

BEFORE OF THE OFFICE OF PUBLIC ACCOUNTABILITY

PROCUREMENT APPEAL

AUG 29 2011

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IN THE APPEAL OF

JOETEN DEVELOPMENT, INC.,

Appellant.

) DOCKET NO. OPA-PA-11-012

) MEMORANDUM OF POINTS AND

) AUTHORITIES RE: JOETEN

) DEVELOPMENT, INC., APPEAL

ARGUMENT

Upon review of the Agency's rebuttal to the comments on the Agency Report, one would see that once again there is no rationale to the cancellation of Invitation for Bid No. GSA-047-011 as was requested and was stated under the law. Instead, the agency goes on to speak about the rationale behind an agency's cancellation of bids. It goes further to state, p.2, fn 3, that the bid exceeded the funds allocated to the agency to cover the rental amounts due for August and September, since the lease expired on August 9, 2011. This statement is incorrect. Upon review of the agency's FY2011 budget, one would notice that there was \$1,244,849.00 appropriated for Office Space Rent. See Exhibit "A". This amount would easily cover the rental due even if the lease amount were at \$100,000.00 a month. The present rental amount is significantly less than what was appropriated. The proposed rental agreement also is significantly less than what the agency is presently paying. This FY2012 proposed budget for Office Space Rent for the Department of Revenue and Taxation is approximately \$1,075,420.00. Exhibit "B". This amount is the amount requested by the Agency. As of today, the budget has been passed by the Legislature and submitted to the Governor for his approval or veto. Even if the governor vetoed this budget and no budget was agreed upon, the previous year's budget would be utilized. Either way the amount budgeted far exceeds the bid proposal by the Appellant.

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2 The Agency further goes on to state that because there has been no funds
3 appropriated, as of this date, for Office Space Rental as no budget has been passed as of the
4 opening of the bids. This rationale is flawed. Under this thinking, there should never be any
5 contracts that extend past the fiscal year as there is never any monies appropriated for the
6 agencies until either the budget is passed or last year's budget is effective due to a veto by the
7 governor and no budget can be agreed upon by the legislature. One only needs to review the
8 last few weeks of the newspapers and you will see that numerous contracts are offered by the
9 government for a variety of services and equipment for a period over one year. Most, if not
10 all, are to be implemented prior to next year's budget being appropriated or passed. How is
11 this possible if there are no monies appropriated for the next fiscal year?
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14 On May 4, 2011 the Chief Procurement Officer, Claudia Acfalle sent a letter to Joeten
15 development Inc notifying it that the bid was cancelled in its entirety due to insufficient funds.
16 This was after the opening of the bid and the amount of the bid was announced. This is similar
17 to what happened in OPA-PA-07-009, In the Appeal of Pacific Security Alarm, Inc vs.
18 GMHA. This case involved an IFB whereas the agency chose to cancel the bid after the bids
19 were opened and the bid price made known to all. The decision in this matter held that an
20 agency can only "cancel" a bid prior to bid opening. After bid opening, an agency may only
21 "reject "all bids as a means of disposing of the solicitation. The decision went further to state
22 that the cancellation was void and thus it was up to the agency as to how to proceed with the
23 dealing of the bids.
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2 As was stated and stipulated to by the parties, the Agency intends to re-issue the bid
3 for Lease of Office Space with no changes to the bid, in an attempt to receive more bidders
4 and a lower price. One can deduce that obviously there is funds available if the agency if
5 going to attempt another IFB or RFP. This is a blatant and obvious attempt by the agency to
6 circumvent the procurement process and thus making the first bid in bad faith with an attempt
7 to perpetrate a fraud upon the bidders. If the agency would release an offer for bid, one could
8 believe that funds are available or will be available upon the awarding of the bid or even upon
9 the release of the IFB.
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11 2 GAR 9104 states the following in regards to whether there was as violation of the
12 law:

13 **§9104. Determination that Solicitation or Award Violates Law.**

14 (a) **Applicability of this Part.** The provisions of this Part apply
15 where it is determined administratively, or upon administrative
16 or judicial review, that a solicitation or award of a contract is in
violation of law (5 GCA §5450 of the Guam Procurement Act).

17 (1) Determination that Solicitation or Award Violates Law.

18 (2) **Determination.** A solicitation or award may be in violation
19 of the law due to actions of territorial employees, bidders,
20 offerors, contractors, or other persons. After consultation with
21 the Attorney General, the Chief Procurement Officer, the
22 Director of Public Works, or the head of a Purchasing Agency
may determine that a solicitation or contract award is in
violation of the provisions of the Guam Procurement Act.

23 After consultation with the Attorney General, the Policy Office
24 may determine that a solicitation or award violates 5 GCA
25 Chapter 5, Article 11 (Ethics in Public Contracting) of the
26 Guam Procurement Act or regulations promulgated hereunder.
27 Any such determination shall be made in writing after an
28 opportunity to be heard is given, and such determination is
subject to appropriate appeal. The courts designated in 5 GCA
§5480 (Waiver of Sovereign Immunity in Connection with

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2 Contracts) of the Guam Procurement Act, may find that a
solicitation or award is in violation of the law.

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4 **(3) Finding of Bad Faith or Fraud.** Bad faith or fraud shall not
5 be assumed. Specific findings showing reckless disregard of
6 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.

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8 Upon review of the facts, in this case the Appellant would argue that the facts support
9 a finding of Bad faith or Fraud on the part of the Agency. The Invitation for Bid, for a period
10 of three years with an option to renew for an additional two years, upon availability of funds,
11 was offered with no maximum amount stated, thus leaving all potential bidders to bid at any
12 price they deem appropriate. Then, after the bid is opened, the offerors now choose to
13 “cancel” the bid due to insufficient funds. On June 10, 2011, a letter from GSA goes on to
14 state that “Your Client’s bid proposal far exceeds the amount certified by the department.
15 However, as was explained and shown earlier the amount of the bid was covered by the
16 certified amounts in the budget of the Agency.
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19 Now the Agency argues that even if the OPA finds that there were enough certified
20 funds available that the cancelling of the bid was an appropriate action by GSA. See
21 Agency’s Rebuttal to the Comments. P.2.

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23 The agency goes further to state in their Rebuttal that if the “government receives only
24 one (1) bid in response to an invitation for bid”...an award may be made to the single bidder
25 if the Chief Procurement Officer finds the price submitted fair and reasonable...” Otherwise
26 the bid may be rejected Pursuant to the provisions of 3115.” The facts set out in the GSA
27 report shows that the bid was determined to be the most responsive and lowest bidder in this
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1 matter and sent the proposed contract to the Agency. It was then that the Agency "found out"
2 that there were not enough funds available to continue with the contract. What is most
3 disturbing is that in all the Agency's comments and reports that they have never shown any
4 documentation that verifies their assertion that they do not have the funds.
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7 The submitted bid is less than what they are currently paying today. No
8 circumstances have changed from the date of the bid offer to the opening of the bid to this
9 day. The space is needed, only one offer was received, and there are no other spaces available
10 for them to relocate. Even the Director has publically stated that he would like to remain in
11 the office space they currently reside in.
12

13 **Section 9106 states:**

14 **§9106. Ratification, Termination, or Cancellation of**
15 **Contract to Comply with the Law.**

16 ...

17 (a) No Fraud or Bad Faith by Contractor.

18 (b) **General.** Upon finding after award that a territorial
19 employee has made an unauthorized award of a contract or that
20 a solicitation or contract award is otherwise in violation of law
21 where there is no finding of fraud or bad faith, the Chief
22 Procurement Officer, the Director of Public Works, or the head
23 of a Purchasing Agency may ratify or affirm the contract or
24 terminate it in accordance with this Section after consultation
25 with the Attorney General.

24 (c) Ratification, and Affirmation.

25 (1) If the violation can be waived without prejudice to the
26 territory or other bidders or offerors, the preferred action is to
27 ratify and affirm the contract.

28 (2) If the violation cannot be waived without prejudice to the
territory or other bidders or offerors, if performance has not

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2 begun, and if there is time for resoliciting bids or offers, the
3 contract shall be terminated. If there is not time for resoliciting
4 bids or offers either formally, or informally under the
5 emergency authority, the contract may be amended
6 appropriately, ratified, and affirmed.

7 (3) If the violation cannot be waived without prejudice to the
8 territory or other bidders or offerors and if performance has
9 begun, the Chief Procurement Officer, the Director of Public
10 Works, or the head of a Purchasing Agency shall determine in
11 writing whether it is in the best interest of the territory to
12 terminate or to amend, ratify, and affirm the contract.
13 Termination is the preferred remedy.

14 The following factors are among those pertinent in determining
15 the territory's best interest:

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

23 (d) **Termination.** Contracts based on awards or solicitations
24 that were in violation of law shall be terminated at no cost to the
25 territory, if possible, unless the determination required under
26 Subsection 9106 of this Section is made. If the contract is
27 terminated, the territory shall, where possible and by agreement
28 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.

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(c) **Ratification and Affirmation.** The contract shall not be modified, ratified, and affirmed unless it is determined in writing that there is a continuing need for the supplies, services, or construction under the contract and:

- (1) there is no time to reward the contract under emergency procedures or otherwise; or
- (2) the contract is being performed for less than it could be otherwise performed.

As stated previously the Appellant here did nothing wrong or in violation of the law. The Agency has attempted to cancel this bid due to many reasons that have all been debunked as to their credibility. The funds are there. The bidder is the sole and deemed to be the only responsive bidder. The Appellant would urge the OPA to ratify the contract, as there still exists a need for the space, as can be attested to by the Agency's desire to re-bid as soon as possible. This is in the best interest of the government. No one can foresee what any of the next bids will be or if there will even be any more bidders than the last one. The next bids could be significantly higher and then what? Will the agency then move to cancel the bid?

The OPA can look at the Federal Acquisition Regulation to see that they clearly mirror the regulations set out on Guam and show the intent to affirm contracts after they have been opened.

The Federal Acquisitions Regulations provides:

14.404-1 Cancellation of invitations after opening.

(a)(1) Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.

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(2) Every effort shall be made to anticipate changes in a requirement before the date of opening and to notify all prospective bidders of any resulting modification or cancellation. This will permit bidders to change their bids and prevent unnecessary exposure of bid prices.

(3) As a general rule, after the opening of bids, an invitation should not be cancelled and resolicited due solely to increased requirements for the items being acquired. Award should be made on the initial invitation for bids and the additional quantity should be treated as a new acquisition.

(b) When it is determined before award but after opening that the requirements of 11.201 (relating to the availability and identification of specifications) have not been met, the invitation shall be cancelled.

(c) Invitations may be cancelled and all bids rejected before award but after opening when, consistent with subparagraph (a)(1) of this section, the agency head determines in writing that—

(1) Inadequate or ambiguous specifications were cited in the invitation;

(2) Specifications have been revised;

(3) The supplies or services being contracted for are no longer required;

(4) The invitation did not provide for consideration of all factors of cost to the Government, such as cost of transporting Government-furnished property to bidders' plants;

(5) Bids received indicate that the needs of the Government can be satisfied by a less expensive article differing from that for which the bids were invited;

(6) All otherwise acceptable bids received are at unreasonable prices, or only one bid is received and the contracting officer cannot determine the reasonableness of the bid price;

(7) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith (see

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2 Subpart 3.3 for reports to be made to the Department of
Justice);

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4 (8) No responsive bid has been received from a responsible
bidder;

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6 (9) A cost comparison as prescribed in OMB Circular A-76 and
Subpart 7.3 shows that performance by the Government is more
economical; or

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8 (10) For other reasons, cancellation is clearly in the public's
interest.

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10 (d) Should administrative difficulties be encountered after bid
opening that may delay award beyond bidders' acceptance
11 periods, the several lowest bidders whose bids have not expired
(irrespective of the acceptance period specified in the bid)
12 should be requested, before expiration of their bids, to extend in
writing the bid acceptance period (with consent of sureties, if
13 any) in order to avoid the need for resoliciting.

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15 (e) Under some circumstances, completion of the acquisition
after cancellation of the invitation for bids may be appropriate.

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17 (1) If the invitation for bids has been cancelled for the reasons
specified in subparagraphs (c)(6), (7), or (8) of this subsection,
and the agency head has authorized, in the determination in
18 paragraph (c) of this subsection, the completion of the
acquisition through negotiation, the contracting officer shall
19 proceed in accordance with paragraph (f) of this subsection.

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21 (2) If the invitation for bids has been cancelled for the reasons
specified in subparagraphs (c)(1), (2), (4), (5), or (10) of this
subsection, or for the reasons in subparagraphs (c)(6), (7), or (8)
22 of this subsection and completion through negotiation is not
authorized under subparagraph (e)(1) of this subsection, the
23 contracting officer shall proceed with a new acquisition.

24
25 (f) When the agency head has determined, in accordance with
paragraph (e)(1) of this subsection, that an invitation for bids
should be canceled and that use of negotiation is in the
26 Government's interest, the contracting officer may negotiate (in
accordance with Part 15, as appropriate) and make award
27 without issuing a new solicitation provided—
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2 (1) Each responsible bidder in the sealed bid acquisition has
3 been given notice that negotiations will be conducted and has
4 been given an opportunity to participate in negotiations; and

5 (2) The award is made to the responsible bidder offering the
6 lowest negotiated price.

7 In this case the agency states that there is no monies to pay for the contract. However,
8 as shown by the Appellant, monies have and will be provided to the Agency to cover the bid
9 offer. To determine the reasonableness of the price made in the offer, the GSA need only
10 look at the rates around the area or use an appraiser to determine the appropriate rate. This
11 should have been done prior to the bid offer and is unreasonable to disqualify an offer without
12 any justification. This has been the Appellant's position throughout these proceedings.

13 26 GARR 16316 states:

14 (2) After Opening,

15 (A) After opening, but prior to award, all bids or proposals may
16 be rejected in whole or in part when the Chief Procurement
17 Officer, the Director of Public Works, or the head of the
18 Purchasing Agency determines in writing that such action is in
19 the territory's best interest including, but not limited to:

20 (i) the supplies, services, or construction being procured are no
21 longer required;

22 (ii) Ambiguous or otherwise inadequate specifications were
23 part of the solicitation;

24 (iii) the solicitation did not provide for consideration of all
25 factors or significance to the territory;

26 (iv) prices exceed available funds and it would not be
27 appropriate to adjust quantities to come within available funds;

28 (v) all otherwise acceptable bids or proposal received are at
clearly unreasonable prices; or

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(vi) there is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, and may have been submitted in and faith.

No statement has been provided to Joeten stating that it would not be in the best interest of the Government to accept the proposed bid for lease of space. It is obvious that the space is needed and not only needed but a necessity for the government of Guam to continue its work for the betterment of the people of Guam. There was no ambiguity or inadequate specification when the bid was announced and as of today no one exists.

No factors had been presented and the need for the space has not diminished in any way since the request for bid and up to the present time. As to the price exceeding the available funds, as stated earlier, the bid is significantly less than the lease price the agency is paying today. The proposed price is within the industry standard for the area and place. The budget for the agency actually reflects a significantly higher amount appropriated for the lease of office space than what was submitted. Lastly, there has been no assertion that any collusion had occurred prior to or after the bidding process.

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CONCLUSION

Upon review of the Agency's reports, there is no justification or explanation as to why the bid was rejected. Here the Appellant shows to the OPA that the argument of the Agency is flawed. Joeten Development Inc is the only responsive as well as the lowest bidder and has meet all the requirements to qualify to be awarded this contract, under Guam law as well as the rationale used under the Federal mandates. Thus Joeten Development Inc. should be awarded the bid as per the context of the proposal.

Respectfully submitted this 29th day of August 2011.

The Law Office of John C. Terlaje, P.C.
Attorney for Appellant Joeten Development, Inc.

By: 
JOHN C. TERLAJE.

Government of Guam
Fiscal Year 2011 Budget
Program Budget Digest

[BBMR BD-1]

Function: Revenue and Taxation
Agency: Department of Revenue and Taxation
Program: SUMMARY

Budget Account Code	Appropriation Classification	FY 2009 Expenditures & Encumbrances	FY2010 Authorized Level	FY 2011			
				General Fund	Federal Fund(s)	Other Fund/1	Total Req. (C+D+E)
PERSONNEL SERVICES							
111	Regular Salaries/Increments/Special Pay	5,075,014	6,473,421	6,105,866	-	478,225	6,584,091
112	Overtime	112,040	149,979	200,000	-	11,370	211,370
113	Benefits	1,535,678	1,905,095	2,113,645	-	173,674	2,287,319
114	Insurance Benefits (Medical / Dental / Life)	-	247,217	-	-	-	-
	TOTAL PERSONNEL SERVICES	6,722,732	8,775,711	8,419,511	-	663,269	9,082,780
OPERATIONS							
220	TRAVEL-Off-Island/Mileage Reimbursement	-	-	-	-	8,500	8,500
230	CONTRACTUAL SERVICES:	1,464,973	1,542,232	-	-	1,480,095	1,480,095
233	OFFICE SPACE RENTAL:	1,087,782	1,132,200	1,244,849	-	-	1,244,849
240	SUPPLIES & MATERIALS:	42,424	50,000	-	-	137,730	137,730
250	EQUIPMENT:	-	25,000	-	-	-	-
271	DRUG TESTING	675	1,000	1,000	-	-	1,000
290	MISCELLANEOUS	-	250,000	-	-	-	-
	TOTAL OPERATIONS	2,595,855	3,000,432	1,245,849	-	1,626,325	2,872,174
UTILITIES							
361	Power	-	-	-	-	-	-
362	Water/Sewer	-	-	-	-	-	-
363	Telephone/Toll	69,570	113,764	-	-	113,764	113,764
	TOTAL UTILITIES	69,570	113,764	-	-	113,764	113,764
701	GRAND TOTALS	-	-	-	-	-	-
450	GRAND TOTALS	-	-	-	-	-	-
	TOTAL OPERATIONS	9,388,156	11,889,907	9,665,360	-	2,403,358	12,068,718
	1/ Better Public Service Fund (\$1,585,109)						
	Tax Collection Enhancement Fund (\$818,249)						
	UNCLASSIFIED	8	8	8	-	-	8
	CLASSIFIED	133	162	152	-	14	166

(i) DEPARTMENT OF REVENUE AND TAXATION
SUMMARY OF BASE OPERATIONAL APPROPRIATION

APPROP. CLASS	OBJ. CLASS	GEN FUND	SPCL FUND	TOTAL
REG SALARIES	111	\$5,900,873	\$273,807	\$6,174,680
OT/SP	112	\$0	\$0	\$0
BENEFITS	113	\$1,800,443	\$85,946	\$1,886,388
TRAVEL/MIL	220	\$0	\$9,500	\$9,500
CONT. SERV.	230	\$0	\$1,367,097	\$1,367,097
OFF. RENTAL	233	\$1,059,635	\$15,785	\$1,075,420
SUP. & MAT.	240	\$8,201	\$61,075	\$69,276
EQUIPMENT	250	\$0	\$0	\$0
WORK. COMP.	270	\$0	\$0	\$0
DRUG-TEST	271	\$1,500	\$0	\$1,500
SUBGRANT	280	\$0	\$0	\$0
MISC	290	\$0	\$0	\$0
POWER	361	\$0	\$0	\$0
WATER/SEWER	362	\$0	\$0	\$0
PHONE/TOLL	363	\$0	\$101,400	\$101,400
CAP. OUTLAY	450	\$0	\$0	\$0
GRAND TOTAL		\$8,770,652	\$1,914,610	\$10,685,262

Better Public Service Fund \$1,422,747 (220 - \$9,500; 230 - \$1,367,097; 240 - \$46,150)

Tax Collection Enhancement Fund \$491,863 (111 - \$273,807; 113 - \$85,946; 233 - \$15,785; 240 - \$14,925; 363 - \$101,400)

1 SUMMARY OF BASE OPERATIONAL APPROPRIATION FUNDING
2 SOURCE

3	GENERAL FUND	\$8,770,652
4	FEDERAL MATCHING GRANTS-IN-AID	\$0
5	SPECIAL FUNDS	<u>\$1,914,610</u>
6	TOTAL	\$10,685,262

7 (1) Personnel Costs for the Department of Revenue and Taxation.
8 The sum of Seven Hundred Twenty-Six Thousand One Hundred Ninety-Five
9 Dollars (\$726,195) is appropriated from the General Fund to the Department of
10 Revenue and Taxation (DRT) in Object Class 111 and the sum of Two Hundred
11 Forty-Two Thousand Sixty-Five Dollars (\$242,065) is appropriated from the
12 General Fund to DRT in Object Class 113 for the payment of personnel costs at
13 DRT.

14