



Jerrick Hernandez <jhernandez@guamopa.com>

E-FILING: In the Appeal of Pacific Data Systems, Inc.; OPA-PA-21-001;

Tawnia N. Katsuren <receptionist@perezlawguam.com>

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Reply-To: receptionist@perezlawguam.com

To: jhernandez@guamopa.com

Cc: john@pdsguam.com, rstopasna@ghura.org, Steven.Carrara@itehq.net, tbagana@guamopa.com, acp@perezlawguam.com

Hafa Adai Jerrick,

Attached is *GHURA's Motion to Dismiss Appeal for Lack of Jurisdiction* for E-filing. We will be serving physical copies to your office shortly.

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Respectfully,

Tawnia N. Katsuren, *Secretary***LAW OFFICE OF ANTHONY C. PEREZ**

Suite 802, DNA Building

[238 Archbishop Flores Street](#)[Hagåtña, Guam 96910](#)

TELEPHONE: (671) 475-5055

FACSIMILE: (671) 477-5445

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**062821 Motion to Dismiss Appeal Lack of Jurisdiction (ACP Final).pdf**

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1 **LAW OFFICE OF ANTHONY C. PEREZ**

2 Suite 802, DNA Building
3 238 Archbishop Flores Street
4 Hagåtña, Guam 96910
Telephone No. (671) 475-5055/7
Facsimile No. (671) 477-5445

5 *Attorney for Guam Housing &*
6 *Urban Renewal Authority*

7 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
8 **HAGATNA, GUAM**

9 In the Appeal of

10 PACIFIC DATA SYSTEMS, INC.

11 Appellant.

APPEAL NO: OPA-PA-21-001

12 **MOTION TO DISMISS APPEAL FOR**
13 **LACK OF JURISDICTION**

14 **INTRODUCTION**

15 The Guam Housing and Urban Renewal Authority (“GHURA”) through counsel, Anthony
16 C. Perez, Esq., moves to dismiss this appeal for lack of jurisdiction. Appellant failed to timely
17 protest, and consequently, the Office of Public Accountability (“OPA”) has no jurisdiction over
18 this Appeal. In addition, Pacific Data Systems (“PDS”) has no standing to either protest or appeal
19 the denial of the protest and thus the OPA lacks jurisdiction over this matter.

20 **BACKGROUND**

21 On January 5, 2021, GHURA issued Invitation for Bid IFB#GHURA-COCC-21-003
22 (“IFB”) for the procurement of Metrolan-Connectivity/Internet/Telecom Bundled Services for
23 GHURA. See Agency Report, Tab C, IFB. Three bidders submitted bids: PDS, PTI Pacifica, Inc.
24 dba IT&E (“IT&E”), and Docomo Pacific, Inc. (“Docomo”). See Agency Report, Tab B, IT&E
25 bid and PDS bid. On February 12, 2021, the bids were opened, a PDS representative was present
26 at the bid opening, and an abstract of bids was created. See Agency Report, Tab D, Abstract of
27 Bid (“Abstract”). The Abstract exhibited that IT&E submitted the lowest bid of \$31,980.00,
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1 Docomo submitted the second lowest bid of \$55,744.32, while PDS submitted the highest bid of
2 \$60,204.00. PDS' bid was almost twice as high as IT&E's bid.

3 On February 12, 2021, the same day as the bid opening, PDS submitted a Freedom of
4 Information Act Request for IFB GHURA-COCC-021-003 ("FOIA") requesting in part a copy of
5 the bid of IT&E. See Agency Report, Tab E, Exhibit 1, FOIA. GHURA dutifully provided the
6 IT&E bid which was received by PDS on February 18, 2021. On February 22, 2021, PDS
7 submitted a letter ("PDS letter") to GHURA related to purported deficiencies within the IT&E bid
8 and requested that IT&E be disqualified as its bid was non-responsive. See Agency Report, Tab
9 E, Exhibit 2, PDS letter. PDS identified four issues with the IT&E bid, namely: deficiencies in
10 the Bid Bond, HUD form 5369-C, and Disclosure of Organizational Conflict of Interest Affidavit,
11 and the non-responsiveness of the IT&E bid because it was based on a point-to-multi-point service
12 design rather than a point-to-point design. *Id.* At this juncture, PDS was aware that IT&E was the
13 lowest bidder for the IFB, and knew that there were deficiencies and problems with the IT&E bid.

14 On February 24, 2021, Julieann Lujan, Data Processing Manager at GHURA, upon review
15 of the PDS letter, issued a Memo to File ("MIS Memo"), addressed to Greta Balmeo, Buyer
16 Supervisor II. See Agency Report, Tab E, Exhibit 3, MIS Memo. The MIS Memo addressed the
17 fourth allegation within the PDS Letter that IT&E's bid was not responsive as it was based on a
18 point-to-multi-point design, and found that PDS' allegation was unfounded as it misquoted the
19 contents of the pre-bid conference meeting. It further found that IT&E's bid was responsive as it
20 was a point-to point system.

21 On March 4, 2021, Greta Balmeo issued a Memo to File ("Procurement Memo") regarding
22 the allegations of the PDS letter, and concluded that though the IT&E bid did contain minor
23 informalities and/or insignificant mistakes, those could be waived or corrected without prejudice
24 to other bidders, as the effect on price, quantity, quality, delivery or contractual obligations is
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1 negligible. 2 GAR § 3109 (m)(4)(b). *See* Agency Report, Tab E, Exhibit 4, Procurement Memo.
2 Consequently, IT&E was permitted to correct such insignificant mistakes and re-submit the bid
3 bond, HUD form 5369-C, and Disclosure of Organizational Conflict of Interest Affidavit
4 (“Resubmissions”). *See* Agency Report, Tab E, Exhibit 5, Resubmissions. On March 4, 2021, the
5 award of the IFB to IT&E was made by the GHURA Board of Commissioners, and on March 12,
6 2021, PDS was informed that IT&E would be awarded the bid (“Notice of Non-Award”). *See*
7 Agency Report, Tab E, Exhibit 6, Notice of Non-Award.

9 On March 26, 2021, PDS issued a Protest of IFB GHURA-COCC-21-003 again alleging
10 identical deficiencies and the non-responsiveness of the IT&E bid that it previously raised in its
11 PDS letter of February 22, 2021. *See* Agency Report, Tab A, Protest. On May 5, 2021, the
12 Response to Letter of Protest (“Protest Decision”) was issued by GHURA denying the protest,
13 finding that though the IT&E bid contain minor informalities and/or insignificant mistakes, those
14 could be waived or corrected without prejudice to other bidders, as the effect on price, quantity,
15 quality, delivery or contractual obligations is negligible. *See* Notice of Appeal, Exhibit 2, Protest
16 Decision. The Protest Decision further found that IT&E’s bid was responsive as it was a point-to-
17 point system, PDS’ Protest was untimely, and PDS’ Bid was unreasonably high. *Id.* On May 19,
18 2021, PDS filed a Notice of Appeal.

21 ARGUMENT

22 The Public Auditor shall have the power to review and determine *de novo* any matter
23 properly submitted to her or him. 5 GCA § 5703 and 2 GAR, Div. 4, § 12103(a). This power
24 includes the power to rule on motions, and other procedural items on matters pending before
25 such office. 2 GAR, Div. 4, § 12109(d). Any motion concerning the jurisdiction of the Public
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1 Auditor shall be promptly filed, and the Public Auditor shall have the right to raise the issue of
2 jurisdiction *sua sponte* at any time. See 2 GAR, Div. 4, § 12104(c)(9).

3
4 **1. PDS has failed to abide by statutory timelines applicable to aggrieved bidders in
5 issuing its Protest.**

6 PDS has failed to comply with applicable law which provides definitive timelines for
7 aggrieved bidders to file a Protest. Here, PDS complained in its Protest of March 26, 2021, that
8 the IT&E bid was non-responsive to the IFB and should have been rejected by GHURA.
9 Specifically, PDS argued the IT&E Bid contained deficiencies in the bid bond, HUD form, and
10 HUD Organizational Conflict of Interest Form. PDS further argued that the IT&E bid was non-
11 responsive because its bid was based on a multi-point service design wherein the IFB sought a
12 point-to-point service design. However, PDS had been aware of the purported deficiencies and
13 non-responsiveness of IT&E's bid since February 22, 2021, when PDS transmitted the PDS
14 Letter to GHURA pointing out these exact same issues in IT&E's bid.

15
16 For procurement protests, any actual or prospective bidder, offeror or contractor who may
17 be aggrieved in connection with source selection, solicitation, or award of a contract, may protest
18 to the Chief Procurement Officer, the Director of Public Works, or the head of a purchasing
19 agency. 5 GCA §5425(a). The protest shall be submitted in writing within fourteen days after
20 such aggrieved person knows or should know of the facts giving rise thereto and protests filed after
21 fourteen-day period shall not be considered. *Id.*, and 2 GAR § 9101(c)(1). If the protest is not
22 resolved by mutual agreement, the Chief Procurement Officer, the Director of Public Works, the
23 head of a purchasing agency, or the designee of one of these officers shall promptly issue a decision
24 in writing and such decision may be appealed by the protestant to the Public Auditor within fifteen
25 days after receipt by the protestant of the notice of decision. 5 GCA § 5425(c) and (e), and 2 GAR
26 § 9101(g). Applying these procurement laws and regulations, for this matter to be properly before
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1 the Public Auditor, the Appellant must have filed its protest no later than fourteen days after it
2 became aware that IT&E's bid was deficient and non-responsive.

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4 On February 12, 2021, GHURA held a bid opening and PDS representatives were present
5 for said bid opening. The bid opening exhibited that IT&E submitted the lowest bid while PDS
6 submitted the highest bid. At this juncture, PDS was aware that it was not going to be awarded
7 the bid. That same day, PDS submitted a FOIA to GHURA seeking the bid documents of IT&E
8 and Docomo, which were provided on or about February 18, 2021. On February 22, 2021, PDS
9 submitted a letter to GHURA stating that PDS has completed a review of the IT&E bid and has
10 identified significant deficiencies in the bid. The deficiencies outlined are the same deficiencies
11 contained within the PDS letter of protest of March 26, 2021, namely: deficiencies in the bid bond,
12 HUD form, and HUD Conflict of Interest Form, and the non-responsiveness of the IT&E bid
13 because it is based on a multi-point service design.

14
15 Thus, by February 22, 2021, PDS knew that IT&E had submitted the lowest bid, and that
16 PDS found such bid deficient and non-responsive. At this juncture, PDS had fourteen days to
17 submit a Protest concerning the IT&E bid. Instead, PDS waited until March 26, 2021, to file a
18 Protest whose content is identical to that of the February 22, 2021 PDS Letter. PDS had actual
19 knowledge of problems with this procurement and IT&E bid on February 22, 2021, yet failed to
20 file a timely Protest within fourteen days of February 22, 2021.

21
22 On March 4, 2021, GHURA conducted a meeting of its Board of Commissioners. The
23 meeting was properly noticed, the award of the IFB at issue herein was on the agenda, and the
24 meeting was open to the public. At that meeting, the GHURA Board of Commissioners awarded
25 the IFB to IT&E. At this juncture, PDS knew that GHURA had not agreed to the PDS request in
26 its February 22, 2021 letter wherein PDS requested that GHURA disqualify the IT&E as non-
27 responsive, and should have known that IT&E was awarded the bid in a public board meeting.
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1 Actual knowledge is not required in determining when to file a protest, but the determination is
2 whether PDS should have known that IT&E was awarded the bid and not disqualified. The award
3 of the IFB was done publicly, and knowledge of the award of the IFB should be attributed to PDS
4 by March 4, 2021. PDS thus also had fourteen days from March 4, 2021, to file a timely protest,
5 but failed.
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7 Considering that PDS had actual and/or constructive knowledge of information that gave
8 rise to the grounds for its Protest on February 22, 2021 at the earliest, and March 4, 2021 at the
9 latest. PDS failed to file its Protest of March 26, 2021 within fourteen days allotted to lodge a
10 Protest, in clear violation of the laws of Guam.

11 **2. PDS has no standing to Protest or Appeal.**

12 PDS, in its Protest, states that it is protesting the Non-Award of the IFB as it argues that
13 the IT&E Bid should have been disqualified, the IT&E award was improperly made, and that PDS
14 presumably should have been awarded the bid. PDS has no standing to make such Protest or
15 Appeal the denial of its Protest as it submitted the third highest Bid, and even if the IT&E Bid was
16 rejected, said award would still not be made to PDS. The second lowest bidder for this IFB was
17 Docomo Pacific, Inc., and should the IT&E bid be rejected, the award would go to Docomo, not
18 PDS. Consequently, PDS is not an “aggrieved bidder” nor suffered any injury as it was not entitled
19 to an award of this Bid even if IT&E’s bid was disqualified.
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22 Standing is a threshold issue which must be addressed before any other inquiry. *Guam*
23 *Imaging Consultants, Inc. v. Guam Mem’l Hosp. Auth.*, 2004 Guam 15 ¶ 17 (citations omitted)
24 (noting that “the fundamental principle of jurisdiction [is] that a party must have standing to
25 litigate”).

26 Standing may be predicated upon either “the statutory grant of such standing by the
27 legislature or the common-law standing principles of Article III.” *Benavente v. Taitano*, 2006
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1 Guam 15 ¶ 20. Where standing is statutorily conferred, a court’s inquiry begins with a “straight
2 statutory construction of the statute to determine upon whom the Legislature conferred standing
3 and whether the Petitioners here fall in that category,” *Id* ¶ 19 (internal quotation marks and
4 citations omitted). Where standing is not conferred by statute, a court turns to “the common law
5 principles of Article III.” *Id.* ¶ 20. The Guam Supreme Court has held that both statutory and
6 common law standing must be satisfied for a movant to bring a cause of action. *See In re A.B.*
7 *Won Pat Int’l, Airport Auth.*, 2019 Guam 6 ¶ 16.

9 For statutory standing, PDS must establish that it was an actual bidder who may be
10 **aggrieved** in connection with a procurement. 5 GCA § 5425 (a). In its Protest and subsequent
11 Appeal, PDS complains of the “Non-Award” of the Bid, and that the IT&E bid and subsequent
12 award be rejected and rescinded. PDS does not have statutory standing to make such arguments
13 as it is not an aggrieved bidder in that it has not suffered any injury or denial of its legal rights
14 based upon GHURA not rejecting the IT&E bid for its deficiencies, and later awarding IT&E the
15 Bid. PDS is not aggrieved, and consequently has no statutory standing to Protest or Appeal this
16 matter because even if the IT&E bid was rejected by GHURA, it would not result in the award of
17 the IFB to PDS as it submitted the third highest bid, a bid that GHURA had deemed unreasonably
18 high. The award of the bid should PDS be successful in this Appeal would likely be made to
19 Docomo as the second lowest bidder, and if any party had standing to Protest this procurement, it
20 would be Docomo.

23 Similarly, PDS does not have common law standing to protest and later appeal the denial
24 of the protest. To establish common law standing, the burden is on the injured party to first
25 demonstrate an “injury in fact.” *Guam Mem’l Hosp. Auth. V. Superior Court*, 2012 Guam 17 ¶ 10.
26 The injury must be “concrete, particularized, and actual or imminent; it cannot be purely
27 conjectural or hypothetical.” *Id.* ¶ 12 (citations omitted). Secondly, the party must show
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1 “causation, in that the injury can be fairly traced to the challenged action taken by the defendant.”
2 *Id.* (citations omitted). Lastly, similar to the second prong, the party must show “redressability,
3 meaning it is likely and beyond mere speculation that a favorable decision will remedy the injury
4 sustained.” *Id.* (citations omitted).

5
6 First, there is no injury to PDS based on the non-rejection and later award of the bid to
7 IT&E as PDS even if successful in this Protest and Appeal would not be awarded the Bid as it
8 submitted the highest bid that was unreasonably high. Second, there is no causation between the
9 non-rejection and subsequent award of the IT&E bid to any injury to PDS as PDS is not eligible
10 for an award even if IT&E’s bid was rejected. The IFB would be awarded to Docomo, not PDS,
11 should the OPA find that the IT&E bid was invalid. Finally, a favorable decision in favor of PDS
12 in this matter won’t redress the purported injury i.e. non-award of the IFB to PDS as a favorable
13 decision would merely result in the IFB being awarded to Docomo.

14
15 PDS further does not have standing as an aggrieved bidder considering its Bid was
16 unreasonably high and not subject to an award. PDS’ bid of \$60,204.00 was an amount almost
17 double that of IT&E, who bid \$31,980.00. This Bid by PDS was unreasonably high, and in
18 violation of the procurement policy to provide increased economy in territorial activities and to
19 maximize the fullest extent practicable the purchasing value of public funds of the Territory. *See*
20 5 GCA § 5001(b)(5). Considering PDS is not even eligible for an award of this Bid based upon
21 its excessive bid submission, it does not have legal standing to Protest the award of the IFB to
22 IT&E.

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CONCLUSION

For the foregoing reasons, GHURA respectfully requests that the OPA dismiss this Appeal for lack of jurisdiction.

Respectfully submitted this 28th day of June, 2021.

LAW OFFICE OF ANTHONY C. PEREZ

By: 

ANTHONY C. PEREZ, ESQ.
*Attorney for Guam Housing and Urban
Renewal Authority*