

proposed sites, and a budget estimate for phased installation.¹ SES issued a March 7, 2006, *Report and Recommendations for Placement, Guam Office of Civil Defense & Homeland Security All Hazard Warning System* (Reference Contract: P066A00792) (hereafter Report).

The Report included a list of siren sites in those areas selected by Guam's Office of Civil Defense (hereafter OCD) and a list of alternate locations. The spreadsheet entitled "Guam All Hazards Warning System Locations Recommended Siting for Phase One Installations," dated March 5, 2006, detailed the location, latitude, longitude, site elevation, and recommended siren models for each site. All the siren models listed were Whelen Engineering Company, Inc., models.

Despite it claiming to include "a cost estimate for installation based on discussions with 'Island contractors', cost estimates for recommended siren models, and cost estimate for design of a radio communications system to provide and retrieve signals to remote sites" no price or cost estimates were found in the Report.

Section 2.0 of the Report contained the following qualification: "Some details regarding installation options are not yet available due to time constraints of the potential contractors and will be provided in a final draft of this Report." A final draft of the Report is not contained in the Procurement Record.

As to installation, the Report provides in relevant part:

OCD prefers an installation plan similar to that of the systems operated by the U.S. Navy on Guam. That particular design includes a 55-foot concrete pole to mount the siren speakers, surrounded by a CMU fence designed to protect electronic cabinets and solar arrays.

Security of equipment from vandalism on the Naval installations are not the issue that it might be for remote sites on the rest of the island where there is no physical security for the site property. An option to provide a small concrete building to house electronics cabinetry and solar panels is included.

(from p.7, Section 4 of Report, emphasis added).

According to GSA's Procurement Record, specifications for the sole source procurements, in addition to the Report, are contained in the May 18, 2006, Transmittal Memorandum from SES to the OHS Planner, and in an undated, unsigned document entitled "All Hazards Warning System-Phase One A & B". The OHS Planner testified at the hearing that both specification documents were prepared by SES. Both documents state, in relevant part:

¹ Although documents evidencing the procurement of this assessment were not provided, testimony was given by the OHS Planner that the assessment was initiated by OHS via phone and followed up with SES physical site survey of Guam on February 23, 2006, for the purpose of compiling data for a report to the Guam OCD and OHS. This meeting was documented in SES Early Warning System assessment dated March 7, 2006.

In Conclusion the Contractor, S.E.S. USA INC, will supply a functional AHWS to Customer, Government of Guam, conforming to the abovementioned specifications in conformance with the Schedule. Systems will meet or exceed specifications of COMNAVMAR system and include five years of preventive maintenance and warranty...

(emphasis added).

A Price Quotation for All Hazards Warning System Phase One “A”, Phase One “B”, and Phase Two addressed to the OHS Planner, and dated May 23, 2006, for the amount of \$1,578,260, is also contained in the Procurement Record.

According to GSA, it received on June 23, 2006, a request from OHS to procure an All Hazards Warning System (Early Warning System), together with a justification for sole source procurement based on interoperability and standardization of the existing equipment currently used by the military and the entire island of Guam. *See* Agency Report, Item #8, p.2. Specifically, OHS’ memorandum, dated June 9, 2006, requested GSA to award contract to SES through sole source procurement, and provided:

The Guam Office of Civil Defense (OCD) has requested that S.E.S. USA, Inc., be awarded the contract due to their years of experience on Guam with the Andersen Air Force Base’s and ComNavMarianas’ ‘Whelen’ Siren Systems.

The OCD, aside from just witnessing how the S.E.S. USA, Inc., design worked and how the ‘Whelen’ Siren Systems of the military had withstood strong typhoons in the past years, is looking at interoperability and standardization of these systems with the military and the entire island of Guam.

Approval of the sole source procurements by GSA, evidenced by interoffice memorandums (forms) dated June 27, 2006 (for Req. No. Q060280193) and June 28, 2006 (for Req. No. Q060280194) stated:

Based on our review of this document, the sole source method of procurement is justified as follows:

Award based on the compatibility of equipment, accessories, or replacement parts.

Items, equipment or materials are standard and uniform to the government.

....

In view of the above, we have determined that the request by OFFICE OF THE GOVERNOR for the procurement of: ALL HAZARDS WARNING SYSTEM PHASE 1A-CY2006-I [and II], has met the test for sole source as stated in Section 3112 of the Guam Procurement Regulations. Therefore, this sole source

procurement is in the best interest of the Government of Guam and the taxpayers of Guam.

According to the Agency Report, GSA's review of the sole source request included review of the following:

1. Email dated June 21, 2006, addressed to the OHS Planner, from the Systems Administrator, the Command Naval Region Marianas Emergency Annunciation Tower that the existing or current equipment being utilized by the Navy is designed and built by SES. The Navy included the caveat that the email was in no way an endorsement nor promotes the services or products of both SES or Whelen Engineering Company, Inc.

2. SES memorandum² to GSA dated June 21, 2006, stating:

We wish to point out that it is vital for system to be supported, match and serviced with existing systems in Guam such as supplied to US AF and Navy.

In interest of safety for the people in Guam a mismatched supply of equipment would cause extreme problems. When critical demand necessary in an emergency does not allow for time to get spare parts or for technical personnel to learn how to service equipment.

SES USA IS THE ONLY COMPANY THAT CAN INTERFACE WITH THE WARNING SYSTEMS INSTALLED AT THE NAVAL BASE AND AIR FORCE BASE ON GUAM. . .

When installing equipment warrantee consideration factory training is vital to the success of entire system.

3. The Interim National Preparedness Goal issued March 31, 2005, and the Homeland Security Presidential Directive/HSPD-8 dated December 17, 2006, which also emphasized the importance of other Federal civilian departments and agencies, to establish and implement streamlined procedures for the ongoing development and adoption of appropriate first responder equipment standards that support nationwide interoperability and other capabilities consistent with the national preparedness goal, including the safety and health of first responders.

GSA issued two purchase orders - P066A06288 for \$535,814, and P066A06304 for \$204,000, relative to a Warning System to SES on June 27, 2006 and June 28, 2006. SES signed the POs on July 10, 2006.

²This memorandum was submitted as part of the Procurement Record by GSA on January 15, 2007; however, the memorandum was not cited in the CPO Decision on the protest nor was it submitted as part of the Procurement Record by OHS on December 29, 2006.

RadioCom learned of the procurements in question on or about November 29, 2006, and a protest was lodged against OHS and GSA on December 5, 2006, regarding both purchase orders on the following basis:

1. The award was not in compliance with the Guam Procurement Law, 5 GCA §5214, with respect to sole source procurement; and
2. The invitation to bid and any award of the contract was not in compliance with the Guam Procurement Law, 5 GCA §5008, regarding the policy in favor of local procurement or the procedures for competitive bidding.

RadioCom filed an appeal with the Office of the Public Auditor (hereafter OPA) on December 19, 2006, and served the same on GSA and OHS on the same date.

The CPO determined the protest was without merit on January 15, 2007.³ In response to Issue No. 1, the CPO Decision stated that the sole source procurement was justified based on:

...justification provided by the Guam Office of Homeland Security for interoperability and standardization of equipment, with the Naval and Air Force Bases here on Guam. To further justify the use of the sole source a copy of an email from the Command Naval Region Marianas indicating that the Naval Region is in fact still using the equipment provided by S.E.S., USA Inc. to ensure that the equipment requested by the Guam Office of Homeland Security is in fact still being used by the Naval and Air Force Bases here on Guam.

In addition, the HSPD8 under the Federal Preparedness Assistance on the topic of Equipment Item #14 indicates the importance of interoperability and other capabilities consistent with the national preparedness goal, including the safety and health of first responders and Item #15 indicates to the extent permitted by law, equipment purchased through Federal preparedness assistance for first responders shall conform to equipment standards in place at time of purchase. And the National Preparedness Goal under National Priorities 3.1.2 Expanded Regional Collaboration (page 11).

(emphasis added by CPO).

In response to Issue No. 2 of the protest, the CPO Decision stated:

The award was based on the justification provided by the Guam Office of Homeland Security to include the directive of the HSPD8

³ While the CPO Decision was dated January 9, 2007, it was received by RadioCom on January 15, 2007, or 41 days after the protest was filed, and 27 days after the appeal was filed.

and the National Preparedness Goal in ensuring the interoperability or compatibility of the existing equipments is the paramount consideration. Based on the existing equipments installed at the Naval and Air Force Bases a determination has been made for compatibility of existing equipments.

A copy of the Procurement Record was submitted by GSA to OPA on January 15, 2007.

RadioCom filed an Amended Notice of Appeal on January 29, 2007, on the same basis as the original appeal, and referencing the formal CPO Decision on the protest.

Hearing on this matter was held on February 9, 2007, pursuant to Notice of Hearing distributed to the parties and the media on January 30, 2007.

III. ISSUES ON APPEAL

RadioCom raised the following issues on appeal:

- A. Does the Public Auditor have jurisdiction of appeals relative to procurements utilizing federal funds?**
- B. Was CPO Decision that proper procedures were followed in processing the two purchase orders as sole sourced procurements consistent with applicable sole source procurement laws and regulations or an abuse of discretion?**
- C. Was CPO Decision that proper procurement procedures were followed in processing the two purchase orders consistent with statutes and regulations mandating preference for procurement from local businesses?**

IV. ANALYSIS AND FINDINGS

- A. The Public Auditor has jurisdiction over this appeal pursuant to Guam Procurement Law.**

The Public Auditor has *de novo* jurisdiction over appeals of decisions relative to protested solicitation or awards pursuant to §5425 and Article 12 of the Guam Procurement Law, found in Chapter 5 of Title 5, Guam Code Annotated. Jurisdiction over appeals of protest decisions relative to solicitation or awards is described in subsections (e) and (f) of 5 GCA §5425, which state in relevant part:

(e) Appeal. A decision under Subsection (c) of this Section including a decision thereunder regarding entitlement to costs as provided by Subsection (h) of this Section, may be appealed by the protestant, to the Public Auditor within fifteen (15) days after receipt by the protestant of the notice of decision.

(f) Finality. A decision of the [Public Auditor] is final unless a person adversely affected by the decision commences an action in the Superior Court in accordance with Subsection (a) of §5480 of this Chapter.

Neither the timeliness of the protest nor the timeliness of the appeal have been challenged; therefore the Hearing Officer finds that the appeal is timely pursuant to §5425(e). The Public Auditor's *de novo* jurisdiction over appeals is further described in 5 GCA §5703, which provides:

The Public Auditor shall have the power to review and determine *de novo* any matter properly submitted to her or him. The Public Auditor shall not have jurisdiction over disputes having to do with money owed to or by the government of Guam. Notwithstanding §5245 of this Chapter, no prior determination shall be final or conclusive on the Public Auditor or upon any appeal from the Public Auditor. The Public Auditor shall have the power to compel attendance and testimony of, and production of documents by, any employee of the government of Guam, including any employee of any autonomous agency or public corporation. The Public Auditor may consider testimony and evidence submitted by any competing bidder, offeror or contractor of the protestant. The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.

The parties were requested by the Hearing Officer at the pre-hearing conference to address at the hearing any jurisdiction issues related to the possibility that federal funds might be used for this procurement. On the day of the hearing, RadioCom verbally asserted that the Public Auditor did not have jurisdiction over procurements involving federal funds, but did not move to withdraw or dismiss its appeal, nor did it cite specific authority for that position. The Assistant Attorney General (hereafter Assistant AG) representing GSA had no objection to jurisdiction of the Public Auditor and made no objection to the applicability of any provision of the Guam Procurement Law to this procurement.

The OHS Grants Coordinator confirmed by his testimony at the hearing that OHS intended to use expiring federal funds to obtain the early warning system, and that there was no restriction associated with the funding to be used for the subject procurements that would exempt said procurements from compliance with the Guam Procurement Law. Documentation regarding the specific source of funding or the extent of any local component was not presented by either party. Nor was any conflicting federal law, regulation, or contract provision shown to apply to the funds.

5 GCA §5004(b) provides for the application of the Guam Procurement Law as follows:

(b) Application to Territorial Procurement. This Chapter shall apply to every expenditure of public funds irrespective of their source,

including federal assistance funds except as otherwise specified in §5501 of this Chapter, by this Territory, acting through a governmental body as defined herein, under any contract, except that this Chapter shall not apply to either grants or contracts between the Territory and another government. Nothing in this Chapter or in regulations promulgated hereunder shall prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

Exceptions to application of the Guam Procurement Law according to this section are federal assistance funds as specified in §5501, and grants between Guam and another government.

5 GCA §5501 authorizes compliance with federal law or regulation in the event of a conflict with local law, as follows:

§5501. Federal Funds.

Where a procurement involves the expenditure of federal assistance or contract funds, or other federal funds as defined by Section 20 of the Guam Organic Act, all persons within the government of Guam shall comply with such federal law and regulations which are applicable and which may be in conflict with or may not be reflected in this Chapter.

Pursuant to 5 GCA §5030(1) *grant* means the furnishing by the Territory of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services or construction; a contract resulting from such an award is not a grant but a procurement contract.

The Hearing Officer finds that the actions of the government to date with regards to the funds in question clearly show that the local administrator of those funds finds any federal restrictions on the funds to be consistent with the Guam Procurement Law or not a “grant” as defined in §5030(1). Without proof to the contrary, it is reasonable to rely on the determination of the administrator of those funds as having made said determination based upon examination of the source documents.

Although their application is unclear to the particular source of funds used for purchase of an early warning system, there are also federal regulations consistent with this determination. Part 13 of Subchapter A of Chapter I of Title 44 of the Code of Federal Regulations contains the Uniform Administrative Requirements For Grants and Cooperative Agreements To State and Local Governments. Subsection (a) of §13.36 of Subpart C of Part 13 provides:

(a) States. When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses

required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

In addition, subsection (b)(1) of §13.36 provides that “Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section”.

Accordingly, based on determination by the government representatives (the OHS Grants Coordinator, the CPO, and the Assistant AG) as to the application of the Guam Procurement Law to these procurements, and there being no conflicting federal regulation presented, the Hearing Officer finds the Public Auditor has jurisdiction as to the appeal pursuant to the Guam Procurement Law and an analysis on the merits is warranted.

B. Use of sole source exception to competitive bidding was not consistent with the Guam Procurement Law under these circumstances.

1. An independent assessment by GSA of the availability of product from other sources is required by 5 GCA §5214 and 2 GAR §3112.

RadioCom contends in its appeal that because it offers an early warning system, SES was not the only source for the system, in contravention of 5 GCA §5214 that requires an agency may only acquire goods or services through sole source procurement when the CPO determines in writing that there is only one source for the required supply, service or construction item. It is also undisputed that no public solicitation was done by OHS or GSA to determine if any other vendors could meet the specifications for an early warning system.

5 GCA §5210 specifies that contracts awarded pursuant to 5 GCA §5214 are exceptions to the requirement that all government contracts be awarded by competitive sealed bidding. §5214 provides:

§5214. Sole Source Procurement.

A contract may be awarded for a supply, service, or construction item without competition when, under regulations promulgated by the Policy Office, the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of either officer above the level of the Procurement Officer determines in writing that there is only one source for the required supply, service or construction item.

A CPO’s determination that there is only one source for the required supply is further governed by 2 GAR §3112, which provides, in relevant part:

(b) Conditions for use of Sole Source Procurement. Sole source procurement is not permissible unless a requirement is available

from only a single supplier. A requirement for a particular proprietary item does not justify a sole source procurement if there is more than one potential bidder or offeror for that item. The following are examples of circumstances which could necessitate sole source procurement:

- (1) where the compatibility of equipment, accessories, or replacement parts is the paramount consideration;
- (2) where a sole supplier's item is needed for trial use or testing;
- (3) where a sole supplier's item is to be procured for resale;
- (4) where public utility services are to be procured;
- (5) where supplies are offered through bankruptcy or receivership sales, or other disposition at lower than prevailing market prices.

The determination as to whether a procurement shall be made as a sole source shall be made by the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or designee of such officer. Such determination and the basis therefor shall be in writing. Such officer may specify the application of such determination and the duration of its effectiveness. In cases of reasonable doubt, competition should be solicited. Any request by a using agency that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.

(emphasis added).

The CPO's determination that only one source is available is final and conclusive unless clearly erroneous, arbitrary, capricious or contrary to Guam Procurement Law. *See* 5 GCA §5245. However, the Public Auditor's jurisdiction over appeals is *de novo*, notwithstanding 5 GCA §5245, and no prior decision by the CPO is binding. *See* 5 GCA §5703.

In this case, the CPO made a determination that the sole source request by the Office of the Governor/OHS for the procurement of an All Hazards Warning System had met the test as stated in 2 GAR §3112 and was in the best interest of the government of Guam and the taxpayers of Guam, based on two grounds:

1. Award based on the compatibility of equipment, accessories, or replacement parts; and
2. Items, equipment or materials are standard and uniform to the government.

See GSA Interoffice Memorandums (forms) dated June 27 and June 28, 2006 (Re: Requisition No. Q060280193 and Requisition No. Q060280194), Items # 9 and 10 in Agency Report.

The Hearing Officer finds that the second ground relied upon by the CPO (*standard and uniform to the government*) is vague, and not consistent with 2 GAR §3112 or 5 GCA §5214.

The CPO's justification on *compatibility* grounds was centered on OHS' request for sole source procurement, dated June 9, 2006, indicating that OHS was "looking at interoperability and standardization of these systems with the military and the entire island of Guam." Justification also relied on the HSPD-8 references to "interoperability" and "equipment standards in place at the time of purchase"; and the memorandum from SES on June 21, 2006, wherein it states that "interfacing" was necessary and that SES alone could interface with the military.

It is undisputed that there is no existing OHS or government of Guam equipment that will operate with the early warning system and that all references to "interoperability, standardization, and compatibility" by either GSA or OHS refer to compatibility with the military systems. However, the specifications for the procurement, as set forth by GSA in the Agency Report and Procurement Record include "systems that will meet or exceed specifications of COMNAVMAR system", and "an installation plan similar to that of the systems operated by the U.S. Navy on Guam". They do not include compatibility of equipment, accessories, or replacement parts.

In addition, the Hearing Officer finds that interfacing was not required by the specifications, but only became relevant during the course of justifying the sole source procurement, when GSA received a letter from SES indicating that interfacing was necessary, and that SES alone could interface with the military system.

At the hearing, testimony by the OHS Planner in charge of this project was convincing and supports a finding that there were no formal plans for interfacing or directly connecting Guam's early warning system with the military warning systems at the time of the purchase of this equipment. Potential advantages cited by OHS from interoperability included 1) that the military might be able to loan parts quicker than the government could obtain them in an emergency; 2) trained technicians that service the military equipment might be able to also service Guam's equipment when necessary; and 3) to prevent confusion over the different siren sounds from different equipment on and off base. These advantages or abilities were not addressed by the original specifications.

Based on the above, the Hearing Officer finds that neither compatibility nor interfacing were of paramount concern to the agency as required by §3112(b)(1). Use of the sole source method was not appropriate based on the *compatibility* grounds.

§3112 also requires that any request by a using agency that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need. While it was well documented that the military uses Whelen siren systems, the Hearing Officer finds that the record is devoid of any independent findings by GSA or OHS that the system offered by SES was exclusively compatible or interoperable with the military systems and that no other company's product would meet the needs as determined by the specifications. Further, a vendor's representation that it alone can provide a service or supply does not constitute adequate explanation by the using agency as to why no other will be

suitable or acceptable to meet the need, especially where the unique service or supply was not a part of the original specifications.

Pursuant to 5 GCA §5214 and 2 GAR §3112, GSA must make an independent assessment of the availability of potential suppliers based on appropriate methods, such as a survey of the local businesses, or inquiry with the using agency and other procuring entities as to any known interest in bidding for this or similar projects on Guam. It is unreasonable to rely on a single, unsupported statement by a vendor that it is the sole provider of equipment (that it does not manufacture) that will meet the needs of the government to the exclusion of all other businesses when that same vendor wrote the specifications, made the needs assessment, and is the sole bidder in an unsolicited procurement.

This need for an independent assessment by GSA of the availability of suppliers is especially pronounced under the current circumstances. Here, the requesting agency was fully aware that there was a local company interested in bidding on an early warning system; the local company had installed a similar system in Rota recently; and the Navy is entertaining proposals or requesting sirens from this same company to meet the standard of equal to or better than and compatible with their existing Whelen sirens. *See* Declaration of V.G. Borja, January 18, 2007.

An agency determination that a proposed contractor is the only source capable of meeting the technical needs of the agency is subject to close scrutiny but will not be overturned if the agency has properly justified its needs and there is a reasonable basis for its determination, *Mine Safety Appliances Co.*, Comp. Gen. Dec. B-233052, 89-1 CPD ¶ 127; *WSI Corp.*, Comp. Gen. Dec. B-220025, 85-2 CPD ¶ 626. However, when a responsible source has expressed interest in the procurement, the agency must make reasonable efforts to permit the source to compete, *Neil R. Gross & Co.*, 69 Comp. Gen. 292 (B-237434), 90-1 CPD ¶ 212.

Based on the above, the Hearing Officer finds that use of the sole source exception to competitive bidding was not consistent with §3112 under these circumstances.

2. The CPO must independently monitor Specifications used in sole source procurements.

5 GCA §5262(a) provides that:

§5262. Duties of the Chief Procurement Officer and Director of Public Works.

(a) The Chief Procurement Officer shall prepare, issue, revise, maintain and monitor the use of specifications for supplies and services required by the Territory.

In working with using agencies and when expert advice or assistance is necessary, 5 GCA §5264 provides:

§5264. Relationship With Using Agencies.

The Chief Procurement Officer and the Director of Public Works shall obtain expert advice and assistance from personnel of Using Agencies in the development of specifications and may delegate in writing to a using agency the authority to prepare and utilize its own specifications.

There is no evidence of delegation to the Office of the Governor/OHS the authority to prepare its own specifications. Even if the authority had been delegated to the using agency, delegation of this duty to the sole source vendor is inappropriate and must be monitored by GSA to prevent specifications in violation of the §5265 and §5268 of the Guam Procurement Law, which provides:

§5265. Maximum Practicable Competition.

All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the Territory's needs, and shall not be unduly restrictive.

§5268. Salient Features.

- (a) Specifications shall not include requirements, such as but not limited to restrictive dimensions, weights or materials, which unnecessarily restrict competition, and shall include only the essential physical characteristics and functions required to meet the Territory's minimum needs.
- (b) Purchase descriptions shall not specify a product having features which are peculiar to the products of one manufacturer, producer or distributor unless it has been determined in writing by the Director of the using agency that those particular features are essential to its requirements and specifying the reason that similar products lacking those features would not meet minimum requirements for the item.
- (c) Purchase descriptions shall describe the salient technical requirements or desired performance characteristics of supplies or services to be procured without including restrictions, which do not significantly affect the technical requirements or performance characteristics.

While the Procurement Record did not identify the drafter of the specifications,⁴ it was elicited at the hearing that the specifications were drafted by the sole source vendor, and did not expressly contain an interfacing requirement prior to the request for sole source procurement. The requirement for interfacing appears only in the sole source vendor's letter of June 21, 2006 to GSA to justify the procurement on a sole source basis.

⁴§5267. Publication of Source of Specifications.

The specifications contained in any invitation for bids or request for proposals, and any amendment thereto, for the procurement of supplies shall identify the person responsible for drafting the specifications and any persons, technical literature or manufacturer's brochures relied upon by the responsible person in drafting the specifications.

The sole source request from OHS did not meet the Director's burden in §5268(b) to determine in writing that the ability to interface is essential to the government's requirements when this peculiar feature was not included in the specifications or purchase descriptions. Neither did the sole source request letter or the SES memorandum specify the reason that similar products lacking the interfacing feature would not meet the minimum requirements for an early warning system.

Based on the above, GSA's determination that interfacing was a requirement and peculiar to SES was not consistent with §5268. In addition, §5262 and §5265 place the duty on the CPO to ensure that specifications requiring only one vendor, especially when written by that vendor, are monitored to ensure maximum competition.

3. The Procurement Record is insufficient for independent review of the sole source procurement.

The Hearing Officer finds that the Procurement Record is incomplete when examined in light of the requirements of 5 GCA §5249, which specifies:

§5249. Record of Procurement Actions.

Each procurement officer shall maintain a complete record of each procurement. The record shall include the following:

- (a) the date, time, subject matter and names of participants at any meeting including government employees that is in any way related to a particular procurement;
- (b) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement;
- (c) sound recordings of all pre-bid conferences; negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement;
- (d) brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications; and
- (e) the requesting agency's determination of need.

Based on testimony by the OHS Planner that this procurement was not an unsolicited offer by SES, it is evident that the records do not document all meetings or correspondence, or contain a log of communications with potential vendors or the chosen vendor. The author of the specifications is not readily apparent from the Procurement Record, and knowing this might have assisted GSA in reviewing the request for sole source. The Procurement Record submitted by GSA on January 15, 2007, differed from the records submitted by OHS on December 29, 2006, and differed from the documents provided to RadioCom prior to filing of the appeal.

It is also evident that the Procurement Record was not certified for completeness under penalty of perjury prior to the award. 5 GCA §5250 requires:

§5250. Certification of Record.

No procurement award shall be made unless the responsible procurement officer certifies in writing under penalty of perjury that he has maintained the record required by §5249 of this Chapter and that it is complete and available for public inspection. The certificate is itself a part of the record.

The CPO testified at the hearing that certification of the record was indicated on the Abstracts of June 27, 2006, and June 28, 2006 (*See* Item #6 of Agency Report). While the language of the abstracts⁵ is applicable towards compliance with 5 GCA §5232 and 2 GAR §3118(b) relative to pricing data, it is insufficient for the purposes of §5250.

In light of the above, the Hearing Officer finds that the award was made in contravention of §5250. GSA requires a different form for certification of the Procurement Record and should ensure that a complete record is maintained at all steps of the procurement process and accessible to review, notwithstanding the use of the sole source method, to support independent review of those specifications and the sole source procurement by the CPO.

C. Purchase from an off-island vendor was inconsistent with Guam Procurement Law mandating preference for local businesses.

RadioCom raises on appeal the issue of whether the CPO Decision on the protest was consistent with applicable laws and regulations favoring local procurement, specifically, 5 GCA §5008 and 2 GAR §1104.⁶ 5 GCA §5008 provides:

§5008. Policy In Favor of Local Procurement.

All procurement of supplies and services shall be made from among businesses licensed to do business on Guam and that maintain an office or other facility on Guam, whenever a business that is willing to be a contractor is:

- (a) a licensed bonafide manufacturing business that adds at least twenty-five percent of the value of an item, not to include administrative overhead, using workers who are U. S. Citizens or lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United State[s] to work, based on their former citizenship in the Trust Territory of the Pacific Islands; or
- (b) a business that regularly carries an inventory for regular immediate sale of at least fifty percent (50%) of the items of supplies to be procured; or
- (c) a business that has a bonafide retail or wholesale business location that regularly carries an inventory on Guam of a value of

⁵ “I certify that the foregoing statement of informal quotation is true and correct and prices charged are just, fair and reasonable, and the best obtainable for the described below.”

⁶ 2 GAR §1104 is essentially identical to 5 GCA §5008.

at least one half of the value of the bid or One Hundred Fifty Thousand Dollars (\$150,000) whichever is less, of supplies and items of a similar nature to those being sought; or

(d) a service business actually in business, doing a substantial portion of its business on Guam, and hiring at least 95% U. S. Citizens, lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United States to work, based on their citizenship in any of the nations previously comprising the Trust Territory of the Pacific Islands.

Procurement of supplies and services from off Guam may be made if no business for such supplies or services may be found on Guam or if the total cost F.O.B. job site, unloaded, of procurement from off island is no greater than eighty-five percent (85%) of the total cost F.O.B. job site, unloaded, of the same supplies or services when procured from a business licensed to do business on Guam that maintains an office or other facility on Guam and that is one of the above-designated businesses entitled to preference.

(emphasis added).

The Hearing Officer finds no dispute between the parties that SES is an off-island vendor of Whelen systems and sirens, and that RadioCom is a local vendor of another brand of early warning systems and sirens. There is no evidence in the record that any attempt was made prior to the procurement to determine if a local business for this particular supply or service existed, except for the assurance of the awardee that it is the only one. The record does not indicate that any price comparison was done in the course of this procurement between the awardee's product and the product of any local business.

The Hearing Officer agrees with the CPO that some needs of the government must be procured from off-island. However, these must be justified by a significantly lower price or by a determination that no business for such supplies or services may be found on Guam. See 5 GCA §5008. *Business* is defined in 5 GCA §5030(a) as any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.

In the CPO Decision on the protest, the CPO justifies procuring from an off-island vendor with the same justification used to justify the sole source procurement, i.e., compatibility of existing equipment. SES in its memorandum of June 21, 2006, assured GSA that SES is the only company that can "interface" with the military systems. That memorandum is the sole assessment on record of whether any business on Guam could provide an early warning system that was compatible with the military systems or could "interface" with the equipment installed on the Naval and Air Force Bases. There is no assessment on record of whether any businesses on Guam could meet the original specifications for the procurement.

The Hearing Officer finds that the CPO must make an independent assessment of the availability of on-island businesses based on a survey of the local businesses, inquiry with the using agency and other entities as to any known interest in bidding for this or similar projects, or examination of the vendors of record for similar items on Guam. It is unreasonable to rely on a single,

unsupported statement by a vendor that it is the sole provider of equipment (that it does not manufacture) that will meet the needs of the government to the exclusion of all local businesses when that same vendor wrote the specifications, made the needs assessment, and is the sole bidder in an unsolicited procurement. Nor is it reasonable to rely on assertions of uniqueness (ability to interface) when the specifications do not clearly mandate that feature.

This need for an independent assessment by GSA of an agency's need for off-island providers is especially pronounced under the current circumstances. Here, the requesting agency was fully aware that there was a local company interested in bidding on an early warning system; the local company had installed a similar system in Rota recently; and the Navy is entertaining proposals or requesting sirens from this same company to meet the standard of equal to or better than and compatible with their existing Whelen sirens. *See* Declaration of V.G. Borja, January 18, 2007.

The analysis relative to the sole source procurement are equally applicable and incorporated here.

The Hearing Officer finds that the purchase from an off-island vendor without assessing the price or availability of any other local vendors was inconsistent with 5 GCA §5008 under these circumstances.

It is noted that federal funding restrictions against the use of statutorily imposed local geographical preferences⁷ may affect the applicability of Guam's local preference statutes to procurements made with federal funds, although conflicting restrictions were not presented by the Office of the Attorney General in this case⁸. GSA and OHS will need to firmly ascertain federal restrictions if the project is re-bid, or seek approval to allow the local preference to be effective, as appropriate.

D. Limited remedies are available pursuant to 5 GCA §5452.

Having found that the solicitation or award of this contract is in violation of Guam Procurement Law, the Hearing Officer now looks to 5 GCA §5450 and §5452 for remedies available after an award.

§5450. Applicability of this Part.

The provisions of this Part apply where it is determined administratively, or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law.

⁷ For example, Subsection (c)(2) of the federal Department of Homeland Security's Uniform Administrative Requirements For Grants and Cooperative Agreements To State and Local Governments requires that

Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws...

44 C.F.R. §13.36.

⁸ See discussion on Jurisdiction in Part III, A of this Decision.

§5452. Remedies After an Award.

(a) If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) if the person awarded the contract has not acted fraudulently or in bad faith:

(i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Territory; or

(ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

(2) if the person awarded the contract has acted fraudulently or in bad faith:

(i) the contract may be declared null and void; or

(ii) the contract may be ratified and affirmed if such action is in the best interests of the Territory, without prejudice to the Territory's rights to such damages as may be appropriate.

(b) This Section shall be read as being in addition to and not in conflict with, or repealing 4 GCA §4137 (Prohibitions on the Activities of Government Employees).

Pursuant to §5452, a determination of whether the contractor acted in bad faith is relevant. RadioCom argued during the hearing that the contractor acted in bad faith, fraudulently submitting a backdated letter⁹ to GSA which stated that interfacing with the military was required and that SES was the only company that could interface. RadioCom argued that this behavior was especially fraudulent in light of interfacing not being a question with OHS prior to that letter, as evidenced by the specifications, and that the company is not the only vendor of Whelen brand systems. GSA denied these allegations.

The Hearing Officer finds that RadioCom has not met its burden of proof to support a finding of bad faith. 2 GAR §9104(a)(3) governs the determination of bad faith and provides:

(3) Finding of Bad Faith or Fraud. Bad faith or fraud shall not be assumed. Specific findings showing reckless disregard of clearly applicable laws or regulations must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or regulations.

Without a finding of bad faith by the vendor, the remedies available to the government pursuant to §5452(1) are:

⁹ This letter had cut off image on top and bottom and GSA did not produce the original document during the hearing to dispel these allegations.

- (i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Territory; or
- (ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

2 GAR §9106 provides further guidance on ratification versus termination where performance has begun, and where there is no finding of fraud or bad faith. It specifically provides that termination is the preferred remedy where the violation cannot be waived without prejudice to the territory or to other bidders, and lists the pertinent factors in determining the territory's best interest:

(3) If the violation cannot be waived without prejudice to the territory or other bidders or offerors and if performance has begun, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall determine in writing whether it is in the best interest of the territory to terminate or to amend, ratify, and affirm the contract. Termination is the preferred remedy. The following factors are among those pertinent in determining the territory's best interest:

- (i) the costs to the territory's best interest;
- (ii) the possibility of returning supplies delivered under the contract and thus decreasing the costs of termination;
- (iii) the progress made toward performing the whole contract; and
- (iv) the possibility of obtaining a more advantageous contract by resoliciting.

GSA through its attorney argued that the grant funds designated for the early warning system are expiring and that a ruling against the government would result in loss of the grant funds, and loss of an early warning system for Guam. The OHS Grants Coordinator presented evidence that it was applying for an extension of the grant; however, no evidence was presented as to whether the extension would be granted. Neither GSA nor OHS could provide evidence as to actual expenses reasonably incurred under the contract or reasonable profit. There was some speculation that some supplies had arrived in Guam already, but the status of the project could not be confirmed by anyone from OHS or GSA. The OHS Planner testified that the project was turnkey, but according to AS400 records from DOA as of February 7, 2007, the vendor was paid \$133,334 for P066A06288 (last payment date was December 19, 2006) and \$204,000 for P066A06304 on January 12, 2007.

The Hearing Officer finds that the relatively early progress of the contract might help defray termination cost, and the government might be able to obtain a more advantageous contract with competition in light of the circumstances surrounding this procurement, it would not serve the best interests of the government to ratify or affirm the contract. There is prejudice to the government and other bidders in the denial of competition, and it remains in the best interest of the government to protect the integrity of the procurement process.

The Hearing Officer finds that the contract may be terminated by GSA pursuant to §9106, which provides in pertinent part:

(d) Termination. Contracts based on awards or solicitation that were in violation of law shall be terminated at no cost to the territory, if possible, unless the determination required under Subsection 9106 of this Section is made. If the contract is terminated, the territory shall, where possible and by agreement with the supplier, return the supplies delivered for a refund at no cost to the territory or at a minimal restocking charge. If a termination claim is made, settlement shall be made in accordance with the contract. If there are no applicable termination provisions in the contract, settlement shall be made on the basis of actual costs directly or indirectly allocable to the contract through the time of termination. Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance were completed. Anticipated profits are not allowed.

In accordance with 2 GAR §9106, GSA should examine the actual costs, including the possibility of returning supplies delivered under the contract, and the possibility of obtaining a more advantageous contract by resoliciting, and shall terminate the contract at minimum cost to the government.

The Hearing Officer finds that interest costs may accrue on any termination costs pursuant to 2 GAR §9107 and should be avoided where possible.

Additionally, the Hearing Officer finds that §5425(h) is not applicable to RadioCom and it is thus not entitled to bid preparation costs or attorney's fees pursuant to the following:

§5425(h) Entitlement to Costs.

In addition to any other relief or remedy granted under Subsection (c) or (e) of this Section or under Subsection (a) of §5480 of this Chapter, including the remedies provided by Part B of Article 9 of this Chapter, when a protest is sustained, the protestant shall be entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, excluding attorney's fees, if:

(1) the protestant should have been awarded the contract under the solicitation but was not; or

(2) there is a reasonable likelihood that the protestant may have been awarded the contract but for the breach of any ethical obligation imposed by Part B of Article 11 of this Chapter or the willful or reckless violation of any applicable procurement law or regulation. The [Public Auditor] shall have the power to assess reasonable costs including reasonable attorney fees incurred by the government, including its autonomous agencies and public corporations, against a protestant upon its finding that the protest was made fraudulently, frivolously or solely to disrupt the procurement process.

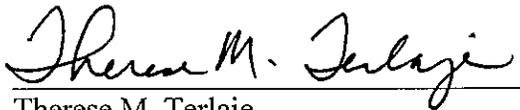
V. RECOMMENDATIONS

In accordance with 5 GCA §5701, the Hearing Officer makes the following recommendations:

1. That the CPO Decision that the protest was without merit be overturned as inconsistent with Guam Procurement Law on the following basis:
 - a. Use of the sole source procurement method was improper where the specifications and agency needs were not independently reviewed by GSA; and
 - b. An independent assessment of agency needs and the availability and pricing of businesses on Guam is mandatory before procurement of services and supplies from off Guam can be made.
2. That GSA obtain the assistance of the Office of the Attorney General to terminate the agreement with SES at minimum cost to the government in accordance with 2 GAR §9106, including negotiating with SES for recovery of the advanced payment, and a return of any delivered items to SES, where possible.
3. That no award be made absent proper and specific certification of the Procurement Record, and strict compliance with Procurement Record requirements of 5 GCA §5249 and §5250 at all steps of the procurement process, to include data relative to the development of specifications.
4. That prior to another award or re-solicitation of an early warning system, specifications for this project be closely monitored by the CPO to ensure maximum practicable competition; and competitive bidding procedures be used.

5. That the Public Auditor issue a written Decision¹⁰ on the appeal consistent with these findings and recommendations, and that a copy of the Decision be provided to the parties and their respective attorneys, in accordance with 5 GCA §5702, and be made available on the OPA Website www.guamopa.org.
6. That the Public Auditor inform all parties of their right to appeal within fourteen (14) days from a Decision by the Public Auditor to the Superior Court of Guam in accordance with Part D of Article 9 of 5 GCA Chapter 5.

Dated this 12th day of March 2007.



Therese M. Terlaje
Hearing Officer
Procurement Appeals
Office of the Public Auditor

¹⁰ 5 GCA §5704 provides that “[a]ny determination of an issue or a finding of fact by the Public Auditor shall be final and conclusive unless arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law. Any decision of the Public Auditor, including any determination regarding the application or interpretation of the procurement law or regulations, shall be entitled to great weight and the benefit of reasonable doubt, although it shall not be conclusive on any court having competent jurisdiction.”