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Opposition to MTD - OPA-PA-22-004

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Hafa Adai, Mr. Hernandez.

Our office would like to submit the attached Appellant's Opposition to Motion to Dismiss for e-filing with the OPA in the matter referenced above. We kindly request an acknowledgement of receipt of this opposition. Have a nice evening.

Si Yu'os Ma'ase,
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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,
LLC.

Appellant.

**APPELLANT’S OPPOSITION
TO MOTION TO DISMISS**

COMES NOW Appellant, DATA MANAGEMENT RESOURCES, LLC (DMR), through undersigned counsel, the Law Office of Jacqueline Taitano Terlaje, PC, to hereby submit its Opposition to the Government’s Motion to Dismiss. related to Request for Proposal Office of the Governor RFP-OOG-2022-001 for the Guam Licensing and Permitting System (hereinafter “Business Licensing System”). While the government applies the Guam Rules of Civil Procedure to this administrative process in seeking dismissal of the appeal herein, as far as is known by Appellant DMR, the OPA has not adopted the civil action standards in these administrative proceedings, and thus, relies on Guam Procurement Law in setting forth this opposition to the Government’s motion to dismiss. *See* OPA Rules of Procedure www.opaguam.org/procurement-appeals/rules-procedure; *see also* 2 GARR, Div. 4 Chapter 12.

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I. FACTUAL BACKGROUND

RFP-OOG-2022-001 is the procurement of a multi-year contract for professional services for a government licensing and permitting system (referred to herein as “Business Licensing System”), and which is intended to integrate numerous entities throughout the Government of Guam, including data integration, payment processing and public portal applications. The initial term of contract is five (5) years.

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

No designation of any procurement officer was produced in the record by the Office of the Governor prior to December 6, 2021, when the initial planning and development stage of RFP-OOG-2022-001 occurred. *See Procurement Record* (Jun. 16, 2022) at p. 234 - 303 Determination of Need for Contract for Professional Services (Dec. 6, 2021); Determination of Multi-Year Contract (Dec. 6, 2021); Determination to Use Installment Payments (Dec. 6, 2021); Memo to Chief Information Officer (Dec. 13, 2021).

On May 19, 2022, following the protests of Appellant of the inability of the Government to clearly describe the minimum specifications of the requested services, amongst other grounds, the Office of the Governor appointed Venido Torres, Procurement Officer with the authority to enter into procurement

1 contracts. *See* Procurement Record (Jun. 16, 2022) at p. 313 Designation of Procurement Officer (May 19,
2 2022).

3 RFP-OOG-2022-001 is currently funded by the U.S. Department of Interior Grant Award No.
4 D20AP00048 until the end of FY 2022. *See* RFP-OOG-2022-001 p. 20, Section Z. Due to an approval of
5 extension, the expiration for utilization of funds is on September 30, 2022. *See* Exhibit 15 and Exhibit 16
6 Decl. J. Terlaje (Jun. 24, 2022). No evidence of the extension of the grant has been provided by the
7 Government beyond September 30, 2022. Therefore, funding for RFP-OOG-2022-001 expires in less than
8 three months despite the necessity of performing deliverables in excess of twelve (12) months. *See*
9 Procurement Record (Jun. 16, 2022) at p. 234 Determination to Use Multi-Year Contract (Dec. 6,
10 2021)(“The Office of the Governor has determined that the scope and scale of this project will require a
11 time frame that will surpass a full fiscal period”.)
12

13 14 **ARGUMENT**

15 The jurisdiction of the Office of Public Accountability (OPA) is to review “de novo” all matters
16 properly submitted, and to “promote the integrity of the procurement process” and the purposes
17 established by the Guam Procurement Law. 5 G.C.A. § 5703(a) and (f). The applicable standard of review
18 is governed by Guam Procurement Law. 5 G.C.A. § 5704. *See* 5 G.C.A. § 5703.
19

20 The OPA has de novo authority to determine the following as appealed:

- 21 (i) Whether the solicitation herein violates 5 G.C.A. § 5003, requiring the parties to act in good
22 faith;
- 23 (ii) Whether the government in failing to comply with 5 G.C.A. § 5141 acted arbitrarily in
24 violation of Guam law and applicable federal law;
- 25 (iii) Whether the government following a protest can “substantially comply” with 5 G.C.A.
26

1 implementation period constitutes bad faith. In this case, as set forth in the Appellant’s Comments to the
2 Agency Report (Jul. 1, 2022), the government concedes that the implementation process required under the
3 Business Licensing System will exceed twelve (12) months. Specifically, the government not only sought an
4 extension of its funding on the basis of the need to extend beyond the first contract year, but it has also
5 confirmed that it has not confirmed any source of funding past September 30, 2022. *See* Exhibit 15 Decl. J.
6 Terlaje (Jun. 24, 2022), Letter Requesting Grant Extension (May 27, 2021)(citing implementation costs,
7 training, licensing and support to be expended outside the first year of contract); Exhibit 4 Notice of
8 Appeal, p. 7 of 13 RFP Gov-2022-001 Responses to All RFP Questions 3/5/2022.

9
10 RFP-OOG-2022-001 provides:

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

14 Based on the current approach of end of Fiscal Year 2022, with less than three (3) months remaining in the
15 current fiscal year, the government concedes that it lacks funding for the first year of contract under RFP-
16 OOG-2022-001. No funding has been identified for Fiscal Year 2023, which begins on October 1, 2022.
17 The failure of the government to act in good faith in the request for a multi-year contract, requires a
18 reformation of RFP-OOG-2022-001, or cancellation based on the impossible and arbitrary conditions
19 imposed by RFP-OOG-2022-001.

20 Notably, the request for reformation and/or cancellation was identified by Appellant on July 1,
21 2022. Notwithstanding, the government insists that DMR has requested no such relief. *See* Motion to
22 Dismiss (Jul. 13, 2022). Because the government is required by 5 G.C.A. § 5003 to enter act in good faith in
23 all stages of this procurement process, including contracting for the multi-year periods, DMR’s appeal
24 should be sustained and this motion to dismiss denied.
25

1 (ii) The arbitrary conduct of the Office of the Governor in compliance with 5
2 G.C.A. § 5141(b) and 2 C.F.R. § 200.319 erodes the maximum fairness and
3 competition required in all procurements.

4 A government employee who was not trained in procurement process and procedure, developed and
5 authored RFP-OOG-2022-001. 5 G.C.A. § 5141(b) prohibits non-procurement personnel from
6 participating in the procurement process until the completion of the mandatory training required by Guam
7 Procurement Law. Notwithstanding the mandatory provision of statute, the government not only permitted
8 the development and authoring of RFP-OOG-2022-001 by an employee unfamiliar with the procurement
9 process, attempts to fix its disregard of Guam law by belatedly appointing a procurement officer on May 19,
10 2022.

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

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

26 The OOG in further failing to comply with 5 G.C.A. § 5141(b) has engaged in arbitrary conduct in violation
27 of 2 C.F.R. § 200.319. Specifically, as a Recipient under U.S. Department of the Interior – Office of Insular
28 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 in accordance
10 with Guam Procurement Law, and the obligations imposed by 2 C.F.R. § 200.319.
11

12
13 **(b) The Office of Public Accountability (OPA) retains jurisdiction over this appeal.**
14

15 The government asserts in its Agency Statement that the appeal herein was untimely made because
16 the Appellant knew or should have known of the government's arbitrary conduct from the first day of the
17 publication of RFP-OOG-2022-001. On March 5, 2022, the OOG provided confirmation that there was no
18 other source of funding other than the federal funds identified, and that such funding would not be
19 available past the implementation period. Appellant had no information available in the procurement that
20 the government had no source of funding beyond September 30, 2022 until March 5, 2022. Upon response
21 from the government, it was clear that the government while knowing that the obligations of performance
22 would exceed September 30, 2022, provides no source of funding for the first year of contract, or the first
23 twelve months, and the remaining term of the multi-year contract. Based on the responses of the
24 government confirming its lack of funding for the entire first year of contract and the additional term
25
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1 required under the multi-year contract, the Appellant's protest was timely. In other words, the government
2 now admits that it has only two months of funding for an initial term of five (5) years. Based on the
3 disclosure of these facts, the protest and appeal were timely.
4

5 **(c) OPA has jurisdiction to review a Determination to Proceed.**

6 On June 24, 2022, Appellant DMR submitted its Motion for Review pursuant to 2 GARR Div. 4 Ch. 12
7 § 12115(b). As set forth therein, Guam Procurement Law does not exclusively limit the review of a
8 government determination to proceed to the two (2) day period alleged by the government.
9

10
11 **CONCLUSION**

12 **BASED ON THE FOREGOING**, DMR respectfully requests that the Hearing Officer deny the
13 Government's Motion to Dismiss.

14 **RESPECTFULLY SUBMITTED** on this 25th day of July, 2022.

15 **LAW OFFICE OF**
16 **JACQUELINE TAITANO TERLAJE, P.C.**

17 BY: /s/

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