



Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-22-004

LEGAL ASST <legal@terlajelaw.com>

Fri, Jul 1, 2022 at 4:21 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: "procurement@guam.gov" <procurement@guam.gov>, Jacqueline Terlaje <jterlaje@terlajelaw.com>, ADMIN DESK <info@terlajelaw.com>

Hafa Adai, Mr. Hernandez.

Our office would like to submit the attached Appellant's Comments to Agency Statement and Appellant's Request for Hearing for e-filing with the OPA in the matter referenced above. Kindly confirm receipt of these two (2) attachments.

Have a nice weekend.

Si Yu'os Ma'ase,
Tatiana Agustin
Legal Assistant
LAW OFFICE OF
JACQUELINE TAITANO TERLAJE, P.C.
284 West Chalan Santo Papa
Hagatna, Guam 96910
Telephone 671.648.9001
Facsimile 671.648.9002
info@terlajelaw.com<mailto:info@terlajelaw.com>

CONFIDENTIALITY NOTICE: THE FOREGOING MESSAGE, INCLUDING ANY ATTACHMENTS, IS COVERED BY THE ELECTRONIC COMMUNICATIONS PRIVACY ACT, 18 U.S.C. SECTIONS 2510-2521, IS SENT BY A LAW FIRM AND IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHOM OR WHICH IT IS ADDRESSED. THE MESSAGE CONTAINS INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE. ANY AND ALL SUCH RIGHTS OF PRIVILEGE, CONFIDENTIALITY AND NON-DISCLOSURE ARE HEREBY CLAIMED AND EXPRESSLY NOT WAIVED. DO NOT READ THE MESSAGE AND ATTACHMENT(S) IF YOU ARE NOT THE INTENDED RECIPIENT. THE INFORMATION CONTAINED IN THIS E-MAIL TRANSMISSION AND ANY ATTACHMENT IS CONFIDENTIAL AND REMAINS THE PROPERTY OF THE SENDER UNTIL IT IS RECEIVED BY THE INTENDED RECIPIENT. IF YOU ARE NOT THE INTENDED RECIPIENT, OR AN EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE CONTACT THE SENDER IMMEDIATELY OR NOTIFY CLIENT SERVICES AT [<mailto:671.648.9001/info@terlajelaw.com> | 671.648.9001/info@terlajelaw.com] ; DELETE THIS EMAIL AND ALL ATTACHMENTS IMMEDIATELY, IF APPLICABLE.

2 attachments **1Jul22 Appellant Comments to Agency Statmt.pdf**
118K **1Jul22 Appellant Req Hearing.pdf**
74K

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Jacqueline Taitano Terlaje, Esq.
LAW OFFICE OF JACQUELINE TAITANO TERLAJE, P.C.
284 W Chalan Santo Papa
Hagåtña, Guam 96910
Telephone 671.648.9001
Facsimile 671.648.9002
Email: info@terlajelaw.com

Attorney for *Appellant*

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

IN THE APPEAL OF) APPEAL NO. OPA-PA-22-004

DATA MANAGEMENT RESOURCES,) **APPELLANT’S COMMENTS TO AGENCY**
LLC.) **STATEMENT**
Appellant.)

COMES NOW Appellant, DATA MANAGEMENT RESOURCES, LLC (DMR), through undersigned counsel, the Law Office of Jacqueline Taitano Terlaje, PC, to hereby submit its Comments to the Agency Statement filed on June 21, 2022 related to Request for Proposal Office of the Governor RFP-OOG-2022-001 for the Guam Licensing and Permitting System.

I. FACTUAL BACKGROUND

Prior to the issuance of the RFP-OOG-2022-001, a Government of Guam employee without any prior procurement training was tasked with the development and authoring of the requirements of the procurement of the Guam Licensing and Permitting System. *See* RFP-OOG-2022-001, p. 48 of 96, Section O. Section O provides, in part “[t]his Scope of Services was drafted by: Matthew Santos”. Matthew Santos has not completed any procurement modules with the Guam Community College

1 Procurement Program, as required by Guam Procurement Law. 5 G.C.A. § 5141(b). Neither was there any
2 assigned Procurement Officer to oversee the function, service, description of requirements, selection and
3 solicitations of sources in preparation of the acquisition of professional services for a licensing and business
4 permitting system. *See* Procurement Record (Jun. 16, 2022) at p. 313 Designation of Procurement Officer
5 (May 19, 2022).

6 No designation of any procurement officer was produced in the record by the Office of the
7 Governor prior to December 6, 2021, when the initial planning and development stage of RFP-OOG-2022-
8 001 occurred. *See* Procurement Record (Jun. 16, 2022) at p. 234 - 303 Determination of Need for Contract
9 for Professional Services (Dec. 6, 2021); Determination of Multi-Year Contract (Dec. 6, 2021);
10 Determination to Use Installment Payments (Dec. 6, 2021); Memo to Chief Information Officer (Dec. 13,
11 2021). On May 19, 2022, following the protests of Appellant of the inability of the Government to clearly
12 describe the minimum specifications of the requested services, amongst other grounds, the Office of the
13 Governor appointed Venido Torres, Procurement Officer with the authority to enter into procurement
14 contracts. *See* Procurement Record (Jun. 16, 2022) at p. 313 Designation of Procurement Officer (May 19,
15 2022).
16

17 RFP-OOG-2022-001 is currently funded by the U.S. Department of Interior Grant Award No.
18 D20AP00048 until the end of FY 2022. *See* RFP-OOG-2022-001 p. 20, Section Z. Due to an approval of
19 extension, the expiration for utilization of funds is on September 30, 2022. *See* Exhibit 15 and Exhibit 16
20 Decl. J. Terlaje (Jun. 24, 2022). No evidence of the extension of the grant has been provided by the
21 Government. Therefore, funding for RFP-OOG-2022-001 expires in three months despite the necessity of
22 performing deliverables in excess of twelve (12) months. *See* Procurement Record (Jun. 16, 2022) at p. 234
23 Determination to Use Multi-Year Contract (Dec. 6, 2021) (“The Office of the Governor has determined that
24 the scope and scale of this project will require a time frame that will surpass a full fiscal period”.)
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ARGUMENT

(a) The government is not excused from the good faith requirement for entry into all contracts, and its failure to secure funding for the first year of its multi-year contract constitutes bad faith.

5 G.C.A. § 5003 requires the Government of Guam to enter into all contracts, including multi-year contracts in good faith. While the government excuses its inability to secure funding for multi-year contracts, the alarming issue in RFP-OOG-2022-001 is that the government not only sought an extension of its funding on the basis of the need to extend beyond the first contract year, but it has also confirmed that it has not confirmed any source of funding past September 30, 2022. *See* Exhibit 15 Decl. J. Terlaje (Jun. 24, 2022), Letter Requesting Grant Extension (May 27, 2021)(citing implementation costs, training, licensing and support to be expended outside the first year of contract); Exhibit 4 Notice of Appeal, p. 7 of 13 RFP Gov-2022-001 Responses to All RFP Questions 3/5/2022.

RFP-OOG-2022-001 provides:

The estimated time for performance of the implementation of the system and services outlined in the Scope of Services in the RFP is approximately twelve (12) months (“Implementation Period”),

RFP-OOG-2022-001 is intended as a multi-year contract. However, the government in response to the funding source after September 30, 2022, responded, “Funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.” Funding must be available for all fiscal periods, or the contract may have to be cancelled. Because the purpose of multi-term contracts is to promote both economy and efficiency, the failure of the government to confirm availability of funding or at bare minimum the agency responsible for the remaining contract term increases the risk of defeating the purpose of multi-term contracts.

1 Based on the current approach of end of Fiscal Year 2022, within three (3) months, the government
2 concedes that it lacks funding for the first year of contract under RFP-OOG-2022-001. The failure of the
3 government to ensure adequate funding, and to act in good faith in the request for a multi-year contract,
4 requires a reformation of RFP-OOG-2022-001, or cancellation based on the impossible and arbitrary
5 conditions imposed by RFP-OOG-2022-001.

6
7 **(b) The arbitrary conduct of the Office of the Governor in compliance with 5 G.C.A. § 5141(b)**
8 **and 2 C.F.R. § 200.319 erodes the maximum fairness and competition required in all**
9 **procurements.**
10

11
12 Importantly, the OOG does not deny its failure to comply with 5 G.C.A. § 5141(b), which provides in
13 part:

14 Mandatory Certification and Continuing Education. Notwithstanding any other provision
15 of law or this Chapter and effective October 1, 2016, all government of Guam personnel
16 tasked with the responsibility of purchasing or otherwise procuring goods, or services, or
17 construction, including those employed by agencies with authority to conduct their own
18 procurement, as well as any person within the Office of Public Accountability responsible
19 for administering procurement appeals or auditing of the purchasing activities of the
20 government of Guam, must receive the training and continuing education to the extent
21 required under this Section and offered by the College in consultation with the Guam
22 Procurement Advisory Council. **A government of Guam employee who is required to**
23 **receive the training may not participate in purchases by the employing agency**
24 **unless the employee has received the required training or received equivalent**
25 **training from a national association recognized by the College and the Guam**
26 **Procurement Advisory Council, which shall be the judge of equivalency.** The
27 equivalent training may count toward the continuing education requirements of this
28 Section, as determined by the College, in consultation with the Guam Procurement
Advisory Council.

24 The OOG in further failing to comply with 5 G.C.A. § 5141(b) has engaged in arbitrary conduct in violation
25 of 2 C.F.R. § 200.319. Specifically, as a Recipient under U.S. Department of the Interior – Office of Insular
26 Affairs, Grant and Cooperative Agreement D20AP0048, the use of federal funds specifically requires the

1 Office of the Governor not only to ensure maximum competition, but to avoid the engagement of arbitrary
2 conduct in the procurement process which is presumptive of restriction on competition.

3 The failure to ensure compliance with procurement training and certification of a central participant
4 in RFP-OOG-2022-001 constitutes arbitrary conduct, and the OOG's attempts to allege that it
5 "substantially and materially complied" does not cure the erosion of the policy mandating maximum
6 competition. While the OOG further alleges that the Appellant has not been affected by its arbitration
7 conduct and that the Appellant has failed to allege prejudice, the mere fact of the government engaging in
8 arbitrary conduct is in itself prejudicial to the maximum competition in procurement, and violates the
9 government's obligation to ensure a competitive and fair process in RFP-OOG-2022-001.
10

11
12 **(c) The Office of Public Accountability (OPA) retains jurisdiction over this appeal.**

13
14 The government asserts in its Agency Statement that the appeal herein was untimely made because
15 the Appellant knew or should have known of the government's arbitrary conduct from the first day of the
16 publication of RFP-OOG-2022-001. On March 5, 2022, the OOG provided confirmation of the lack of
17 funding beyond September 30, 2022. Appellant had no information available in the procurement that the
18 government had no source of funding beyond September 30, 2022. On March 5, 2022, it was clear that the
19 government while knowing that the obligations of performance would exceed September 30, 2022, provides
20 no source of funding for the first year of contract, or the first twelve months, and the remaining term of the
21 multi-year contract. Based on the responses of the government confirming its lack of funding for the entire
22 first year of contract and the additional term required under the multi-year contract, the Appellant's protest
23 was timely. In other words, the government now admits that it has only three months of funding of a five
24 (5) year contract. Based on the disclosure of these facts, the protest and appeal were timely.
25
26

1
2 **(d) Failure to comply with procurement laws on maintenance of record, publication and notices**
3 **in compliance with 5 G.C.A § 5220 is evidence of depletion of confidence in procurement**
4 **where government arbitrarily ignores its obligation under 5 G.C.A. § 5141(b).**
5

6 The government misconstrues the intent of Appellant in identifying other procurement irregularities in
7 RFP-OOG-2022-001, as identified in Section (c) of the Notice of Appeal. The OPA has authority to
8 consider evidence of irregularities in the procurement process in the context of any procurement appeal.
9 Notably, the government has confirmed that it is in receipt of proposals to RFP-OOG-2022-001. However,
10 lacking in the record is any confirmation of the government's compliance with notices to All Interested
11 Parties regarding the status of this appeal. 2 GARR Div. 4 Ch. 12 § 12104(c)
12

13
14 **CONCLUSION**

15 **BASED ON THE FOREGOING**, DMR respectfully requests that the Hearing Officer set this
16 matter for hearing on the merits of this appeal.

17 **RESPECTFULLY SUBMITTED** on this 1st day of July, 2022.
18

19 **LAW OFFICE OF**
20 **JACQUELINE TAITANO TERLAJE, P.C.**

21 BY: /s/

22 **JACQUELINE TAITANO TERLAJE**
23 *Attorney for Appellant, Data Management Resources, LLC*