

1 **KELLY O. CLARK, ESQ.**
2 GWA General Counsel
3 Guam Waterworks Authority
4 Gloria B. Nelson Public Service Bldg.
5 688 Route 15
6 Mangilao, GU 96913
7 Telephone: (671) 300-6853

8 *Attorney for the Guam Waterworks Authority*

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 09.29.16
TIME: 11:10 AM PM BY: JM
FILE NO OPA-PA: 16-013

9 **BEFORE THE OFFICE OF THE PUBLIC ACCOUNTABILITY**

10 IN THE APPEAL OF) APPEAL NO.: OPA-PA-16-013
11)
12 IP&E Holdings, LLC,) **SUBMISSION OF**
13) **AGENCY REPORT**
14 Appellant.)
15)

16 **COMES NOW**, GUAM WATERWORKS AUTHORITY (GWA), the purchasing agency
17 in this matter, by and through its attorney, KELLY O. CLARK, ESQ., hereby submits the
18 following exhibits pursuant to 2 GAR §12105:

19 a. A copy of the protest.

20 *A copy of the protest is included in the Procurement Record as Tab 28.*

21 b. A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer
22 that is being considered for award or whose bid or offer is being protested, if any had been
23 submitted prior to the protest.

24 *A copy of the Appellant's bid is included in the Procurement Record as Tab 14.*

25 c. A copy of the solicitation, including the specifications or portions thereof relevant
26 to the protest.

1 *A copy of GWA IFB 2016-09 is included in the Procurement Record as Tab 13*
2 *and a copy of Amendment No. 1 as Tab 6.*

3
4 d. A copy of abstract of bids or offers or relevant or portions thereof relevant to the
5 protest.

6 *A copy of the abstract of bidders is included in the Procurement Record as Tab*
7 *18.*

8
9 e. Any other documents which are relevant to the protest; including the contract, if
10 one has been awarded, pertinent amendments, and plans and drawings.

11 *None.*

12
13
14 f. The decision from which the Appeal is taken, if different than the decision
15 submitted by Appellant.

16 *None.*

17
18 g. A statement answering the allegation of the Appeal and setting forth findings,
19 actions, and recommendations in the matter together with any additional evidence or information
20 deemed necessary in determining the validity of the Appeal. The statement shall be fully
21 responsive to the allegations of the Appeal.

22 *Exhibit 1 GWA's Agency Statement*

23
24 h. If the award was made after receipt of protest, the report will include the
25 determination required under 2 GAR §9101(e).

26 *Not applicable.*

27
28
29 i. A statement in substantially the same format as Appendix B to this Chapter,
30 indicating whether the matter is subject of a court proceeding.

Exhibit 2 Declaration Regarding Court Action

Dated this 29th day of September, 2016.

Respectfully submitted,

GUAM WATERWORKS AUTHORITY (GWA)

By:  _____
KELLY O. CLARK, ESQ.
GWA General Counsel

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EXHIBIT 1

1 **KELLY O. CLARK, ESQ.**
2 General Counsel
3 Guam Waterworks Authority
4 Gloria B. Nelson Public Service Bldg.
5 688 Route 15
6 Mangilao, GU 96913
7 Telephone: (671) 300-6853

8 *Attorney for the Guam Waterworks Authority*

9 **BEFORE THE OFFICE OF THE PUBLIC ACCOUNTABILITY**

10 IN THE APPEAL OF) APPEAL NO.: OPA-PA-16-013
11)
12 IP&E Holdings, LLC,) **AGENCY STATEMENT**
13)
14 Appellant.)
15)

16 **COMES NOW**, the GUAM WATERWORKS AUTHORITY (“GWA”), by and through
17 KELLY O. CLARK, ESQ., and hereby files its Agency Statement pursuant to 2 Guam
18 Administrative Rules and Regulations (“GAR”) § 12105(g) in response to the appeal of GWA IFB
19 2016-09 filed by IP&E Holdings, LLC “Appellant”.

20 **I. BACKGROUND.**

21
22 On September 7, 2016, GWA opened the bids on an IFB designed to secure a fuel contract
23 from October 2016 to October 2019 along with two one-year extensions. In that IFB, GWA set
24 forth estimated quantities in the IFB to be 50,000 gallons of diesel and 115,000 gallons of regular
25 gasoline. When bids were opened it was clear there were two bidders very close to each other; one
26 being the Appellant and the other being the successful bidder or “Awardee.” Appellant’s diesel
27 price was \$1.32 per gallon while it’s gasoline price was \$1.53 per gallon. Awardee’s diesel price
28 was \$1.34 and its gasoline price was \$1.52 per gallon.
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1 The Shell Oil licensee on Guam and has continually been the fuel provider for GWA since
2 2007. More recently, Appellant, as the Shell licensee, has been supplying all fuel purchased by
3 GWA under the Second Amendment to Contract for IFB no. GWA 2011-15 dated September 28,
4 2015 which was an extension of the original Fleet Fuel Supply Contract that expired on December
5 30, 2011.
6
7

8 In order to determine low bidder in a solicitation that was split and within pennies, GWA
9 looked at several different formulas and approaches to the bid numbers and how each approach
10 might lead to the bid most advantageous to GWA. One option was to use the estimated quantities
11 and award to a single provider. Another option was to use the estimated quantities and split the
12 contract between fuel types and have a supplier for diesel and another for gasoline. Another, which
13 happens to be the one that GWA determined was in its best interest, was to have a single provider
14 and to input GWA's actual usage along with the predicted trend of fuel usage going forward over
15 the life of the contract. This formula option was based on a rational application of GWA empirical
16 financial figures and was not in any way designed to prejudice one bidder over the other.
17
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20 II. DISCUSSION

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22 In its procurement appeal, Appellant states that GWA was "required to use the estimated
23 quantities provided in the IFB for evaluation." In fact, there is no language in the IFB stating that
24 the estimated quantities will be used as part of the evaluation criteria. Under paragraph 6 of the
25 IFB, "the awarded contract will be made by GWA to the lowest responsive and responsible bidder
26 whose bid conforms to the invitation for bids and *would be most advantageous to GWA*" and that
27 "GWA reserves the right to award the Contract to a vendor *other than the lowest price offeror.*"
28
29 (emphasis added)
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1 The estimated quantities were provided for two purposes: 1) to allow the bidders to bid
2 intelligently; and 2) to allow the agency to evaluate proposals on a relatively equal basis. The
3 two lowest bids could hardly be more equal. The bid numbers for the two lowest bidders were
4 disparate between the two fuel types specified in the IFB. Appellant's diesel price was \$.02
5 lower than the successful bidder however, Appellant's regular unleaded price was \$.01 higher
6 than the successful bidder.
7

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9 Appellant's apparent position is that if the IFB contained actual usage figures as the
10 estimated quantities, Appellant would have used a price different than offered in its bid. Using
11 standard business practices to determine a different bid price based on a lower quantity, the new
12 price should have been higher. Under normal circumstances with regards to fuel bids, the lower
13 the volume, the higher the price. Further, GWA did not use actual usage as the sole determining
14 factor in its criteria. GWA also used trends and how GWA's infrastructure changes over the
15 next few years would impact gasoline usage over the life of the Contract.
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18
19 Actual fuel usage by GWA over the past three years shows a trend down in diesel usage
20 and GWA's gasoline consumption also dropped over the last couple of years as well. Those
21 trends appears to have levelled off but, gasoline usage is expected to climb somewhat over the
22 next several years due to expanded capital improvement projects coming on-line. Therefore, a
23 lower gasoline price from a single provider is more advantageous to GWA over the life of the
24 contract and its potential extensions. While no party to this procurement appeal has a crystal
25 ball, GWA contends that to award the contract on the method it used is not arbitrary but, a
26 reasonable and rational approach entirely within its discretion.
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1 Appellant fails to show that it was prejudiced by the evaluation criteria used in
2 determining the lowest price that was the most advantageous to GWA. Being the incumbent
3 supplier, Appellant has known the actual gallons bought each and every day by GWA since
4 2011. While the successful low bidder was not privy to that information, Appellant undeniably
5 was. One would assume the Appellant considered the information it had in its files showing
6 actual GWA consumption and usage trends over the past five years as a part of formulating its
7 bid pricing.
8
9

10 III CONCLUSION

11
12 It is GWA's position that whether it used an actual and trending usage formula or the
13 estimated quantities formula, Appellant's numbers would have either been the same or higher in
14 its bid. Most importantly, the award criteria set forth in the IFB states the Contract will be made
15 to the lowest responsive and responsible bidder whose bid *would be the most advantageous to*
16 *GWA in terms of price and all other factors* while expressly reserving the right to award the
17 Contract to a bidder *other than the lowest price offeror*.
18
19

20
21 **WHEREFORE**, GWA respectfully requests that the appeal of IP&E be denied and that
22 the Public Auditor grant all legal and any further equitable relief it deems appropriate.

23 **RESPECTFULLY SUBMITTED** this 29th day of September, 2016.

24 **GUAM WATERWORKS AUTHORITY (GWA)**

25
26
27 By: 
28 KELLY O. CLARK, ESQ.
29 GWA General Counsel
30
31
32

EXHIBIT 2

1 **KELLY O. CLARK, ESQ.**
2 General Counsel
3 Guam Waterworks Authority
4 Gloria B. Nelson Public Service Bldg.
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6 Mangilao, GU 96913
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8 *Attorney for the Guam Waterworks Authority*

9 **BEFORE THE OFFICE OF THE PUBLIC ACCOUNTABILITY**


10 IN THE APPEAL OF) APPEAL NO.: OPA-PA-16-013
11)
12 IP&E Holdings, LLC,) **DECLARATION REGARDING**
13) **COURT ACTION**
14 Appellant.)
15)

16 Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses
17 interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on
18 any appeal where action concerning the protest or appeal has commenced in any court.

19
20 The undersigned party does hereby confirm that to the best of his knowledge, no case or
21 other action concerning the subject of this Appeal has been commenced in court. All parties are
22 required to and the undersigned party agrees to notify the Office of the Public Auditor within 24
23 hours if court action commences regarding this Appeal or the underlying procurement action.
24

25 Dated this 28th day of September, 2016.

26 **GUAM WATERWORKS AUTHORITY (GWA)**

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28
29
30 By: )
31 THOMAS E. CRUZ, P.E.
32 Acting General Manager