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**In the Appeal of Track Me Guam, LLC; OPA-PA-21-002**

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**Claire Pollard** <cpollard@rwtguam.com>

Mon, Jul 26, 2021 at 4:08 PM

To: Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

Cc: "Joshua D. Walsh" &lt;jdwalsh@rwtguam.com&gt;, "Edwin J. Torres" &lt;etorres@rwtguam.com&gt;

Dear Mr. Hernandez:

Please see the attached *Comments on Agency Report* below to be filed in the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,  
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**7.26.21 Comments on Agency Report.pdf**

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**PROCUREMENT APPEAL OF DENIAL OF PROCUREMENT PROTEST  
IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

**PART I.**

In the Appeal of

Track Me Guam, LLC

Appellant.

**DOCKET NO. OPA-PA-21-002**

**COMMENTS ON AGENCY REPORT**

**I. INTRODUCTION**

Pursuant to 2 GAR §§ 12104(c)(4) and 12108(a), Appellant Track Me Guam, LLC. (“TrackMe” or “Appellant”) submits its Comments on the Agency Report submitted by the Guam Power Authority (“GPA”) to the Office of Public Accountability on July 16, 2021. These comments are submitted to address the inadequacies and unavailing nature of the Agency Report regarding Guam Power Authority issued Bid Invitation GPA-024-21 issued on January 8, 2021, seeking Fleet and Fuel Management Software Services for GPA’s fleet (the “IFB”).

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## II. COMMENTS TO AGENCY STATEMENT

### A. **RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.**<sup>1</sup>

The Guam Power Authority issued Bid Invitation GPA-024-21 seeking Fleet and Fuel Management Software Services for GPA's fleet. Bids were opened on January 28, 2021, and TrackMe was informed on March 8, 2021, that an award was recommended for IT&E. TrackMe initiated an agency level protest on March 12, 2021, as the selection of IT&E under the IFB would mean that GPA would be selecting a non-responsive and ultimately non-responsible bidder, since IT&E's proposed tracking solution for GPA cannot comply with requirement C.1-17 Fuel dispense tracking as specified in the IFB.

Following that initial protest, TrackMe obtained new information discovered on March 29, 2021, following GPA's production of documents to TrackMe, pursuant to a Sunshine Request submitted to GPA with TrackMe's first protest. From the documents produced, TrackMe identified four (4) issues with IT&E's bid that render the bid non-responsive and IT&E non-responsible: (1) inability to comply with requirement C.1-17 of the IFB; (2) inability to comply with requirement B.6 of the IFB; (3) inability to comply with requirement C.1-13; and (4) inability to comply with requirement C.2. Those failures were identified to GPA in TrackMe's correspondence of April 6, 2021. On June 16, 2021, TrackMe received correspondence from GPA Denying its Protests of March 21 and April 6, 2021. A

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<sup>1</sup> Much of this history is contained in TrackMe's Notice of Appeal, but is recounted here for ease of reference for the reader.

Notice of Appeal to the OPA followed. The Agency report was provided on July 16, 2021.

**B. GPA'S AGENCY REPORT PROVIDES NO SUBSTANTIVE RESPONSE TO THE APPEAL FILED WITH THE OPA, AND CONFIRMS THAT GPA ALLOWED IT&E TO ANSWER THE QUESTION OF RESPONSIVENESS FOR THE AGENCY, AND ALLOWED IT&E TO SUPPLEMENT ITS BID RESPONSE.**

2 GAR Div. 4, §12105 (g) explains that an Agency Report shall include a “statement answering the allegation of the Appeal and setting forth findings, actions, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the Appeal. The statement shall be fully responsive to the allegations of the Appeal.” GPA’s Agency report here, like the Protest Decisions is issued previously, anemically address only some of the protest grounds, and wholly ignore others. The Agency Report stands upon the same grounds for the denial issued to TrackMe’s Agency Level protest: GPA requested that IT&E respond to each of the allegations raised in the protests. GPA then accepted those responses, did no independent investigation of its own, and promptly denied the protest. GPA’s Agency Report, like its June 16, 2021, denial of TrackMe’s protests, also did not substantively address the allegations that IT&E’s was non-responsive to the IFB. Rather than conduct its own inquiry into the responsiveness of IT&E’s submitted bid, GPA simply restated its reliance upon IT&E.<sup>2</sup>

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<sup>2</sup> GPA’s Agency report falsely claims that the information provided to GPA regarding IT&E’s nonresponsiveness are “not supported by documents.” Agency report, 3. GPA simply ignores the fact that TrackMe’s April 6, 2021, protest included more than 100 pages of data and manuals supporting its assertions.

**C. GPA DID NOT SUBSTANTIVELY ENGAGE WITH THE MERITS OF TRACKME'S PROTEST REGARDING IT&E'S NONRESPONSIVENESS.**

GPA's Protest Denial contained no substantive response to the material technical issues raised in TrackMe's protests that formed the basis of TrackMe's April 6, 2021, Protest. GPA's Agency Report similarly ignores these further failings. This constitutes error by GPA.

The Agency Report claims that the agency reviewed the allegations made by Track Me regarding IT&E's responsiveness, and reviewed the matter with the GPA evaluation committee, and found no error. Agency Report, 3. The procurement record reveals a different reality. TrackMe's protest of April 6 raised the specific failure of IT&E to respond to the following requirements as grounds for the protest: Failure to Comply with Requirement C.1-17, Failure to Comply with Requirement B.6, Failure to Comply with Requirement C.1-13, and the Failure to Comply with Requirement C.2. Procurement Record ("PR"), Tab 16. GPA's legal counsel then directed the protest to the evaluation committee for action that same day. PR, Tab. 13 (pg. 247 of 1464). On April 19, 2021, the committee prepared an unsigned memorandum meant for the Supply Management Administrator seeking to have IT&E provide clarification on the various matters raised in the protest. PR, Tab 13. (pg. 244 of 1464). It appears from the record that the Memo went nowhere while waiting for further internal action from GPA, and GPA simply chose to deny TrackMe's protest, without ever following through on the evaluation committee

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Procurement Record, Tab 16. TrackMe's earlier protest also contained documentary support, and included relevant correspondence from IT&E's software supplier. Procurement Record, Tab 24.

memorandum. PR, Tab 10. This failing of GPA in keeping an adequate procurement record and organization to handle TrackMe's protest violates Guam law.

**D. IT APPEARS THAT GPA IS SEEKING TO VIOLATE THE AUTOMATIC STAY.**

Troublingly, it appears that GPA has taken steps to violate the automatic stay of procurement mandated by Guam Law. It is axiomatic that "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." *Teleguam Holdings, LLC v. Territory of Guam*, 2015 Guam 13, ¶ 24 (Guam Apr. 22, 2015). The Procurement Record shows that, shortly after deciding to deny TrackMe's Protests, GPA prepared and executed notices lifting the stay of procurement, and declaring that it would proceed with an award to IT&E despite the protest not being fully resolved. (Procurement Record Tab 12, Pf. 226 of 1464). GPA's actions constitute a further violation of law. *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20, ¶ 148. ("We have consistently held that the stay following a timely, pre-award procurement protest applies automatically. In other words, the stay under section 5425(g) is triggered by a timely protest. It applies where a protest is both factually timely and ... pursued before the award has been made. This is in accord with the mandatory nature of 5 GCA § 5425(g). For this reason, once a party brings a timely protest, an automatic stay of procurement until final resolution of that protest is required. While our cases have indicated that parties have sought to enforce the automatic stay by court order, our case law is

equally clear that the automatic stay is a legal entitlement that vests upon a timely, pre-award protest. No court order is necessary for the automatic stay to become effective. The automatic stay set forth in section 5425(g) remains in effect from the date of protest and continues until final resolution of the action by the Superior Court.” (internal quotations, citations, and edits omitted).


GPA’s pushing forward with the procurement award and performance of IT&E hampers any remedy TrackMe may have to become an awardee of the IFB, since the Territory may be able to merely ratify and affirm IT&E’s contract regardless of the outcome of the instant appeal. 5 GCA § 5425(a)(1); (2). Since TrackMe may only be able to recover the costs of its bid if the stay is not honored and its protest appeal is sustained by the OPA, TrackMe may be irreparably injured if GPA continues along this path. Irreparable injury is defined as injury for which there is no adequate remedy at law. *Shin v. Fujita Kanko Guam, Inc.*, CVA 07-002, 2007 WL 4348300 (Guam Dec. 6, 2007); *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 716-17 (Fed. Cl. 2006). The Federal Claims court has held that where an aggrieved offeror can only gain the costs of bid preparation in a suit for damages, and not anticipated profits, such a bid protester is irreparably harmed. *See Bannum, Inc. v. United States*, 60 Fed. Cl. 718, 730 (Fed. Cl. 2004) *citing Essex Electro Eng'rs, Inc. v. United States*, 3 Cl.Ct. 277, 287 (1983), *aff'd*, 757 F.2d 247 (Fed.Cir.1985). TrackMe reserves all rights available to it if it learns that GPA has indeed violated the stay of procurement.

### III. CONCLUSION

GPA issued an IFB for tracking services, selected for award a non-responsive offeror, and took no action to review that matter. Rather than confront the merits of the appeal, GPA's Agency report stands upon the same vapid protest denial that led to this appeal. Based on the foregoing, TrackMe respectfully requests that its protest appeal be sustained.

Submitted this 26<sup>th</sup> day of July, 2021.

**RAZZANO WALSH & TORRES, P.C.**

By:   
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