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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL

DATE: Dec. 7, 2020
TIME: 3:54 AM PM BY: Cms
FILE NO OPA-PA: 20-009

PART I- To be completed by OPA

In the Appeal of)
Guam Industrial Services, Inc.) **NOTICE OF APPEAL**
DBA Guam Shipyard)
(Name of Company), APPELLANT)
Docket No. OPA-PA _____)
_____)

PART II- Appellant Information

Name: Guam Industrial Services, Inc. DBA Guam Shipyard
Mailing Address: 272 East Harmon Industrial Park Rd., Ste. 101
Tamuning, Guam 96913
Business Address: Same
Email Address: MPothen@guamshipyard.net
Daytime Contact No: (671) 646-5261
Fax No.: (671) 646-5258

PART III- Appeal Information

- A) Purchasing Agency: Guam Power Authority
- B) Identification/Number of Procurement, Solicitation, or Contract: MSB GPA-061-20
Nov. 19, 2020, rec'd
- C) Decision being appealed was made on Nov. 23, 2020 (date) by:
 Chief Procurement Officer Director of Public Works Head of Purchasing Agency

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

- D) Appeal is made from:
(Please select one and attach a copy of the Decision to this form)
- Decision on Protest of Method, Solicitation or Award
 Decision on Debarment or Suspension
 Decision on Contract or Breach of Contract Controversy
(Excluding claims of money owed to or by the government)
 Determination on Award not Stayed Pending Protest or Appeal
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

<u>JBC/Orbis/Guaden JV</u>	_____
<u>Marianas Energy Co.</u>	_____
<u>Dooik Engine Co.</u>	_____
<u>Monster Auto Corp.</u>	_____
_____	_____

PART IV- Form and Filing

In addition to this form, the Rules of Procedure for Procurement Appeals require the submission together with this form of additional information, including BUT NOT LIMITED TO:

1. A concise, logically arranged, and direct statement of the grounds for appeal;
2. A statement specifying the ruling requested;
3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

Note: Please refer to 2 GAR § 12104 for the full text of filing requirements.

PART V- Declaration Re Court Action

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

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

Submitted this 7th day of Dec., 2020.

By: _____
APPELLANT

or

By: Arthur B. Clark
Appellant's Duly Authorized Representative

(Address) Law Offices of Arthur Clark, P.C., 196 Sirena Ln., Tamuning, Guam 96913
(Phone No.) (671) 687-1389

APPENDIX A

NOTICE OF APPEAL PART IV

Summary

Appellant, Guam Industrial Services dba Guam Shipyard, was one of five bidders for MSB GPA-061-020 (the "IFB") for the performance management contract for GPA's Yigo diesel generators. Phase I of the multi-step IFB was to review and rate the technical offers. Phase II was to review the prices of the bidders whose offers were deemed acceptable during Phase I.

When utilizing the multi-step method, 2 GAR, Div. 4, § 3109(t)(4) requires that "unpriced technical offers shall be categorized as: (a) acceptable, (b) potentially acceptable,... or (c) unacceptable." Consistent with § 3109(t)(4) the IFB indicated that the offers would be separated into three categories. (See IFB at page 200 of 200, Government of Guam Sealed Bid Instructions, ¶ 13.d.); *see also Office of Public Accountability Executive Summary of Guam Procurement Law and Regulations for Procurement Solicitation, Feb. 2018, p. 4, column 2, "Evaluation of Unpriced Technical Offers."*

https://www.opaguam.org/sites/default/files/procurement_executive_summary.pdf.

Instead of complying with Guam law and following the Government Sealed Bid Instructions, GPA used a 1,050-point threshold to separate technical offers into only one of two categories, acceptable or unacceptable. Although a conflicting instruction indicating that the technical offers would be separated into only two categories was published at §1.15(e) of the IFB, at page 15 of 200, GPA should have followed Guam law and separated the technical offers into three categories, including "potentially acceptable," which was excluded. GPA's failure to comply with Guam law should have resulted in the IFB being cancelled or revised to comply with law. See 5 GCA § 5451 and 2 GAR, Div.4, § 9105. Despite these issues being brought to GPA's attention, GPA has proceeded with the IFB.

Had Guam Shipyard's bid been qualified as "potentially acceptable," it would have been allowed to participate in Phase II of the procurement. Per § 3109(t)(5):

Discussions of Unpriced Technical Offers. The Procurement Officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer.... Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable [which would have included "potentially acceptable" bidders] may submit supplemental information amending its technical offer at any time until the closing date established by the Procurement Officer. Such submission may be made at the request of the Procurement Officer or upon the bidder's own initiative.

Procedural History

After all bids were submitted and the technical offers were reviewed during Phase I of the IFB, Guam Shipyard was first advised by letter dated October 14, 2020, (Ex. A) that its technical offer was deemed unacceptable. However, GPA's October 14 letter did not satisfy § 1.17 of the IFB, which stated that GPA would provide all bidders whose proposals are deemed unacceptable a notice "informing them of the reason for not qualifying." (IFB, pp. 15-16). No reason was provided

for GPA's determination. Consequently, the October 14 letter is irrelevant to Guam Shipyard's protest and this appeal.

By letter dated October 19, 2020 (Ex. B), Guam Shipyard requested an explanation for its disqualification.

By letter dated October 22, 2020 (received Monday, October 26, 2020) (Ex. C), GPA informed Guam Shipyard for the first time that GPA had acted contrary to law and the Government of Guam Sealed Bid Instructions, and had utilized a two-category method to disqualify Guam Shipyard. Based on Guam law and the Government of Guam Sealed Bid Instructions, Guam Shipyard cannot reasonably be deemed to have known that GPA would have acted contrary to Guam law in evaluating its bid, which is the basis of its protest, until it received GPA's October 22 letter. Any confusion created by the conflicting provisions of the IFB should be resolved against the party who created the confusion, which is GPA, and in any event it should not be resolved in favor of disregarding the law.

Less than 14 days from Guam Shipyard's receipt of GPA's October 22 letter, by letter dated November 4, 2020, emailed after the close of business on November 3 and hand-delivered on November 4, 2020, (Ex. D) Guam Shipyard formally protested GPA's determination that Guam Shipyard was not qualified to participated in Phase II of the IFB.

By letter dated November 9, 2020, but not mailed until November 19, 2020 and received on November 23, 2020, (Ex. E) GPA denied Guam Shipyard's November 4, 2020 protest.

By letter dated November 24, 2020, (Ex. F) Guam Shipyard requested GPA reconsider its denial.

Timeliness and Basis of Appeal

Title 5 GCA § 5425(a) and 2 GAR, Div. 4, § 9101(c)(1) commence the 14-day period for the filing of a protest from when the aggrieved bidder "knows or should have known of the facts giving rise thereto." GPA's October 14 letter did not explain its basis for deeming Guam Shipyard's bid as unacceptable. It failed to satisfy § 1.17 of the IFB, which stated that GPA would provide all bidders whose proposals are deemed unacceptable a notice "informing them of the reason for not qualifying." It did not contain the legally operative fact that GPA disregarded Guam law and the Government of Guam Sealed Bid Instructions. Consequently, it failed to provide any facts that could give rise to an earlier protest.

As confirmed by GPA's November 19 letter, GPA did not conform with IFB § 1.17 until its October 22 letter, which Guam Shipyard did not receive until October 26. Accordingly, Guam Shipyard's protest period did not expire until November 9, and its November 4 protest letter was timely.

In addition, GPA's October 22 letter, relaying for the first time the fact that GPA acted in violation of Guam law, would have triggered a new protest period. *See Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15, ¶ 28 (Guam 2004):

Upon review, and in consideration of the applicability of GMHA's own Procurement Regulations to solicitations undertaken by GMHA as stated above, we disagree with the trial court's conclusion that "[t]here can only be one event, and not a series of events, which triggers the right to protest." The plain meaning of 26 GAR 16901(c)(2), which states that "[p]rotestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer," supports an interpretation that there may be multiple events in any given solicitation that could legitimately trigger protests.

Cf. 2 GAR, Div. 4, § 9101(c)(2) ("Protestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.")

In any event, the Guam Supreme Court has ruled that when a solicitation fails to comply with Guam law, the legal remedies in 5 G.C.A. § 5451 (cancellation or revision to comply with law) govern *regardless* of whether a protest was timely filed.

Our holding today invalidates the procurement process used in this case, *and therefore, it is unnecessary to discuss the other arguments raised by the parties in their briefs.* We look instead to available remedies in light of our holding. The contract, which was the subject of the RFP process erroneously used here, had not yet been awarded. The appropriate remedies, therefore, are found in 5 GCA § 5451 (2005),...

We hold that using Request for Proposal DOARFP 03-001 to procure the operation, management and maintenance of the Guam Mass Transit system, violated the Guam Procurement Code.... Because the procedure was conducted in violation of Guam law, the procurement is invalidated, and the proposed award is canceled.

Fleet Servs., Inc. v. Dep't of Admin., Gov't of Guam, 2006 Guam 6, ¶¶ 36-37 (Guam 2006).

The "other arguments raised by the parties in their briefs" to which the Court referred and declared unnecessary to discuss included a dispute over whether the aggrieved bidder timely filed its protest. *See Fleet Servs., Inc.*, 2006 Guam 6, ¶ 12 ("The parties here raise several arguments..... Fleet next argues that the trial court erred in holding that its second protest letter was not timely and in dismissing the case.")

Ruling Requested

Respectfully, Guam Shipyard requests that GPA be ordered to comply with 5 GCA § 5451 and 2 GAR, Div. 4, § 9105, and that the IFB be cancelled. Although the law allows the IFB be revised to comply with law, Guam Shipyard is duly concerned at GPA's apparent lack of good faith in reviewing Guam Shipyard's protest thus far. Moreover, all bidders' technical proposals have already been scored. In addition to Guam Shipyard, one other bidder has been deemed unqualified. Guam Shipyard is concerned about the potential for mischief by allowing GPA to

revise the IFB such that it may continue to disqualify one or both bidders. Accordingly, cancellation of the IFB is requested.

EXHIBIT A

GPA's October 14, 2020 letter



GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUÁHAN
P.O.BOX 2977 • HAGÁTÑA, GUAM U.S.A. 96932-2977

October 14, 2020

Matthews Pothen
President
Guam Industrial Services, Inc. dba: Guam Shipyard
272 E. Harmon Industrial Park Road
Units 201-202
Tamuning, Guam 96913

REFERENCE: Multi-Step Bid No.: GPA-061-20 for Performance Management Contract for Yigo Generators

Dear Mr. Pothen:

The Guam Power Authority has completed the evaluation of Phase 1 for Performance Management Contract for Yigo Generators.

We regret to inform you that your bid was deemed not qualified to participate in Phase 2. GPA greatly appreciates the interest and efforts you showed in responding to our requirements.

The opening shall take place in the GPWA Procurement Conference Room, Room 101A at 10:00 A.M., Friday, October 30, 2020. Due to the COVID-19 pandemic, each bidder will be limited to one (1) in-person representative. Access to a virtual conference link will be available for any additional representatives. Please submit the name of the representative and email address to jpangelinan@gpagwa.com no later than Wednesday, October 21, 2020.

If you have any questions or concerns, please feel free to contact Mrs. Jamie L.C. Pangelinan, Supply Management Administrator at Telephone Nos.: (671) 648-3054/55, E-mail: jpangelinan@gpagwa.com or Fax (671) 648-3165.

Respectfully,

JOHN M. BENAVENTE, P.E.

 General Manager

EXHIBIT B

Guam Shipyard's October 19, 2020 letter



Guam Shipyard ♦ 272 E. Harmon Industrial Park Road, Unit 201
Tamuning, Guam - 96913

♦ Tel: (671) 648-1160 ♦ Fax: (671) 648-1166

October 19, 2020

John M. Benavente, P.E.
General Manager
Guam Power Authority
Gloria B. Nelson Public Service Building
688 Route 15
Mangilao, Guam.



RE: Rejection Letter Dated October 14, 2020.

REF: Multi-Step Bid No. GPA-061-020 for Performance Management Contract for Yigo Generators.

Hafa Adai John,

We were disappointed to receive the letter from Guam Power Authority (GPA) few days back informing us that Guam Industrial Services Inc. dba Guam Shipyard (Guam Shipyard) was deemed to be “not qualified” to participate in Phase 2 of Multi-Step Bid No. GPA-061-020 for Performance Management contract for Yigo Generators. Guam Shipyard respectfully requests reconsideration of this decision based on merits, Guam procurement law, and the best interests of GPA and the people of Guam that it serves.

Firstly, on page 15 of the bid invitation “1.17 NOTICE OF ACCEPTIBILITY OR UNACCEPTABILITY” it states:

“BIDDERS whose proposals are deemed unacceptable shall be provided a notice informing them of the reason for not qualifying for Step 2 of the bid.” (Emphasis added)

No reason for our being deemed “not qualified” (or “unacceptable” or “unresponsive” and “unresponsible”) was given to us in the letter. We believe we are owed an explanation. As an industrial services company with decades of experience servicing, repairing and managing large diesel engines, generators and high-voltage electrical systems to United States Navy standards and military specification, we are puzzled why we were deemed as “not qualified” to execute the Performance Management Contract for GPA’s Yigo Diesel Generators.

We received a letter from GPA dated October 5th 2020 requesting clarification on four issues on the technical proposal. We were under the impression that these were the only issues with our technical proposal and we fully addressed each of the issues in the affirmative. Nothing in that communication indicated there was any issue with our qualifications.

We also note that Guam law 2GAR §3109 (r) (1) states:

Definition Multi-step sealed bidding is a two-phase process consisting of a technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by the territory, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their priced bids considered. It is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtained the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers. (Emphasis added)

We think the following sections of Guam law on Bid Evaluation and Award are relevant:
First, 2GAR §3109 (n) (2):

Responsiveness of bids is covered by 5 GCA §5201(g), of the Guam Procurement Act, which defines responsive bidder as a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

And also, 2GAR §3109 (n) (3):

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another, but only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bids.

Finally, 2GAR §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. (Emphasis added).

We believe that a review of our bid will show that we have been responsive and are responsible. We are highly qualified and more than capable of doing this work, much less meeting the minimum qualifications. Moreover, we have repair capabilities others on island do not possess. Thus, GPA and the people of Guam should benefit from including our bid in the price competition with the award going to the lowest responsive, responsible bidder as required by law.

Should you require further information or clarification, please contact me at telephone (671) 727-7799 or by email mpothen@guamshipyard.net.

Sincerely,



Mathews Pothen.
President.

CC: Jamie L.C. Pangelinan, Supply Management Administrator

EXHIBIT C

GPA's October 22, 2020 letter



GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUÅHAN
P.O.BOX 2977 • HAGÁTÑA, GUAM U.S.A. 96932-2977

October 22, 2020

Matthews Pothen
President
Guam Industrial Services, Inc. dba: Guam Shipyard
272 E. Harmon Industrial Park Road
Units 201-202
Tamuning, Guam 96913

REFERENCE: Multi-Step Bid No.: GPA-061-20 for Performance Management Contract for Yigo Generators

Dear Mr. Pothen:

The intent of this solicitation is to award a Performance Management Contract to an experienced contractor who will manage, maintain and operate the 40-MW power plant on a 24/7-basis, including fuel handling; operation and management of special equipment and high-voltage equipment such as the 34.5kV-transformers, SCADA systems, and Selective Catalytic Reduction (including DEF/Urea Supply); dispatching; performance and emission testing; permitting (Title V, ASTs, etc.); provide engineering support; and management of major maintenance and/or capital improvement projects. This power plant is critical to meeting GPA's system demand, and are high-priority dispatch units. The Scoring Criteria and Checklist Items on the Qualitative Proposal Evaluation were developed based on these contract requirements.

The evaluation committee reviewed Guam Shipyard's qualifications based on the content of their proposal, and the scores were based on how adequately the proposal responded to GPA's Checklist items. When a proposal provides adequate information and clear responses to each checklist item, especially those requiring information on Bidder's experience, the score is higher. In some checklist items, GPA requires bidder to illustrate plans and past experiences; Bidder may present a good plan, but if there is not enough information on past experience, this may result in a low score. GPA also requires submission of audited or certified financial information.

A proposal needs to receive the minimum required passing score of at least 70% or 1,050 points for a bidder's proposal to be deemed "Acceptable". If the majority of the GPA evaluators rate the bidder's proposal as "Acceptable", the bidder is determined to be Qualified and will be allowed to participate in Step 2 Price Proposal Evaluation. GSY's proposal was rated by a majority (3 out of 5) of the evaluators as Unacceptable (scored less than 1,050 points) and was determined to be Not Qualified and will not be allowed to participate in Step 2- Price Proposal.

Attachment 1 provides the sections where Guam Shipyard's scores were low, including brief explanations from the committee members.

If you have any questions or concerns, please feel free to contact Mrs. Jamie L.C. Pangelinan, Supply Management Administrator at Telephone Nos.: (671) 648-3054/55, E-mail: jpangelinan@gpawwa.com or Fax (671) 648-3165.

Respectfully,



for JOHN M. BENAVENTE, P.E.

 General Manager 

ATTACHMENT 1: GSY PROPOSAL EVALUATION

CHECKLIST ITEM:	REASON FOR LOW SCORES:
Power Plant Management, Operation & Maintenance	<ul style="list-style-type: none"> • Proposal did not provide adequate proof of experience specifically with operating Aggreko-type units with SCRs. • Not enough information provided on experience with meeting performance guarantees, such as Heat Rate and Equivalent Availability Factor (EAF). • No information provided regarding plans for meeting performance guarantees required in the contract.
Generation Outage Planning	<ul style="list-style-type: none"> • Not enough information provided on experience with SCRs, and balance of plant (fuel supply system, etc.). • Not enough information provided on experience with planning for outages.
Plant Engineering & Technical Services	<ul style="list-style-type: none"> • Insufficient illustration of support that can be provided for Engineering Services. • Organizational Chart did not include Engineer / Engineering Services support staff.
Unit Transfer, Preparation and Clean-up of Facility	<ul style="list-style-type: none"> • Not enough information provided on experience with actual unit transfer or facility preparation and clean-up.
Procurement, Inventory Planning and Management	<ul style="list-style-type: none"> • Minimal Information provided for experience with emergency procurement for expedited repairs. • Not enough information provided on experience with inventory planning for generating units.
Performance Management & Reporting	<ul style="list-style-type: none"> • Not enough information provided for performance tracking. Although the plan is provided and GSY mentioned it will be in place, GPA was requesting for experience.
Environmental Compliance Review, Monitoring and Requirements	<ul style="list-style-type: none"> • Minimal information provided for experience such as for plant water discharge, hazardous waste handling & disposal, and environmental regulations pertaining to Yigo Diesel Generators.
Federal and Regulatory Compliance	<ul style="list-style-type: none"> • Minimal information provided for experience and certifications for regulatory reporting for local and federal regulations. • Indicated that they will comply with all regulations, however proposal lacks sufficient illustration of experience. • Insufficient supporting information provided on some regulations such as Fire Code, etc.
Financial Information Checklist	<ul style="list-style-type: none"> • Financial ratios not very strong, many negative ratios due to net losses for past five years. • Submitted Financial statements are not audited nor certified.
Insurance Policy	<ul style="list-style-type: none"> • Proposal submitted did not include sufficient documents to verify if \$10 million excess liability coverage can be obtained.

ATTACHMENT 2: SCORES

	BIDDER	SCORES					<i>Financial and Insurance Info Only</i>
		Evaluator 1	Evaluator 2	Evaluator 3	Evaluator 4	Evaluator 5	
2	Guam Industrial Services, Inc.	960	899	1,190	1,114.5	973	29

Scores below 1,050 means evaluator deemed bidder's proposal as Unacceptable.

EXHIBIT D

Guam Shipyard's November 4, 2020 protest



Guam Shipyard ♦ 272 E. Harmon Industrial Park Road, Unit 201
Tamuning, Guam - 96913

♦ Tel: (671) 648-1160 ♦ Fax: (671) 648-1166

November 4, 2020

John M. Benavente, P.E.
General Manager
Guam Power Authority
Gloria B. Nelson Public Service Building
688 Route 15 Fadian,
Mangilao, Guam.

RE: Rejection Letter Dated October 22, 2020 (sent October 26, 2020) and Formal Protest.

REF: Multi-Step Bid No. GPA-061-020 for Performance Management Contract for Yigo Generators.

Hafa Adai John,

Guam Industrial Services Inc., doing business as Guam Shipyard, is in receipt of your letter dated October 22, 2020 (received Monday, October 26, 2020), informing us of the reasons our proposal is "not qualified" to participate in phase two of the Invitation for Multi-Step Bid No. GPA-061-020 ("IFB"). Having reviewed the letter, Guam Shipyard hereby formally protests this decision, and respectfully requests your reconsideration of this decision and Guam Shipyard's inclusion in the phase two Price Competition based on the merits, Guam procurement law and the best interests of GPA and the people of Guam that it serves.

Please be advised that Guam Shipyard does not recognize GPA's October 14, 2020 letter as relevant to its current protest. As pointed out in my October 29, 2020 letter to GPA, GPA's October 14 letter did not satisfy Section 1.17 of the IFB, which stated that GPA would provide all bidders whose proposals are deemed unacceptable a notice "informing them of the reason for not qualifying." Guam Shipyard did not receive a notice conforming to Section 1.17 until October 26, 2020.

This protest is based on GPA's failure to comply with Guam law, namely 2 GARR Division 4 § 3109(t), "Procedure for Phase One of Multi-Step Sealed Bidding". In particular, § 3109(t)(4) requires that "unpriced technical offers shall be categorized as: (a) acceptable; (b) potentially acceptable, that is, reasonably susceptible of being made acceptable; or (c) unacceptable." Referring to page 15 of the IFB, GPA erroneously and illegally limited the number of available categories to only two: acceptable or unacceptable.

Accordingly, Guam law requires that, "If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be: (a) cancelled; or (b) revised to comply with the law." 5 G.C.A. § 5451. The Guam Supreme Court has previously applied this statute to cancel a solicitation that similarly failed to comply with Guam law – without regard to any other procedural issues, including the timeliness of the protest. In *Fleet Services Inc. vs. Department of Administration*, the Guam Supreme Court held:

"Our holding today invalidates the procurement process used in this case, and therefore, it is unnecessary to discuss the other arguments raised by the parties in their briefs. We look instead to available remedies in light of our holding. The contract, which was the subject of the RFP process erroneously used here, had not yet been awarded. The appropriate remedies, therefore, are found in 5 GCA § 5451 (2005), . . .

"We hold that using Request for Proposal DOARFP 03-001 to procure the operation, management and maintenance of the Guam Mass Transit system, violated the Guam Procurement Code. . . . Because the procedure was conducted in violation of Guam law, the procurement is invalidated, and the proposed award is canceled."

Fleet Servs., Inc. v. Dep't of Admin., Gov't of Guam, 2006 Guam 6, ¶¶ 36-37 (Guam Mar. 30, 2006).

With regard to the IFB, if the procurement regulations had been followed it is clear that Guam Shipyard should have qualified for "potentially acceptable" in light of the fact that the standard for acceptability is three out of five evaluators determining a proposal is acceptable, and Guam Shipyard had two evaluators reach that conclusion.

Had Guam Shipyard's bid been qualified as "potentially acceptable," it would have been allowed to participate in phase two of the procurement. Per § 3109(t)(5):

Discussions of Unpriced Technical Offers. The Procurement Officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. . . . Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable [which would have included "potentially acceptable" bidders] may submit supplemental information amending its technical offer at any time until the closing date established by the Procurement Officer. Such submission may be made at the request of the Procurement Officer or upon the bidder's own initiative.

Guam Shipyard believes its technical offer was more than adequate under the criteria set forth in the IFB, and we take exception to the reasons given in GPA's letter for our "low score." If we had been given the opportunity, as required by § 3109(t)(4) and (5), we believe that we would have been able to point out the errors in the evaluator's evaluations and remedy any perceived deficiencies. As an example, the letter states that our "Organizational Chart did not

include Engineer / Engineering Services support staff.” While the organizational chart we provided on page 12 focuses on the dedicated staff for daily operations of the Yigo plant, if you review the rest of the proposal, on Page 22, Guam Shipyard addresses the Engineering and Technical Support services. In addition, everyone on the organizational chart comprises the Engineer / Engineering Services support staff, to include Mr. Charlie Maher, Mr. Russel Miller and myself. Qualifications of these employees are provided on page 5 through 8 of our proposal. Furthermore, we have other qualified engineers who, while not dedicated on full-time basis to the Yigo Generator project, are available as needed. We believe that is one of our strengths in supporting the Yigo generator project.

Similarly, we were ranked down for “Minimal information provided for experience such as for plant water discharge, hazardous waste handling & disposal, and environmental regulations pertaining to Yigo Diesel Generators,” as well as “Minimal information provided for experience and certifications for regulatory reporting for local and federal regulations”, “Indicated that they will comply with all regulations, however proposal lacks sufficient illustration of experience,” and “Insufficient supporting information provided on some regulations such as Fire Code, etc.” We made it clear that Guam Shipyard has operated in Guam for over two decades providing ship repair services and subject to ALL the same Guam and Federal laws and regulations for environmental and Safety compliance. Information that pertains Environmental Compliance was provided in Page 29 and 42 of the proposal. Moreover, we are certain that no other bidder has the depth of experience and knowledge in safety and environmental area operating in Guam.

Guam Shipyard proposal was ranked lower for: “Minimal information provided for experience with emergency procurement for expedited repairs” when a significant amount of our work on Guam for both the United States Navy and for commercial vessels consists of emergency vessel repairs (including to diesel engines and diesel generators) requiring expedited procurement of parts and materials to effect repairs and get ships underway. The detailed information about purchasing department and staffing levels are provided on Page 15 and 25 of the proposal.

Similarly, we were ranked lower for “Not enough information provided on experience with inventory planning for generating units” when we gave an extensive inventory plan utilizing our Procurement Department’s best practices for our own warehouse and inventory management system. Detailed information regarding Guam Shipyards’ Inventory Management was provided on Page 26 through 28 of the proposal.

There are just a few examples why the scoring is erroneous.

Moreover, on October 5th 2020, we received a letter from GPA “SUBJECT: Clarification” stating “The Evaluation Committee has reviewed your company’s technical proposal and requests the following clarifications:

1.We request the bidder to confirm that if awarded as the PMC, they will be able to perform all tasks required to effectively operate (24-hours/7 days a week) and maintain the units, as required in the bid package.
2. ...Please confirm that bidder's staff includes employees qualified and with adequate experience in performing operation and maintenance on the electrical systems including.... Please also confirm that the Operation and Maintenance Budget includes performance of necessary operation and maintenance work on the existing electrical systems.
3. ...Please confirm that bidder's staff includes employees qualified and with adequate experience in performing operation and maintenance on the SCRs. Please also confirm that the Operation and Maintenance Budget Includes operation and maintenance budget for the SCRs.
4. Due to adjustments in the bid milestones, there will be a gap between termination of the current contract..... Please advise if you will have any issues.

In a letter dated October 8, 2020, we provided our confirmation of the above as requested and referenced the sections of our technical proposal that addressed each of the requested clarifications.

No issues regarding our qualifications or sufficiency of examples of relevant past experience was raised in that letter. Yet we are now told we were ranked lower and deemed "not qualified" mainly for not providing more relevant past experience. If that was a concern, GPA should have requested further clarification in that letter.

There are just a few examples why we believe the scoring is erroneous, and why we should have been given the opportunity as a potentially acceptable bidder to clarify these issues. While we believe Guam Shipyard should have received a higher score based on the above, and we should have been qualified as "acceptable", if we had at least been determined as "potentially acceptable" we would have been given the opportunity during subsequent discussions to clarify these issues and/or provide additional information.

Under 5 GCA §5425(b), you have the authority to resolve this protest. Under 5 GCA § 5451, you have the authority to either cancel the solicitation or revise it to comply with law. While either is acceptable to Guam Shipyard, in order to prevent delay Guam Shipyard would have no objection to a revision that qualifies Guam Shipyard, and other bidders, as "potentially acceptable" based on an acceptable rating by two evaluators, such that these bidders may now participate in the price competition under phase two. This would avoid litigating the protest with resulting expense and delays and would allow GPA and the people of Guam the benefit of increased competition with the award simply going to the lowest responsive, responsible bidder as required by law.

If selected as the low bidder, we would be an excellent partner for GPA in operating and maintaining the Yigo Generator Site. We are a Guam-based business with decades of

experience servicing, repairing and managing large diesel engines, generators and high-voltage electrical systems on for the United States Navy.

Should you require further information or clarification, please contact me at telephone (671) 727-7799 or by email mpothen@guamshipyard.net.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Mathews Pothen', with a long horizontal flourish extending to the right.

Mathews Pothen.
President.

CC: GPA Bid File – GPA – 061-020

EXHIBIT E

**GPA's November 9, 2020 letter (postmarked November 19, 2020)
protest denial**



GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUAHAN
P.O. BOX 2977 • AGANA, GUAM U.S.A. 96932-2977

Tel: (671) 648-3225; Fax: 648-3290

DENIAL OF PROCUREMENT PROTEST

November 9, 2020

Mr. Matthews Pothern
President
Guam Industrial Services, Inc., dba: Guam Shipyard
272 E. Harmon Industrial Park Road, Units 201-202
Tamuning, Guam 96913

RE: Guam Power Authority's Response to Guam Industrial Services, Inc. Protest dated November 4, 2020, for GPA-061-20, Performance Management Contract for Yigo Generators

Dear Mr. Pothern:

I have reviewed your protest letter dated November 4, 2020, protesting the Guam Power Authority's (GPA) decision to not qualify your company to participate in Phase II of GPA-061-20, Performance Management Contract for Yigo Generators. Your Protest is hereby denied for the following reason:

1. On October 14, 2020, Guam Industrial Services, Inc. received via e-mail a Bid Status for GPA-061-20, which expressed GPA's decision to not qualify Guam Industrial Services, Inc. to proceed to Phase II of the IFB for the Performance Management Contract for Yigo Generators. GPA received an e-mail protest from Guam Industrial Services, Inc. on November 4, 2020, which was rejected by the procurement office as being untimely. Guam Industrial Services, Inc.'s protest was untimely in that a protest must be made in writing and filed ... with the head of a purchasing agency **within 14 days** after a protestor either knows or should have

known of the facts giving rise thereto. 5 GCA §5425 (a) and 2 GAR, Div. 4, Chap. 9, §9101(c)(1). *In the Appeal of ASC Trust Corporation, OPA-PA-09-010.* The attached e-mail thread indicates that you received notice on October 14, 2020 and filed your protest with GPA on November 4, 2020, which is untimely as the protest was not filed within 14 days. In addition, the proposal submitted did not meet the minimum required passing score of at least 70% or 1,050 points for a bidder. In response to your letter of October 19, 2020, GPA provided a response on October 22, 2020, detailing the scoring criteria, and noting that a majority of the evaluators rated your company proposal as Unacceptable (scored less than 1,050 points).

Guam Industrial Services, Inc. is hereby ON NOTICE that this is the Guam Power Authority's final decision concerning Guam Industrial Services, Inc.'s November 4, 2020, protest for the above described IFB. You are hereby advised that Guam Industrial Services, Inc. has the right to seek judicial review.

Sincerely,


JOHN M. BENAVENTE, P.E.
General Manager

Encl:

1. GPA Letter re Not Qualified (10/14/20)
2. Guam Industrial Letter to GPA (10/19/20)
3. GPA Response to Guam Industrial Letter (10/22/20)



GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUAHAN
P.O BOX 2977 • HAGÁTÑA, GUAM U S A 96932-2977

October 14, 2020

Matthews Pothén
President
Guam Industrial Services, Inc. dba: Guam Shipyard
272 E. Harmon Industrial Park Road
Units 201-202
Tamuning, Guam 96913

REFERENCE: Multi-Step Bid No.: GPA-061-20 for Performance Management Contract for Yigo Generators

Dear Mr. Pothén:

The Guam Power Authority has completed the evaluation of Phase 1 for Performance Management Contract for Yigo Generators.

We regret to inform you that your bid was deemed not qualified to participate in Phase 2. GPA greatly appreciates the interest and efforts you showed in responding to our requirements.

The opening shall take place in the GPWA Procurement Conference Room, Room 101A at 10:00 A.M., Friday, October 30, 2020. Due to the COVID 19 pandemic, each bidder will be limited to one (1) in-person representative. Access to a virtual conference link will be available for any additional representatives. Please submit the name of the representative and email address to jpangelinan@gpawga.com no later than Wednesday, October 21, 2020.

If you have any questions or concerns, please feel free to contact Mrs. Jamie L.C. Pangelinan, Supply Management Administrator at Telephone Nos.: (671) 648-3054/55, E-mail: jpangelinan@gpawga.com or Fax (671) 648-3165.

Respectfully,

JOHN M. BENAVENTE, P.E.

General Manager

Melissa C Uncangco

From: Microsoft Outlook
To: Mathews Pothen
Sent: Wednesday, October 14, 2020 3:53 PM
Subject: Relayed: MS GPA-061-20. Performance Management Contract for Yigo Diesel Generators

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

Mathews Pothen (MPothen@quamshipyard.net)

Subject: MS GPA-061-20, Performance Management Contract for Yigo Diesel Generators



MS GPA-061-20
Performance M

Melissa C Uncangco

From: Mathews Pothan <MPothan@guamshipyard.net>
Sent: Wednesday, October 14, 2020 4:00 PM
To: Melissa C Uncangco
Subject: Read: MS GPA-061-20, Performance Management Contract for Yigo Diesel Generators
Attachments: Read: MS GPA-061-20, Performance Management Contract for Yigo Diesel Generators

Disclaimer Notice: The information contained in this communication is intended solely for the use of the individual or entity to whom it is addressed and others authorized to receive it. It may contain confidential or legally privileged information. If you are not the intended recipient you are hereby notified that any disclosure, copying, distribution or taking any action in reliance on the contents of this information is strictly prohibited and may be unlawful. If you have received this communication in error, please notify us immediately by responding to this email and then delete it from your system. Guam Power Authority is neither liable for the proper and complete transmission of the information contained in this communication nor for any delay in its receipt.

Melissa C Uncangco

From: Melissa C Uncangco
Sent: Wednesday, October 14, 2020 3:53 PM
To: 'Mathews Pothan'
Cc: Jamie C. Pangelinan; Josephina F. Naputi; Patty B Camacho; Dawn KP Fejeran, Stephanie M. Taijeron
Subject: MS GPA-061-20, Performance Management Contract for Yigo Diesel Generators
Attachments: Guam Industrial Services, Inc. dba Guam Shipyard.pdf

Tracking:	Recipient	Delivery
	'Mathews Pothan'	
	Jamie C. Pangelinan	Delivered: 10/14/2020 3:53 PM
	Josephina F. Naputi	Delivered: 10/14/2020 3:53 PM
	Patty B Camacho	Delivered: 10/14/2020 3:53 PM
	Dawn KP Fejeran	Delivered: 10/14/2020 3:53 PM
	Stephanie M. Taijeron	Delivered: 10/14/2020 3:53 PM

Hafa Adai!

Please acknowledge receipt of attached letter for Step 1 of MS GPA 061-20, Performance Management Contract for Yigo Diesel Generators.

Regards,

Melissa C. Uncangco

Melissa C. Uncangco

Buyer II

GPA Procurement Division

📞 714-648-3165 / Fax: 671-648-3165

✉️ melissac@aggawa.com



Guam Shipyard ♦ 272 E. Harmon Industrial Park Road, Unit 201
Tamuning, Guam - 96913

♦ Tel: (671) 648-1160 ♦ Fax: (671) 648-1166

October 19, 2020

John M. Benavente, P.E.
General Manager
Guam Power Authority
Gloria B. Nelson Public Service Building
688 Route 15
Mangilao, Guam



RE: Rejection Letter Dated October 14, 2020.

REF: Multi-Step Bid No. GPA-061-020 for Performance Management Contract for Yigo Generators.

Hafa Adai John,

We were disappointed to receive the letter from Guam Power Authority (GPA) few days back informing us that Guam Industrial Services Inc. dba Guam Shipyard (Guam Shipyard) was deemed to be "not qualified" to participate in Phase 2 of Multi-Step Bid No. GPA-061-020 for Performance Management contract for Yigo Generators. Guam Shipyard respectfully requests reconsideration of this decision based on merits, Guam procurement law, and the best interests of GPA and the people of Guam that it serves.

Firstly, on page 15 of the bid invitation "1.17 NOTICE OF ACCEPTIBILITY OR UNACCEPTABILITY" it states:

"BIDDERS whose proposals are deemed unacceptable shall be provided a notice informing them of the reason for not qualifying for Step 2 of the bid." (Emphasis added)

No reason for our being deemed "not qualified" (or "unacceptable" or "unresponsive" and "unresponsible") was given to us in the letter. We believe we are owed an explanation. As an industrial services company with decades of experience servicing, repairing and managing large diesel engines, generators and high-voltage electrical systems to United States Navy standards and military specification, we are puzzled why we were deemed as "not qualified" to execute the Performance Management Contract for GPA's Yigo Diesel Generators.

We received a letter from GPA dated October 5th 2020 requesting clarification on four issues on the technical proposal. We were under the impression that these were the only issues with our technical proposal and we fully addressed each of the issues in the affirmative. Nothing in that communication indicated there was any issue with our qualifications.

We also note that Guam law 2GAR §3109 (r) (1) states:

Definition Multi-step sealed bidding is a two-phase process consisting of a technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by the territory, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their priced bids considered. It is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtained the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers. (Emphasis added)

We think the following sections of Guam law on Bid Evaluation and Award are relevant:
First, 2GAR §3109 (n) (2):

Responsiveness of bids is covered by 5 GCA §5201(g), of the Guam Procurement Act, which defines responsive bidder as a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

And also, 2GAR §3109 (n) (3):

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another, but only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bids.

Finally, 2GAR §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. (Emphasis added).

We believe that a review of our bid will show that we have been responsive and are responsible. We are highly qualified and more than capable of doing this work, much less meeting the minimum qualifications. Moreover, we have repair capabilities others on island do not possess. Thus, GPA and the people of Guam should benefit from including our bid in the price competition with the award going to the lowest responsive, responsible bidder as required by law.

Should you require further information or clarification, please contact me at telephone (671) 727-7799 or by email mpothen@guamshipyard.net.

Sincerely,



Mathews Pothén.
President.

CC: Jamie L.C. Pangelinan, Supply Management Administrator



GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUAHAN
P.O. BOX 2977 • HAGÁTÑA, GUAM U.S.A. 96932-2977

October 22, 2020

Matthews Pothén
President
Guam Industrial Services, Inc. dba: Guam Shipyard
272 E. Harmon Industrial Park Road
Units 201 202
Tamuning, Guam 96913

REFERENCE: Multi-Step Bid No.: GPA-061-20 for Performance Management Contract for Yigo Generators

Dear Mr. Pothén:

The intent of this solicitation is to award a Performance Management Contract to an experienced contractor who will manage, maintain and operate the 40-MW power plant on a 24/7-basis, including fuel handling; operation and management of special equipment and high-voltage equipment such as the 34.5kV-transformers, SCADA systems, and Selective Catalytic Reduction (including DFF/Urea Supply); dispatching, performance and emission testing; permitting (Title V, ASTs, etc.); provide engineering support; and management of major maintenance and/or capital improvement projects. This power plant is critical to meeting GPA's system demand, and are high priority dispatch units. The Scoring Criteria and Checklist Items on the Qualitative Proposal Evaluation were developed based on these contract requirements.

The evaluation committee reviewed Guam Shipyard's qualifications based on the content of their proposal, and the scores were based on how adequately the proposal responded to GPA's Checklist items. When a proposal provides adequate information and clear responses to each checklist item, especially those requiring information on Bidder's experience, the score is higher. In some checklist items, GPA requires bidder to illustrate plans and past experiences; Bidder may present a good plan, but if there is not enough information on past experience, this may result in a low score. GPA also requires submission of audited or certified financial information.

A proposal needs to receive the minimum required passing score of at least 70% or 1,050 points for a bidder's proposal to be deemed "Acceptable". If the majority of the GPA evaluators rate the bidder's proposal as "Acceptable", the bidder is determined to be Qualified and will be allowed to participate in Step 2 Price Proposal Evaluation. GSY's proposal was rated by a majority (3 out of 5) of the evaluators as Unacceptable (scored less than 1,050 points) and was determined to be Not Qualified and will not be allowed to participate in Step 2- Price Proposal.

Attachment 1 provides the sections where Guam Shipyard's scores were low, including brief explanations from the committee members.

If you have any questions or concerns, please feel free to contact Mrs. Jamie L.C. Pangelinan, Supply Management Administrator at Telephone Nos.: (671) 648-3054/55, E-mail: jpangelinan@gpagwa.com or Fax (671) 648-3165.

Respectfully



JOHN M. BENAVENTE, P.E.
General Manager

ATTACHMENT 1: GSY PROFITABILITY EVALUATION

CHECKLIST ITEM	REASON FOR LOW SCORES
Power Plant Management, Operation & Maintenance	<ul style="list-style-type: none"> • Proposal did not provide adequate proof of experience specifically with operating Aggreko-type units with SCRs. • Not enough information provided on experience with meeting performance guarantees, such as Heat Rate and Equivalent Availability Factor (EAF). • No information provided regarding plans for meeting performance guarantees required in the contract
Generation Outage Planning	<ul style="list-style-type: none"> • Not enough information provided on experience with SCRs, and balance of plant (fuel supply system, etc.) • Not enough information provided on experience with planning for outages
Plant Engineering & Technical Services	<ul style="list-style-type: none"> • Insufficient illustration of support that can be provided for Engineering Services • Organizational Chart did not include Engineer / Engineering Services support staff
Unit Transfer, Preparation and Clean-up of Facility	<ul style="list-style-type: none"> • Not enough information provided on experience with actual unit transfer or facility preparation and clean-up
Procurement Management	<ul style="list-style-type: none"> • Minimal information provided for experience with emergency procurement for expedited repairs • Not enough information provided on experience with inventory planning for generating units
Business Development & Marketing	<ul style="list-style-type: none"> • Not enough information provided to illustrate how the Applicant will generate additional revenue from the contract beyond what is required for operation
Environmental Compliance Requirements	<ul style="list-style-type: none"> • Minimal information provided for experience such as for plant water discharge, hazardous waste handling & disposal, and environmental regulations pertaining to rigid Diesel Generators
Working with Regulatory Agencies	<ul style="list-style-type: none"> • Minimal information provided for experience and certifications for regulatory reporting for local and federal regulations • Indicated that they will comply with all regulations however proposal lacks sufficient illustration of experience • Insufficient supporting information provided on some regulations such as Fire Code, etc.
Financial Statements & Ratios	<ul style="list-style-type: none"> • Financial ratios not very strong, many negative ratios due to net losses for past five years. • Submitted Financial statements are not audited nor certified
Insurance Policy	<ul style="list-style-type: none"> • Proposal submitted did not include sufficient documents to verify if \$10 million excess liability coverage can be obtained

ATTACHMENT 2: SCORES

	BIDDER	SCORES					<i>Financial and Insurance In a Only</i>
		Evaluator 1	Evaluator 2	Evaluator 3	Evaluator 4	Evaluator 5	
2	Guam Industrial Services, Inc.	960	899	1,190	1,111.5	973	29

Scores below 1 050 means evaluator deemed bidder's proposals Unacceptable

Melissa C Uncangco

From: Mathews Pothen <MPothen@guamshipyard.net>
Sent: Monday, October 26, 2020 2:55 PM
To: Melissa C Uncangco
Cc: JSelleck@iecoguam.com; Jamie C. Pangelinan; Josephina F. Naputi; Patty B Camacho; Dawn KP Fejeran; Stephanie M. Taijeron; John Selleck
Subject: RE: MS GPA-061-20 Performance Management Contract for Yigo Diesel Generators

Good Afternoon Melissa;

Acknowledge receipt of Letter on the Performance Management Contract. Not the outcome we were expecting with experience Guam Shipyard possess in maintain Diesel generators.

Best Wishes & Stay safe.

Mat

From: Melissa C Uncangco <muncangco@gpagwa.com>
Sent: Monday, October 26, 2020 2:25 PM
To: Mathews Pothen <MPothen@guamshipyard.net>
Cc: JSelleck@iecoguam.com; Jamie C. Pangelinan <jpangelinan@gpagwa.com>; Josephina F. Naputi <Jfnaputi@gpagwa.com>; Patty B Camacho <pcamacho@gpagwa.com>; Dawn KP Fejeran <dfejeran1@gpagwa.com>; Stephanie M. Taijeron <smtaijeron@gpagwa.com>
Subject: FW: MS GPA-061-20 Performance Management Contract for Yigo Diesel Generators

Good Afternoon Mr. Pothen!

Kindly acknowledge receipt of attached response letter for MS GPA-061-20, Performance Management Contract for Yigo Diesel Generators.

Regards,

Melissa C. Uncangco

Melissa C. Uncangco

Buyer II

GPA Procurement Division

☎ 671-648-3054/55 / Fax: 671-648-3165

✉ muncangco@gpagwa.com

From: Melissa C Uncangco

Sent: Monday, October 26, 2020 7:38 AM

To: 'Mathews Pothen' <MPothen@guamshipyard.net>

Cc: Jamie C. Pangelinan <jpangelinan@gpagwa.com>; Josephina F. Naputi <jfnaputi@gpagwa.com>; Patty B Camacho <pcamacho@gpagwa.com>; Dawn KP Fejeran <dfejeran1@gpagwa.com>; Stephanie M. Taijeron <smtaijeron@gpagwa.com>

Subject: MS GPA-061-20 Performance Management Contract for Yigo Diesel Generators

Good Morning Mr. Pothen!

Please acknowledge receipt of the Authority's response to your company's letter dated October 19, 2020 with reference to Phase I of MS GPA-061-20, Performance Management Contract for Yigo Generators.

Regards,

Melissa C. Uncangco

Melissa C. Uncangco

Buyer II

GPA Procurement Division

☎ 671-648-3054/55 / Fax: 671-648-3165

✉ muncangco@gpagwa.com

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Melissa C Uncangco

From: Melissa C Uncangco
Sent: Monday, October 26, 2020 7:38 AM
To: 'Mathews Pothen'
Cc: Jamie C. Pangelinan; Josephina F. Naputi; Patty B Camacho; Dawn KP Fejeran; Stephanie M. Tajjeron
Subject: MS GPA-061-20 Performance Management Contract for Yigo Diesel Generators
Attachments: MS GPA-061-20 Guam Shipyard

Tracking:

Recipient	Delivery
'Mathews Pothen'	
Jamie C. Pangelinan	Delivered: 10/26/2020 7:38 AM
Josephina F. Naputi	Delivered: 10/26/2020 7:38 AM
Patty B Camacho	Delivered: 10/26/2020 7:38 AM
Dawn KP Fejeran	Delivered: 10/26/2020 7:38 AM
Stephanie M Tajjeron	Delivered: 10/26/2020 7:38 AM

Good Morning Mr. Pothen!

Please acknowledge receipt of the Authority's response to your company's letter dated October 19, 2020 with reference to Phase I of MS GPA-061-20, Performance Management Contract for Yigo Generators.

Regards,

Melissa C. Uncangco

Melissa C. Uncangco

Buyer II

GPA Procurement Division

☎ 671-648-3054/55 / Fax: 671-648-3165

✉ muncangco@gpagwa.com



GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUÅHAN
P.O.BOX 2977 • HAGÁTÑA, GUAM U.S.A. 96932-2977

November 12, 2020

Guam Industrial Services, Inc.
Db: Guam Shipyard
272 E. Harmon Industrial Park Road
Units 201-202
Tamuning, Guam 96913

ATTENTION: Matthews Pothan
President

SUBJECT: "Stay of Procurement" dated November 3, 2020 for Invitation for Multi-Step Bid No.:
GPA-061-20 for Performance Management Contract for Yigo Generators

Dear Mr. Pothan:

Pursuant to the protest email submitted by Monster Auto Corporation dated October 30, 2020 you are hereby advised that GPA declares their protest to be without merit.

The referenced "Stay of Procurement" has been lifted. The Authority will proceed with the completion of evaluation for Phase II of this Multi-Step Bid. This is my final determination. However, you have the right to seek judicial review within the confines of the law.

If you should have any questions, please feel free to contact the undersigned.

Respectfully,

for JOHN M. BENAVENTE, P.E.
Vice General Manager



GUAM POWER AUTHORITY
P.O. Box 2977, HAGATÑA, GUAM 96932-2977



747 560413
04 JAN 12 09:01

POSTAGE \$001.40⁰⁰

EXHIBIT F

Guam Shipyard's November 24, 2020 request for reconsideration



Guam Shipyard ♦ 272 E. Harmon Industrial Park Road, Unit 201
Tamuning, Guam - 96913

♦ Tel: (671) 648-1160 ♦ Fax: (671) 648-1166

November 24, 2020

John M. Benavente, P.E.
General Manager
Guam Power Authority

RE: Request for Reconsideration - November 19, 2020 Protest Denial Letter

REF: Multi-Step Bid No. GPA-061-020 for Performance Management Contract for Yigo Generators.

Hafa Adai John,

Guam Shipyard is in receipt of your letter denying Guam Shipyard's November 4, 2020 protest of the Invitation for Multi-Step Bid No. GPA-061-020 ("IFB"). I would point out that although your letter is dated November 9, it was postmarked November 19 and not received until November 23. Accordingly, we will refer to this letter as GPA's November 19 letter. Having reviewed the letter, Guam Shipyard hereby formally requests pursuant to 2 GAR §9101(h) that you reconsider your decision for the reasons below. Because of the short timeframe that Guam Shipyard has to appeal your decision to the Office of Public Accountability, a timely response would be much appreciated.

Title 5 GCA § 5425(a) and 2 GAR § 9101(c)(1) commence the 14-day period for the filing of a protest from when the aggrieved bidder "knows or should have known of the facts giving rise thereto." As pointed out in my October 19 and November 4 letters, GPA's October 14 letter did not explain its basis for deeming Guam Shipyard's bid as unacceptable. It failed to provide any facts that could give rise to any protest. In addition, the October 14 letter failed to satisfy Section 1.17 of the IFB, which stated that GPA would provide all bidders whose proposals are deemed unacceptable a notice "informing them of the reason for not qualifying."

As confirmed by your November 19 letter, GPA did not conform with IFB Section 1.17 and inform Guam Shipyard of the reason it did not qualify until your October 22, 2020 letter, which Guam Shipyard did not receive until October 26, 2020. Accordingly, Guam Shipyard's protest period did not expire until November 9, 2020, and its November 4, 2020 protest letter was timely.

Of significant legal effect, GPA's use of a 1,050-point threshold to separate technical offers into only two categories, acceptable and unacceptable, violates Guam regulation, namely, 2 GAR § 3109(t)(4), and it directly contradicts Section 13 of the "Government of Guam Sealed Bid Solicitation Instructions" (IFB p. 200), both of which require GPA to segregate technical offers into three categories, including "potentially acceptable." Section 3109(t)(4) unequivocally mandates that: "The unpriced technical offers shall be categorized as acceptable, potentially acceptable..., or unacceptable." Accordingly, Guam Shipyard cannot reasonably be deemed to have known that GPA would be acting contrary to law and the IFB itself until it received your October 22 letter.

At a minimum, your October 22 letter may be deemed as relaying for the first time the fact that GPA acted in violation of Guam law, which would have triggered a new protest period. *See Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15, ¶ 28 (Guam 2004):

Upon review, and in consideration of the applicability of GMHA's own Procurement Regulations to solicitations undertaken by GMHA as stated above, we disagree with the trial court's conclusion that "[t]here can only be one event, and not a series of events, which triggers the right to protest." The plain meaning of 26 GAR 16901(c)(2), which states that "[p]rotestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer," supports an interpretation that there may be multiple events in any given solicitation that could legitimately trigger protests.

Cf. 2 GAR § 9101(c)(2) ("Protestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.")

Notwithstanding any dispute over when Guam Shipyard's protest period started, the Guam Supreme Court has already ruled that when a solicitation fails to comply with Guam law, the legal remedies in 5 G.C.A. § 5451 (cancellation or revision to comply with law) govern *regardless* of whether a protest was timely filed.

Our holding today invalidates the procurement process used in this case, *and therefore, it is unnecessary to discuss the other arguments raised by the parties in their briefs.* We look instead to available remedies in light of our holding. The contract, which was the subject of the RFP process erroneously used here, had not yet been awarded. The appropriate remedies, therefore, are found in 5 GCA § 5451 (2005),...

We hold that using Request for Proposal DOARFP 03-001 to procure the operation, management and maintenance of the Guam Mass Transit system, violated the Guam Procurement Code.... Because the procedure was conducted in violation of Guam law, the procurement is invalidated, and the proposed award is canceled.

Fleet Servs., Inc. v. Dep't of Admin., Gov't of Guam, 2006 Guam 6, ¶¶ 36-37 (Guam 2006).

The "other arguments raised by the parties in their briefs" to which the Court referred and declared unnecessary to discuss included a dispute over whether the aggrieved bidder timely filed its protest. *See Fleet Servs., Inc.*, 2006 Guam 6, ¶ 12 ("The parties here raise several arguments. Fleet challenges KEI's proposal in response to the RFP.... Fleet next argues that the trial court erred in holding that its second protest letter was not timely and in dismissing the case.")

Finally, your November 19 letter fails to mention any consultation with the Attorney General as required by 2 GAR § 9104(a)(2) ("After consultation with the Attorney General... 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"). As GPA is also required by 5 G.C.A. § 5150 to rely on the Attorney General's Office during all phases of any solicitation in excess of \$500,000, could you please confirm whether the Attorney General's Office has acted as GPA's legal advisor during all phases of the solicitation and in reviewing Guam Shipyard's protest. Please be advised that any additional information coming to Guam Shipyard's attention of a further violation of Guam law may result in an additional protest being filed. A

copy of this letter and Guam Shipyard's protest will be provided to the Attorney General's Office as a courtesy.

For your further consideration, you are respectfully reminded that the Guam Supreme Court has made clear that all solicitations under protest are suspended pending a final resolution of both the administrative and judicial processes.

Once a party brings a timely protest, an automatic stay of procurement until final resolution of that protest is required by both 5 GCA, Chapter 5, and 2 GAR, Div. 4, Chapter 9. The automatic stay provision of 5 GCA, Chapter 5, is found at 5 GCA § 5425(g) and states as follows: "In the event of a timely protest under Subsection (a) of this Section or under Subsection (a) of § 5480 of this Chapter, the Territory shall not proceed further with the solicitation or with the award of the contract prior to final resolution of such protest, and any such further action is void...."

(Teleguam Holdings, LLC v. Territory of Guam, 2015 Guam 13, ¶ 24).

The Government should refrain from taking action (e.g., issuing purchase orders to its chosen bidder) on a procurement award until the fourteen-day period has expired and a civil action has not been filed in the Superior Court to review the OPA's decision. There is no clearly stated legislative intent contrary to this interpretation."

(Teleguam, 2015 Guam 13, ¶ 25). Guam Shipyard reserves its rights to all administrative and judicial remedies.

Guam Shipyard regrets that these apparent errors in the preparation of the IFB have warranted the course of action it is now pursuing. However, but for the confusion in the IFB, Guam Shipyard and possibly some or all of the other bidders would have been given further opportunity under 2 GAR § 3109(t)(5) to provide GPA with more information that would have helped GPA ensure that it is selecting the lowest responsible and responsive bidder, consistent with the Guam Procurement Law. Guam Shipyard looks forward to further participating in this solicitation, as revised or reissued, to present GPA with the information that it believes will assist GPA secure the best deal for the Island of Guam. If selected as the low bidder, Guam Shipyard would be an excellent partner for GPA in operating and maintaining the Yigo Generator Site.

Should you require further information or clarification, please contact me at telephone (671) 727-7799 or by email mpothen@guamshipyard.net.

Sincerely,



Mathews Pothen
President

CC: GPA Bid File – GPA – 061-020
Attorney General's Office
Arthur Clark, Esq.