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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.) RESPONSE TO AGENCY REPORT
)
Appellant)
_____)

Pacific Security Alarm, Inc., ("PSA") submits its response to the Agency Report submitted by Guam Memorial Hospital Authority ("GMHA").

I. PSA'S PROTEST WAS TIMELY

The Guam 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 GMHA 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, when a conflict exists between the Procurement law and the GMHA procurement regulations, the procurement law controls. *See Id* at ¶ 41.

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). PSA's protest to GMHA acknowledges that PSA received the notice of cancellation on August 9, 2007. GMHA's November 1, 2007 letter to PSA denying the protest unequivocally notes that PSA received the cancellation notice on August 9, 2007. Likewise, in GMHA's Agency Report, GMHA represents that PSA received notice of the bid cancellation on August 9, 2007. Fourteen days from August 9, 2007 is August 23, 2007. Nevertheless, GMHA in its Agency Report seeks to claim the due date for PSA's protest was August 21, 2007. GMHA apparently makes this claim by relying on the date of the cancellation notice, August 7, 2007, and not the date of August 9, 2007 when PSA received notice of the cancellation. The undisputed facts establish that PSA did not receive notice of the cancellation until August 9, 2007. The record is void of any evidence or assertion that PSA knew of the cancellation prior to its August 9, 2007 receipt of the cancellation notice. Accordingly, PSA's protest is timely as the 14 day period did not commence until August 9, 2007. *See Guam Imaging Consultants, Inc.*, 2004 Guam 15 at ¶ 33.

At this juncture, it should also be noted that in the Agency Report GMHA contends PSA did not file its protest until August 23, 2007. A review of PSA's stamped receipt copy of its protest, a copy of which is attached hereto, shows that GMHA received the protest on August 22, 2007. Thus, PSA's protest was filed with GMHA one day prior to expiration of the 14 day period. Again, the protest is timely. *See Guam Imaging Consultants, Inc.*, 2004 Guam 15 at ¶ 33. Even more so, and most telling, GMHA did not raise the limitations issue as a basis for denying the protest. This shows that the limitations argument is a post hoc rationalization being advanced

for the first time on appeal in an effort to frustrate PSA's appeal rights.

II. THE CANCELLATION WAS IMPROPER AS IT DID NOT COMPLY WITH THE PROCUREMENT LAW OR GMHA REGULATIONS

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.

The Procurement Law's first requirement for bid cancellation is that the solicitation must specifically give notice that it 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). A review of Bid Invitation at issue reveals that it did not specify that the bid could be cancelled or that it was subject to cancellation. The Bid Invitation did, however, provide that GMHA could reject bids; but rejection of an offeror's bid is apparently not the same as cancellation of the bid. *See* 26 GAR § 16316(a) - (d) [GMHA Regulations for cancellation of a bid] and 26 GAR § 16316(d) - (f) [GMHA Regulations for rejection of bids]. Most notably is 26 GAR § 16316(e)(2) which provides that GMHA solicitations "shall provide that any bid or proposal may be rejected in whole or in part when in the best interest of the hospital as provided in these Regulations." The fact that GMHA has separate regulations obligating a procurement solicitation to give notice regarding cancellation of the bid and rejection of the bid strongly

suggests that rejection of a bid is not the same as cancellation of a bid. The Bid Invitation in this matter did not give any notification that it was subject to cancellation. GMHA's canceling the bid, therefore, failed to comply with the Procurement Law and its own regulations. 26 GAR § 16316 (c). *See* 5 GCA § 5225. This rendered the cancellation improper and contrary to law. *See Guam Imaging Consultants, Inc.*, 2004 Guam 15 at ¶ 41.

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. 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]. 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]. 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). Nevertheless, if GMHA's use of the word "cancel" as opposed to "reject" is deemed to be mere semantics 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 for reasons. 26 GAR § 16316(d)(2)(A). The regulation then proceeds to identify certain reasons which satisfy the "best interest" requirement. The reason GMHA seeks to rely upon in this case is that "prices exceed available funds and it would not be appropriate to adjust quantities to come

within available funds" See 26 GAR § 163 16(d)(2)(A)(4). The facts show that GMHA did not comply with this regulatory provision.

GMHA's "cancellation" notice advised the bid was being canceled because of insufficient funds. GMHA did not explain or state why "it would not be appropriate to adjust quantities to come within available funds" as mandated by 26 GAR § 16316(d)(2)(A)(4). This alone renders the cancellation or rejection improper and contrary to law. Even more so, PSA's protest raised the issue of GMHA adjusting the quantities of the bid by proposing that the scope of work be performed in phases. GMHA's denial of PSA's protest did not address or respond to the phase suggestion or otherwise reveal or indicate why "it would not be appropriate to adjust quantities to come within available funds."

The protest denial is further fatally defective because, in "canceling" the bid, GMHA failed to explain or justify why there were insufficient funds. GMHA's regulations recognize that solicitations or invitations to bid "should only be issued when there is a valid procurement need unless the solicitation states that it is for informational purposes only." 26 GAR § 16316(b). A review of the Bid Invitation in this case reveals that it was not issued for informational purposes which can only mean that a "valid procurement need" existed for the bid. *Id.* GMHA's regulations further mandate that the solicitation or bid "give the status of funding for the procurement." *Id.* The Bid invitation in this case did not give the status of funding for the procurement.

Although GMHA's protest denial letter conceded that it had to ensure the availability of funding prior to issuance of the solicitation, the record appears to be void of facts or evidence establishing the existence of funding prior to issuance of the Bid Invitation. This is

crucial in as much as, if funding was not in existence at the time of the Bid Invitation then the entire process was an exercise in futility and the issue becomes why did GMHA wait until after bid opening to "cancel" the bid or "reject" all bids. On the other hand, if funding existed at the time of the Bid Invitation, then the issue becomes what happened to the funding between the Bid Invitation and the Bid Opening. To this extent, in cases upholding a bid cancellation due to lack of funding, the governmental agency explained or justified the lack of funding. *See Toriya, Inc. v. United States*, 28 Fed.Cl. 727, (Fed.Cl. 1991); *Dick Fischer Development No. 2, Inc. v. Department of Administration*, 838 P.2d 263 (Alaska, 1992). GMHA offers no explanation or justification for the lack of funding. It simply states insufficient funds. This explanation standing alone is insufficient.

III. THE CANCELLATION OR REJECTION WAS NOT IN GOOD FAITH

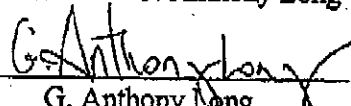
The Procurement Law as well as GMHA regulations require all procurement activities to be conducted in good faith. The absence of any evidence showing the existence of funding at the time of the Bid Invitation coupled with GMHA's failure to offer any explanation for the lack of funds or proffer any reason why "it would not be appropriate to adjust quantities to come within available funds" indicates this procurement may not have been conducted in good faith. Indeed, given that PSA's bid is now a matter of public record, 26 GAR § 16316(d)(2), PSA will be at a substantial competitive disadvantage when and if a new solicitation is issued as all potential offerors will be aware of PSA's bid amount. This is especially so if the lack of funding was known prior to bid opening. If the lack of funding was known prior to bid opening, then no justifiable reason existed for GMHA opening the bids.

IV. REQUEST FOR HEARING

PSA requests a hearing in this matter.

Respectfully submitted,

Law Office of G. Anthony Long

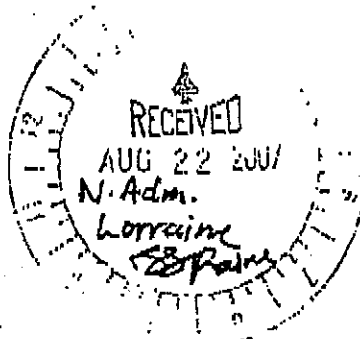
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August 23, 2007



[Signature]
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L. Solano, Lorraine
THAT NAME
08.22.07 @ 2:25p
WAVE U. TIME.

Mr. Peter John D. Camacho, M.P.H.
Hospital Administrator/CEO
Guam Memorial Hospital Authority
850 A. Gov. Carlos Camacho Road
Tamuning Guam 96911

Subject: GMHA Bid 023-2007, Removal and Replacement of Fire Alarm System Project

Dear Mr. Camacho,

This letter is our official protest of the GMHA decision included in your letter dated August 7th, 2007 (faxed and received by PSA on August 9, 2007) indicating a decision to cancel the above referenced bid for "Insufficient Funds".

We understand that the replacement of the existing, aging fire alarm system is an integral and priority component of GMHA's efforts to obtain accreditation and, therefore, the funding deficiency is likely to be a temporary condition. GMHA would, in all probability, be in the position of needing to implement the replacement of the fire alarm system within the ensuing months.

The requirements for the replacement will not change during this short period, and the necessity for a re-bid of the same project will result in an inherent unfairness of the bidding process. The bid submissions for the project were followed by a public opening. Thereafter, it is not possible to return to an equal, fair footing for prospective bidders. In addition to current bidders having access to competitor's bid amount, presumably other prospective future bidders are able to obtain the same information. Even if the future scope of work on a re-bid was altered somewhat, the basic replacement remains constant, and any reasonable bidder could separate estimated costs of any alternation and arrive at an amended bid amount. There is simply no way to regain the fairness that is intended in the GMHA procurement process.

We believe the appropriate remedy for this is to rescind the "cancellation", and issue a "Notice of Intent to Award to the Lowest Bidder", but advising there will be a delay pending funding, before a contract is executed and a Notice to Proceed is issued. If this delay extends beyond 30 days, the fairness to the contractor is accomplished by his agreement to maintain pricing included in the bid, at the time of signing the contract. Should the delay extend beyond the contractors ability to maintain his pricing, and a negotiated agreement could not be reached with GMHA, the bid could then be cancelled and re-bid.

As a practical matter, this seems to be in the best interest of GMHA also, as it determines exact funding requirements, and eliminates the additional cost, delays, and administrative expenses associated with a re-bid of the replacement

We also believe that GMHA has the procurement authority to structure a contract that would allow the work to be performed in phases. Under this approach, if partial funding is available (say 60%), a Notice to Proceed could be given on "Phase 1", which would not exceed the funding available. "Phase 2" could be started, if and when funding is available for the second portion. The physical structure of the Hospital appears to be conducive to this approach.

We appreciate your consideration in this matter.

Sincerely,



Lee Palmer
President

cc: Daniel L. Webb,
Chairman of the GMHA Board of Trustees