

**CABOT
MANTANONA LLP**
Edge Building, Second Floor
929 South Marine Corps Drive
Tamuning, Guam 96913
Telephone: (671) 646-2001
Facsimile: (671) 646-0777

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

AUG 05 2011
TIME: 3:00 PM BY: AC
FILE NO. OPA-PA: 11-011

Attorney for Appellee, Guam Community College

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

In the Matter of Appeal of)	Docket Number: OPA-PA-11-011
PACIFIC DATA SYSTEMS, INC,)	
)	REBUTTAL TO APPELLANT'S
Appellant)	COMMENTS ON THE
)	AGENCY REPORT
)	
)	
)	
)	
)	

Appellee Guam Community College, (hereinafter "GCC"), by and through its attorney, Catrina M. Campana, of Cabot Mantanona LLP, respectfully submits this Rebuttal to Appellant's Comments on the Agency Report.

I. PDS' BID EXCEEDS AVAILABLE FUNDS

The PDS bid of \$307,880.50 exceeded the available funds by over \$22,000.00. As noted by PDS, GCC has stated that the entire purpose of IFB GCC-FB-015 was to save GCC money on phone services.

Subsequent to the January 12, 2011 OPA decision in OPA-PA-10-005, GCC reviewed the remaining bids by PDS and IT&E and rejected both of them because rejecting the bids was in the best interest of the territory.

The first reason GCC rejected the remaining bids in the IFB pursuant to 2 G.A.R. Div. 4 § 3115 (h)(A)(iv) is because the prices of the remaining bids exceed available ARRA funds.

The PDS bid of \$307,880.50 exceeds the available funds of \$285,000.00. The purpose of the IFB was to save GCC money on phone services. However, PDS repeatedly asserts that the PDS bid of \$307,880.50 does not exceed the available funds of \$285,000.00 because the cost of the new system should be considered **in combination** with the funding used by GCC for its existing telephone services.

GCC rejects the assertion that the total funding available for the new telephone system should be considered a sum that equals the total of the current funding for the existing telephone services in combination with the cost of existing telephone services. The purpose of the new telephone system is to replace the existing telephone services, thereby saving the territory money.

GCC provided documentation of both the amount of local funds and the \$285,000.00 of ARRA funds which were available to pay for the new VOIP telephone system. PDS submits a configuration of "available funds" which combines funds for the "New Telephone System" with the funds presently used for the "Existing Telephone System" to arrive at a sum of \$417,000.00, which according to PDS represents the "Total Funding Available" for this bid.

The inherent purpose of the new telephone system is to replace the existing system. GCC acknowledges that the new services and system would be inexorably linked, however, this does not justify speculative cost savings derived from an inflated "Total Funding Available" that does not conform to the bid funding available.

GCC rejects PDS' extrapolation of the numbers to come to the speculative conclusion that significant savings could be realized by GCC, if only the fact is ignored that on its face, the PDS bid exceeds the available funds of \$285,000.00.

2. GCC'S DETERMINATION THAT IT IS NOT APPROPRIATE TO ADJUST QUANTITIES TO COME WITHIN AVAILABLE FUNDS

PDS submits in their April 21, 2011 protest a revised bid based upon their assertion that GCC should have modified the bid quantities to conform to the available funds.

PDS states that it is "not true" that GCC made a determination, based on a review of the PDS bid, that it was not appropriate to adjust the quantities.

PDS appears to take the position that GCC's decision to not adjust the quantities to come within the bid limitations is inherently a violation of Guam Procurement Law.

GCC asserts that it is within GCC's discretion to review the bid to determine if an adjustment would be appropriate. GCC reviewed the bid and determined that it would not be appropriate to adjust the quantities in order to bring the PDS bid within available funds.

The PDS Protest of April 21, 2011 contained a "Revised Bid Form and Worksheet" which adjusts the original PDS bid of \$307,880.50 to a lower figure. As authority that the "Revised Bid Form and Worksheet" (prepared by PDS) must be accepted by GCC, PDS cites G.A.R. Div 4 § 3115(d)(2)(A)(iv) and the GCC Bid specifications detailed in GCC Amendment #3.

G.A.R. Div. 4 §3115(d)(2)(A)(iv) authorizes the head of a purchasing agency to reject a bid in whole or in part if the action is in the territory's best interest because the prices exceed the available funds and it would not be appropriate to adjust quantities to come within available funds. Rather than mandating GCC adjust the quantities, G.A.R. Div. 4 § 3115(d)(2)(A)(iv) explicitly authorizes GCC to reject a bid if the determination is made by the agency that it is not appropriate to adjust quantities.

Likewise, GCC's response to Question #1 in Amendment #3 states that "GCC reserves the right to increase or decrease quantity of items anywhere from 0 to 300 according to availability of funds". As stated in the April 7, 2011 rejection of all bids, GCC reviewed the bids and determined that modifying the quantities would not be appropriate.

PDS does not have the authority to force GCC to modify the quantities. While Amendment #3 reserves GCC's right to increase or decrease the quantity of items according to availability of funds, Amendment #3 **does not** grant PDS authority to unilaterally revise their bid nor does Amendment 3 grant PDS the right to force GCC to accept the unilaterally revised bid figures in its consideration of whether or not the PDS bid complied with available funds.

Amendment #3 and G.A.R. Div. 4 §3115 (d)(2)(A)(iv) reserve GCC's right to make this judgment call regarding modification of quantities. Subsequent to the Order of January 12, 2011, GCC reviewed the remaining bidders and made a determination that it was not appropriate to modify the quantities. Contrary to PDS' assertion that GCC's decision to not adjust the quantities represents a violation of Procurement Law, GCC's decision is aligned with both Guam law and the Bid specifications.

IV. THE SUPPLIES AND SERVICES ARE NO LONGER REQUIRED

Pursuant to 2 G.A.R. Div. 4 3115 (d)(2)(A)(i) GCC has decided to reject all bids because the supplies and services are no longer required. As stated in the April 7, 2011 letter, GCC received notice from GSA of a new IFB which would render IFB GCC-FB-015 redundant.

PDS speculates as to the operational specifications which could be provided by a future telephone service by GSA. There is no concrete justification for PDS's arguments.

V. THE PDS BID IS UNREASONABLE

GCC initially rejected the remaining bids in the IFB pursuant to 2 G.A.R. Div. 4 § 3115 (d)(2)(A)(v) because the proposal from PDS was for an unreasonable price. As per the January 12, 2011 Order GCC considered the remaining bidders.

The PDS bid of \$307,880.50 exceeded the available funds by over \$22,000.00. As noted by PDS, GCC has stated that the entire purpose of IFB GCC-FB-015 was to save the territory money. Switching to the new VoIP system under the bid would not be worth the cost. Therefore, rejecting the remaining bids in the IFB is in the best interest of the territory, as the PDS bid exceeds the available funds by an unreasonable amount on its face.

VI. GCC REJECTED THE BIDS IN ACCORDANCE WITH G.A.R. DIV. 4

GCC rejected the remaining bids in the IFB pursuant to 2 G.A.R. Div. 4 § 3115 (h)(A)(iv) because prices of the remaining bids exceed available funds and it would not be appropriate to adjust quantities to come within funds and because the supplies and services are no longer required. GCC has presented significant justification for the rejection of this bid.

VII. COMMENTS ON PDS' RELIEF REQUESTED

Contrary to PDS' assertion that GCC has not made a good faith effort to comply with the Order of the Public Auditor in the Decision of January 21, 2011 that "GCC shall consider the IFB's remaining bidders in accordance with Guam Procurement Law and Regulations", after the Public Auditor issued the decision disqualifying GTA's bid, GCC took action to comply with the decision by reviewing the remaining bids. The determination by GCC that it is in the best interest of the territory to reject the remaining bids conforms with the January 12, 2011 OPA decision in OPA-PA-10-005.

PDS' review of the record in this case and accusation of a "lack of action" by GCC makes no mention of GCC's April 22, 2011 Response to Appellant's Motion to Enforce Public Auditor's Decision, which reiterated that GCC was rejecting all remaining bids pursuant to 2 G.A.R. Div. 4 3115 (h)(A)(iv) because prices of the remaining bids exceed available funds and it would not be appropriate to adjust quantities to come within funds and because the supplies and services are no longer required. GCC's position that it is in the best interest of the territory to reject all remaining bids has not wavered.

In regards to the expiration of the ARRA funding, GCC is requesting that the ARRA funds be reprogrammed to other procurement projects that were underfunded and of a higher priority to GCC.

GCC respectfully requests that the Public Auditor dismiss this Appeal and award all legal and equitable remedies that GCC may be entitled to as a result.

Respectfully submitted this 5th day of August, 2011.

CABOT MANTANONA LLP
Attorney for Guam Community College

By:



CATRINA M. CAMPANA