMHA's procurement regulations allow for cancellation of a solicitation "in whole or in part when the Hospital Administrator determines in writing" that such action is in the hospital's best interest. 26 GAR § 16316(d)(1)(b). Reasons identified as being a sufficient basis for cancellation include but are not limited to (1) the hospital no longer requiring the supplies, services or construction, (2) the hospital no longer can reasonably expect to fund the procurement, or (3) proposed amendments to the solicitation are of such magnitude that a new solicitation is desirable. *Id.* Insufficient funds is not specifically identified as a basis for cancelling a bid, but it is also not excluded as a justification for cancellation.

26 GAR §16316(d)(1)(b)(2) allows GMHA to cancel a bid if "the hospital no longer can reasonably expect to fund the procurement." The evidence in this case will show that the amount GMHA budgeted for bid 023-2007 never changed at any time. The procurement was funded and remains funded. Thus, GMHA could not reasonably conclude that "the hospital no longer can reasonably expect to fund the procurement." In any event, it is noted that 26 GAR § 16316(d)(1)(b) is premised upon a determination being made prior to bid opening. However, that

is not the circumstance in this case as the "cancellation" occurred after bid opening not prior to bid opening.

Pursuant to GMHA's regulations, a bid cancellation can occur only prior to opening of the bids. *See* 26 GAR § 16316(d)(1)[GMHA Regulations governing cancellation limited to action prior to bid opening]. Pursuant to GMHA Regulations, after opening of the bid, GMHA can only reject all bids as opposed to cancelling the bid. *See* 26 GAR § 16316(d)(2)[GMHA Regulations governing rejection of bids limited to action after bid opening]. The evidence will show that the "cancellation" in this case occurred after bid opening. GMHA's action in this case was, in essence, a rejection of bids and not a cancellation as the decision to withdraw the solicitation or bid invitation was made after bid opening. This means that GMHA cancelling the bid is contrary to its own regulations as it cannot cancel a bid after bid opening. *See* 26 GAR § 16316(d). As such it is not in the Government's best interest for GMHA to cancel a bid after opening contrary to or in derogation of its own regulations, especially when the bid concerns a major safety matter.

## **2. THE SOLICITATION DID NOT PROVIDE THE REQUISITE NOTICE**

The Procurement Law's first requirement for bid cancellation is that the solicitation must specifically give notice that it is subject to cancellation. *Id.* In accordance with this statutory prerequisite GMHA regulations expressly provides that "[e]ach solicitation issued by the hospital shall state that the solicitation may be cancelled as provided in these Regulations." 26 GAR § 16316(c). The evidence will show that the bid invitation in this case did not specify that the bid could be cancelled in accordance with GMHA regulations.

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**C. IF THE AGENCY ACTION IS CONSTRUED AS A REJECTION OF BIDS, RATHER THAN A CANCELLATION OF THE BID, THEN THE AGENCY ACTION REMAINS ARBITRARY, CAPRICIOUS AN ABUSE OF DISCRETION AND CONTRARY TO LAW**

If GMHA's use of the word "cancel" as opposed to "reject" is deemed to be mere semantics, which PSA does not without any substantive differentiation, then GMHA's action still remains improper and contrary to law.

GMHA regulations allow for rejecting all bids after opening, but prior to an award, when the Hospital Administrator determines in writing that such action is in the hospital's best interest. 26 GAR § 16316(d)(2)(A). The regulation then proceeds to identify certain reasons which satisfy the "best interest" requirement. *See Id.* While GMHA premises its conduct in this case on the basis of "Insufficient Funds," this reasoning alone is an insufficient bass for rejecting a bid or bids after opening. GMHA's regulations allow for rejection of a bid or bids if the "prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds" *See* 26 GAR § 16316(d)(2)(A)(4)(emphasis added). Thus, insufficient or inadequate funding, standing alone, is not a legitimate basis for rejecting a bid or bids. GMHA must also make a determination that "it would not be appropriate to adjust quantities to come within available funds." *Id.* The evidence will show that GMHA's action in this case was contrary to or in derogation of 26 GAR § 16316(d)(2)(A)(4) as it did not make any determination regarding adjusting the quantity of the bid.

The evidence will show that GMHA advised the basis for its action regarding the solicitation was premised on insufficient funds and for no other reason. The evidence will further show that GMHA did not explain or state why "it would not be appropriate to adjust quantities to

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come within available funds" as mandated by 26 GAR § 16316(d)(2)(A)(4). The evidence will also show that GMHA did not consider or even discuss adjusting the "quantities to come within available funds" prior to taking the agency action at issue.

Law Office of G. Anthony Long

By: G. Anthony Long  
G. Anthony Long