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 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS

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Attorneys for the Government of Guam (People of Guam)

**THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

IN THE APPEAL OF:)	DOCKET NO. OPA-PA-15-010
)	
GUAM PACIFIC ENTERPRISES INC.)	
)	MOTION TO DISMISS
Appellant.)	
)	

Comes now, the General Services Agency, represented by the Office of the Attorney General of Guam, and hereby moves for this appeal to be dismissed. This motion is made pursuant to the arguments included below.

Facts:

Appellant has set forth in its Form and Filing a statement promoting its argument, which appears to be comprised of the following contentions:

1. GPE's bid was rejected due to not meeting the delivery time required.
2. GPE was the lowest bidder that met the specifications.
3. GPE should have been awarded the bid in the public interest.
4. There is no need for the delivery requirement to be 30 days.

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5. Other bids have been cancelled for lack of participation, with the unfounded presumption that it is because of delivery requirements.

Argument:

Even assuming all the facts asserted by the appellant are correct, which they are not, there are still no legal grounds for this appeal to succeed.

1. Delivery date is a major bid component

The time for delivery is not an insubstantial part of a bid. Delivery date is in fact one of the critical, material bid components. The procurement process is lengthy and subject to many delays. And the government retains the option to modify the delivery time to fit its needs - there are times when delivery must be quick, whether it's to use funds that may expire soon, or to meet the immediate needs of a particular agency. It is the government, not the bidders, that choose the time for delivery, for incredibly obvious reasons. Because it is the government that is making the award. Because it is the government that knows the particular needs of its agencies. Because it is the government that balances out the need for haste with the need for a wide range of potential bidders.

2. The best interest of the Government of Guam is actually decided by the Government of Guam, not losing bidders

Another obvious point that is seemingly lost on the appellant is that the ability of the Government of Guam to make modifications to the bid in its best interest is not subject to outside opinion. One primary reason for this is because there can be an infinite number of outside opinions as to what the best course should be for the government, none of which have the necessary information to make that determination. The exclusive right of the government to make the determination what's best for it is because the government knows the budget, knows the needs of the agency, knows the potential for bids, and knows the market for the services.

3. GPE was not even the lowest bidder

Despite GPE's assertion to the contrary, its bid was nearly 150% of the lowest bidder, Westsource, MSM. The bid of Westsource, MSM was \$11,644.14, compared to GPE's \$17,279.94. This is not an insubstantial amount, such as the \$450.06 between GPE's bid and the accepted bid of Sunleader DBA: Guam Modern Office. Even if the government were to ignore the delivery date material bid component entirely, GPE would not be the winning bid. And if GPE had attempted to win the bid and accept penalties for late delivery, the combined price of the bid plus the penalties would be greater than the winning bid. If expedited shipping is required for a bidder to submit a complying bid, then the solution is for the bidder to make that cost part of the bid, not to submit a non-compliant bid and then protest a disqualification.

4. There is no requirement that GovGuam provide rational bases for each and every term of the bid

GPE demands that the government expand its delivery date, that there is no reason for the government to need the cabinets in the time frame required for compliance. That determination, like the best interest determination, is exclusive to the government. This is because agencies make the decision to structure the bid to fit their needs, and know how it will affect the bid. The time to question the terms is not post-bid, but rather prior to the submission of bids, where the agency can decide whether to modify the terms or to keep them as-is, with notice to all interested parties.

5. The status of other bids has no relevance to this bid, and even if it did, only one bid has been rejected due to not meeting the delivery requirements as stated in the IFB, GSA 076-015.

Contrary to GPE's assertion, only one other bid this year has been rejected due to delivery requirements. There is no evidence proffered to show that other miscellaneous cancellations are because of delivery requirement issues. Not that any of this has any bearing

on the current bid, especially given that the delivery requirements of this bid were actually met by one bidder. This is not "impossible to meet", as GPE proclaims, as one company has actually done so. These aren't unreasonable conditions. If a company is not able to meet the material conditions of the bid, the simple solution is not bidding. A secondary solution is to petition for a change to the bid conditions prior to the bidding. The solution is not to make a non-compliant bid and then appeal on the basis that you think you know what the government ought to do or have done.

This appeal is baseless. Appellant has cited to no legal authority to support his claim, and has instead attempted to subpoena the entire General Services Agency in what can only be conceived as a punitive measure for not using its power, "in the public interest," to award the bid to a non-compliant, non-lowest bid. It is a complete waste of the government's resources, time, and money.

Based on the foregoing, the General Services Agency, represented by the Office of the Attorney General, moves to dismiss this appeal in its entirety.

Dated this 3rd day of November, 2015.

OFFICE OF THE ATTORNEY GENERAL

Elizabeth Barrett-Anderson

By:



NICOLAS TOFT
Assistant Attorney General