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Pacific Data Systems, Inc.*

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FILE NO OPA-PA-021-001

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Procurement Appeal of

Pacific Data Systems, Inc. (PDS),

Appellant.

DOCKET NO. OPA-PA-021-001

**OPPOSITION TO IT&E's MOTION TO
DISMISS PDS's PROTEST FOR LACK
OF STANDING**

I. INTRODUCTION

On May 19, 2021, Pacific Data Systems (“PDS”) appealed the decision of the Guam Housing and Urban Renewal Authority (“GHURA”) denying PDS’s agency level protest of IFB#GHURA-COCC-21-003. On June 28, 2021, PTI Pacifica Inc, dba IT&E (“IT&E”) — an offeror who GHURA selected for award despite the non-responsive nature of its bid — filed a Motion to Dismiss the appeal (“Motion”) claiming that aggrieved bidder PDS does not have standing to appeal the denial of its agency level protest. This Opposition is submitted to address the failings of that argument.

II. ARGUMENT IN OPPOSITION

IT&E claims that PDS, as a bidder whose price was ranked third in this flawed procurement, lacks standing to maintain its appeal before the Office of Public

Accountability (“OPA”). To make this argument, IT&E relies upon *In re A.B. Won Pat Int’l Airport Auth., Guam*, 2019 Guam 6, and the Supreme Court of Guam’s discussion regarding a party’s standing in court for litigation involving the sealing of records under Guam’s Open Government law. In that case, the Court confirmed that “Although we are not bound by the standing requirements applicable to federal courts of limited jurisdiction under Article III of the United States Constitution,’ we have repeatedly found that the ‘traditional standing requirements’ expressed in Article III nevertheless apply to claims asserted in Guam’s courts.” *In re A.B. Won Pat Int’l Airport Auth., Guam*, 2019 Guam 6, ¶ 16. Without citation to any procurement precedent, IT&E asserts that PDS does not meet these traditional standing requirements since IT&E’s price was third in line for potential award. Motion, 2. IT&E misapprehends the law.

In making its argument, IT&E first ignores the fact that the instructions in *In re A.B. Won Pat Int’l Airport Auth.* are limited to “to claims asserted in Guam’s courts.” *In re A.B. Won Pat Int’l Airport Auth., Guam*, 2019 Guam 6, ¶ 16. Second, IT&E ignores the fact that the Guam Legislature has specifically conferred upon aggrieved bidders the ability to bring Agency level protests of solicitations. 5 G.C.A. § 5425 explains how “Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency.” IT&E similarly ignores how the Guam Legislature has further directed that the decision of the agency on that protest “may

be appealed by the protestant, to the Public Auditor.” 5 G.C.A. § 5425 (e).¹ Because of these statutory pathways to the OPA, IT&E’s reliance upon the standing instructions directed to “Guam’s courts” is misplaced.²

IT&E’s motion also completely ignores the fact that GHURA has not claimed that PDS’s third ranked price precludes PDS from mounting its protest or subsequent appeal to the OPA. To the contrary, GHURA’s bases for denying PDS’s protest rest upon GHURA’s assertion that allowing IT&E to correct its bid in multiple respects after submission and to accept IT&E’s clarifications of the service configuration offered was allowed under the law. *See*, Notice of Appeal, Exhibit 2. GHURA does find a jurisdictional fault with PDS, but that fault stands upon GHURA’s belief that PDS brought an untimely protest, and not that PDS was prevented from bringing a protest altogether given GHURA’s price review ranking PDS third in line for award.

¹ Of course, Guam law also creates a direct statutory pathway to the Superior Court of Guam. 5 G.C.A. § 5481(a) explains that, following a final administrative decision from the OPA, Guam’s courts “shall have jurisdiction over an action between the Territory and a bidder, offeror, or contractor, either actual or prospective, to determine whether a solicitation or award of a contract is in accordance [with the laws and regulations].”

² Even if *In re A.B. Won Pat Int’l Airport Auth.* were instructive on the standing of PDS to bring an agency level protest and subsequent OPA appeal, that case explicitly recognizes the role the legislature plays in shaping, through statutes, standing within which to bring a case. The court explained that “we do not suggest that our prior caselaw regarding ‘statutory standing’ is no longer good law. Rather, we clarify that the doctrine we have referred to in our jurisdiction as ‘statutory standing’ establishes that the legislature may impart a judicially-cognizable injury upon a particular class of persons to establish an injury in fact where one would otherwise have been too abstract under a constitutional-standing inquiry.” *In re A.B. Won Pat Int’l Airport Auth.*, *Guam*, 2019 Guam 6, ¶ 20.

See, Notice of Appeal, Exhibit 2. Here, it is clear that the agency felt compelled by law to address PDS's protest, and not simply to ignore it as IT&E urges.³

Finally, even if GHURA's third place price determination of PDS's bid somehow implicated the issue of standing before the OPA, as opposed to before the Courts of Guam, a review of instructive procurement law shows that being "next in line" is not a prerequisite for being able to maintain a solicitation protest, and courts regularly allow protests to proceed even when the protestant is not the "next in line" for award.⁴ See, e.g., *Solon Automated Servs., Inc. v. United States*, 658 F. Supp. 28, 31 (D.D.C. 1987) ("a disappointed bidder has standing to challenge a contract award even though unable to demonstrate a 'legal right' to the contract.... It is not necessary for plaintiff to prove it would have won the contract if [lowest price offer's] bid had been rejected. An order requiring the Navy to resolicit bids would redress the injury by giving responsive bidders an opportunity to be evaluated in a fair procurement

³ Interestingly, while GHURA did not raise PDS's third place position as a basis to deny its protest originally, it appears that GHURA has since consulted with IT&E and adopted IT&E's reliance upon *In re A.B. Won Pat Int'l Airport Auth.* and filed a Motion to Dismiss based upon IT&E's reasoning. It strains credulity for an Agency to seek dismissal of a procurement protest appeal on grounds that the Agency had available to it earlier, but did not rely upon in denying a bidder's protest.

⁴ PDS is, in fact, the second lowest price offeror. Relying upon GHURA's price ranking is especially suspect given the fact that GHURA has turned a blind eye to the price extension calculation errors of Docomo Pacific, Inc. that allowed that offeror to appear to have the second lowest price. If Docomo's price calculation error were corrected, PDS would be the second lowest priced offeror. Docomo's error was pointed out to GHURA by PDS in correspondence sent on February 23, 2021. GHURA has not yet addressed the price calculation error. PDS's correspondence on this point is part of the procurement record that has yet to be produced to PDS, and is attached as **Attachment A** to this Opposition for the OPA's ease of reference.

procedure. This Court finds, therefore, that [protester] has standing to challenge the contract award to [lowest price offer] even though it did not submit the second lowest bid.) (internal citations and quotations omitted); *S. Foods, Inc. v. United States*, 76 Fed. Cl. 769, 778 (2007) (Because we could not say with certainty that the contracting officer knew what she was doing by placing Southern Foods in third place in this confused state of affairs, we believe plaintiff had standing to bring this action....While prejudice in the context of determining standing is obviously closely related to prejudice as it relates to the merits, for purposes of plaintiff's right to bring the action to this court, we defer any further consideration of prejudice to the merits discussion....)(internal citations and quotations omitted); *Ulstein Mar., Ltd. v. United States*, 646 F. Supp. 720, 728–29 (D.R.I. 1986), *aff'd*, 833 F.2d 1052 (1st Cir. 1987) (“This court and others have concluded that unsuccessful bidders, such as the plaintiffs, challenging procurement decisions governed by statutes and regulations satisfy the prerequisites for standing.”)

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III. CONCLUSION

IT&E urges the OPA to dismiss PDS's appeal based singularly upon a case that neither addressed the jurisdiction of the OPA nor the nature of aggrieved parties under Guam's procurement law. More, IT&E does this while ignoring the body of procurement law that clearly supports the ability of offerors beyond those with the second lowest price to maintain a procurement protest through the agency level and into the courts. The OPA should reject IT&E's invitation, and move this matter forward to an analysis of the merits of the PDS's protest.

Respectfully submitted this 6th day of July, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSHUA D. WALSH
EDWIN J. TORRES
Attorneys for Appellant
Pacific Data Systems, Inc.

ATTACHMENT A



February 23, 2021

Via Email to gbalmeo@ghura.org

Ms. Greta Balmeo
Buyer Supervisor II
Guam Housing and Urban Renewal Authority (GHURA)
117 Bien Venida Avenue
Sinajana, GU 96910

Subject: IFB GHURA-COCC-021-003: Review of FOIA Request Document - Docomo Pacific Bid

Hafa Adai Ms. Balmeo:

On February 18, Pacific Data Systems (PDS) received a response from GHURA regarding a Freedom of Information Act (FOIA) request made for bid documents in the above referenced procurement. PDS has completed a preliminary review of these documents and now takes this opportunity to share our review with GHURA prior to any formal award being made in this procurement.

The following summarizes issues with the bid submitted by Docomo Pacific, Inc. (DPAC). Our review has identified significant deficiencies in the DPAC bid as shown below:

1. The required Bid Bond submitted by DPAC is invalid since the form is not complete with essential parts of the required Bid Bond Form left blank. See Attachment A. The DPAC bid should be rejected as non-responsive due to this issue.
2. The HUD form submitted by DPAC is invalid since the form is not complete with essential parts of the required form left blank. See Attachment B. The DPAC bid should be rejected as non-responsive due to this issue.
3. The Bid Form submitted by DPAC contains a calculation error in Bid Item 3.A for the GHURA requirement of 2 (two) ISDN-PRI Circuits. The DPAC bid form shows this service has a PER UNIT COST of \$938.52. However, DPAC failed to properly calculate the total MONTHLY COST by multiplying the PER UNIT COST by the GHURA stated QUANTITY of 2. Instead DPAC used the UNIT COST as the MONTHLY COST without any extension for the required quantity of 2. This error resulted in the TOTAL of DPAC **bid being short by \$11,262.24 (12 x \$938.52)**. GHURA must make adjustments to the bid amount by DPAC for this item to reflect the proper quantity of service as stated by GHURA with an adjustment to the TOTAL of the DPAC bid. See Attachment C. After these required adjustments are made, the **new DPAC Bid Total will be \$67,006.56**.

The deficiencies noted as #1 and #2 above clearly disqualify the DPAC bid submission as non-responsive and GHURA should now reject this submission without further consideration. Any award to DPAC in spite of these issues will only result in controversy and conflict with significant delays in making a sustainable award.

Please contact me if you have any questions regarding the PDS review points noted above.

Sincerely,

John Day
President

Attachments A - C as noted above

Pacific Data Systems

121 Robat Street, Suite 101, Maite, GU 96910 | Main: 300-0200 | Fax: 300-0265 www.pdsguam.com

**Guam Housing and Urban Renewal Authority
117 Bien Venida Avenue
Sinajana, GU 96910**

BID BOND NO.: KIC-15443-B

KNOW ALL MEN BY THESE PRESENTS, that we the undersigned _____

DOCOMO PACIFIC, INC.

(Name of Principal)

as PRINCIPAL, and

DB INSURANCE CO., LTD.

SURETY

are held and firmly bound unto Guam Housing and Urban Renewal Authority, hereinafter called "GHURA", in the penal sum of 15% OF TOTAL BID AMOUNT

Dollars, (15% OF TOTAL BID AMOUNT), lawful money of the United States, for the payment of which sum will and truly be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas, the Principal has submitted the accompanying bid, dated the FEB. 3, 2021, for the IFB#-GHURA-COCC-021-003 METROLAN - CONNECTIVITY/INTERNET/TELECOM BUNDLED SERVICES

NOW THEREFORE, if the principal shall not withdraw said bond within the period specified therein after the opening of the same, or, if no period be specified, within sixty (60) days after the said opening, and shall within ten (10) days after the prescribed forms are presented to him for signature, enter into a written contract with Guam Housing and Urban Renewal Authority in accordance with the bid as accepted, and give bond with good and sufficient surety or sureties, as may be required, for the faithful performance and proper fulfillment of such contract; or in the event of the withdrawal of said bid within the period specified, or time specified, if the principal shall pay Guam Housing and Urban Renewal Authority, the difference between the amount specified in said bid and the amount for which Guam Housing and Urban Renewal Authority may procure the required work or supplies, or both, if the latter amount be in excess of the former, then the above obligation shall be void and of no effect, otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the above bounden parties have executed this instrument under their several seals this 2ND day of FEBRUARY 2021, the name and corporate seal of each corporate party being hereto affixed and

these presents duly signed by its undersigned representatives, pursuant to authority of its governing body.

ATTEST:

Sole Proprietorship

(Individual Principal Signature)

(Business Address)

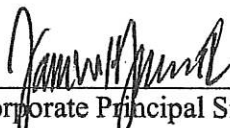
(Name of Individual Principal Above)

(Seal)

ATTESTED:

Corporation

DOCOMO PACIFIC, INC.




(Corporate Principal Signature)

219 SOUTH MARINE CORPS DR., STE 206
CENTURY PLAZA, TAMUNING, GUAM 96913

(Business Address)



(Name of Corporate Principal Above)



(Title)

Affix Corporate Seal

ATTEST: MOYLAN'S INSURANCE UND., INC.
RESIDENT GENERAL AGENT

Surety Company
DB INSURANCE CO., LTD.

Carafico
CAROLINA G. SERAFICA
SURETY DIVISION MANAGER

Changsoo Lee
JEONG NAM KIM
(Corporate Surety Signature)

Changsoo Lee
CHANG SOO LEE
(Corporate Surety Signature)

424 WEST O'BRIEN DRIVE, SUITE 202
HAGATNA, GUAM 96910
(Business Address)

JEONG NAM KIM/CHANG SOO LEE
Name of Corporate Surety)
PRESIDENT & CEO/
EXECUTIVE VICE PRESIDENT
(Title)

Affix Corporate Seal

(Power of Attorney for person signing for Surety Company must be attached to the Bond)

CERTIFICATE AS TO CORPORATE PRINCIPAL

I, _____, certify that I am the _____

Secretary of the Corporation names as Principal in the within the bond; that
_____ " who signed the said bond on behalf of the

Principal was then _____ of said corporation; that I know his

signature, and his signature thereto is genuine; and that said bond was duly signed,

sealed, and attested to, for and *in* behalf of said corporation by authority of its governing

body.

(Corporate Seal)

**Certifications and
Representations
of Offerors
Non-Construction Contract**

Attachment B

The reporting burden for this collection of information is estimated to average 5 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

This form includes clauses required by OMB's common rule on bidding/offering procedures, implemented by HUD in 24 CFR 85.36, and those requirements set forth in Executive Order 11625 for small, minority, women-owned businesses, and certifications for independent price determination, and conflict of interest. The form is required for nonconstruction contracts awarded by Housing Agencies (HAs). The form is used by bidders/offerors to certify to the HA's Contracting Officer for contract compliance. If the form were not used, HAs would be unable to enforce their contracts. Responses to the collection of information are required to obtain a benefit or to retain a benefit. The information requested does not lend itself to confidentiality.

1. Contingent Fee Representation and Agreement

(a) The bidder/offeror represents and certifies as part of its bid/offer that, except for full-time bona fide employees working solely for the bidder/offeror, the bidder/offeror:

(1) has, has not employed or retained any person or company to solicit or obtain this contract; and

(2) has, has not paid or agreed to pay to any person or company employed or retained to solicit or obtain this contract any commission, percentage, brokerage, or other fee contingent upon or resulting from the award of this contract.

(b) If the answer to either (a)(1) or (a) (2) above is affirmative, the bidder/offeror shall make an immediate and full written disclosure to the PHA Contracting Officer.

(c) Any misrepresentation by the bidder/offeror shall give the PHA the right to (1) terminate the resultant contract; (2) at its discretion, to deduct from contract payments the amount of any commission, percentage, brokerage, or other contingent fee; or (3) take other remedy pursuant to the contract.

2. Small, Minority, Women-Owned Business Concern Representation

The bidder/offeror represents and certifies as part of its bid/offer that it:

(a) is, is not a small business concern. "Small business concern," as used in this provision, means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding, and qualified as a small business under the criteria and size standards in 13 CFR 121.

(b) is, is not a women-owned small business concern. "Women-owned," as used in this provision, means a small business that is at least 51 percent owned by a woman or women who are U.S. citizens and who also control and operate the business.

(c) is, is not a minority enterprise which, pursuant to Executive Order 11625, is defined as a business which is at least 51 percent owned by one or more minority group members or, in the case of a publicly owned business, at least 51 percent of its voting stock is owned by one or more minority group members, and whose management and daily operations are controlled by one or more such individuals.

For the purpose of this definition, minority group members are:

(Check the block applicable to you)

- Black Americans Asian Pacific Americans
 Hispanic Americans Asian Indian Americans
 Native Americans Hasidic Jewish Americans

3. Certificate of Independent Price Determination

(a) The bidder/offeror certifies that—

(1) The prices in this bid/offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other bidder/offeror or competitor relating to (i) those prices, (ii) the intention to submit a bid/offer, or (iii) the methods or factors used to calculate the prices offered;

(2) The prices in this bid/offer have not been and will not be knowingly disclosed by the bidder/offeror, directly or indirectly, to any other bidder/offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the bidder/offeror to induce any other concern to submit or not to submit a bid/offer for the purpose of restricting competition.

(b) Each signature on the bid/offer is considered to be a certification by the signatory that the signatory:

(1) Is the person in the bidder/offeror's organization responsible for determining the prices being offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to subparagraphs (a)(1) through (a)(3) above; or

(2) (i) Has been authorized, in writing, to act as agent for the following principals in certifying that those principals have not participated, and will not participate in any action contrary to subparagraphs (a)(1) through (a)(3) above (insert full name of person(s) in the bidder/offeror's organization responsible for determining the prices offered in this bid or proposal, and the title of his or her position in the bidder/offeror's organization);

(ii) As an authorized agent, does certify that the principals named in subdivision (b)(2)(i) above have not participated, and will not participate, in any action contrary to subparagraphs (a)(1) through (a)(3) above; and

(iii) As an agent, has not personally participated, and will not participate in any action contrary to subparagraphs (a)(1) through (a)(3) above.

(c) If the bidder/offeror deletes or modifies subparagraph (a)2 above, the bidder/offeror must furnish with its bid/offer a signed statement setting forth in detail the circumstances of the disclosure.

4. Organizational Conflicts of Interest Certification

(a) The Contractor warrants that to the best of its knowledge and belief and except as otherwise disclosed, it does not have any organizational conflict of interest which is defined as a situation in which the nature of work under a proposed contract and a prospective contractor's organizational, financial, contractual or other interest are such that:

(i) Award of the contract may result in an unfair competitive advantage;

(ii) The Contractor's objectivity in performing the contract work may be impaired; or

(iii) That the Contractor has disclosed all relevant information and requested the HA to make a determination with respect to this Contract.

(b) The Contractor agrees that if after award he or she discovers an organizational conflict of interest with respect to this contract, he or she shall make an immediate and full disclosure in writing to the HA which shall include a description of the action which the Contractor has taken or intends to eliminate or neutralize the conflict. The HA may, however, terminate the Contract for the convenience of HA if it would be in the best interest of HA.

(c) In the event the Contractor was aware of an organizational conflict of interest before the award of this Contract and intentionally did not disclose the conflict to the HA, the HA may terminate the Contract for default.

(d) The Contractor shall require a disclosure or representation from subcontractors and consultants who may be in a position to influence the advice or assistance rendered to the HA and shall include any necessary provisions to eliminate or neutralize conflicts of interest in consultant agreements or subcontracts involving performance or work under this Contract.

5. Authorized Negotiators (RFPs only)

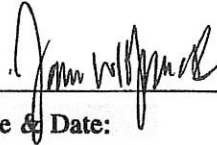
The offeror represents that the following persons are authorized to negotiate on its behalf with the PHA in connection with this request for proposals: (list names, titles, and telephone numbers of the authorized negotiators):

6. Conflict of Interest

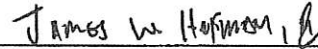
In the absence of any actual or apparent conflict, the offeror, by submission of a proposal, hereby warrants that to the best of its knowledge and belief, no actual or apparent conflict of interest exists with regard to my possible performance of this procurement, as described in the clause in this solicitation titled "Organizational Conflict of Interest."

7. Offeror's Signature

The offeror hereby certifies that the information contained in these certifications and representations is accurate, complete, and current.

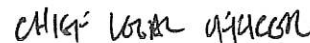


Signature & Date:



Typed or Printed Name:

Title:



AMP3 Agat

Non-Recurring Cost:	-0-
Per Unit Cost:	<u>₱175.00</u>
Monthly Cost:	<u>₱175.00</u>
Annual Cost:	<u>₱2,100.00</u>

AMP4 Toto Gardens:

Non-Recurring Cost:	-0-
Per Unit Cost:	<u>₱175.00</u>
Monthly Cost:	<u>₱175.00</u>
Annual Cost:	<u>₱2,100.00</u>

AMP4 Dededo

Non-Recurring Cost:	-0-
Per Unit Cost:	<u>₱175.00</u>
Monthly Cost:	<u>₱175.00</u>
Annual Cost:	<u>₱2,100.00</u>

Guma Trankilidat

Non-Recurring Cost:	-0-
Per Unit Cost:	<u>₱175.00</u>
Monthly Cost:	<u>₱175.00</u>
Annual Cost:	<u>₱2,100.00</u>

BID ITEM 2A: TOTAL NON-RECURRING COST:	<u>-0-</u>
TOTAL MONTHLY COST:	<u>₱1,225.00</u>
TOTAL ANNUAL COST:	<u>₱14,700.00</u>

BID ITEM 3: **Voice Services**

- A. Must support and include two (2) PRIs (Sinajana) and Direct Inward Dialing (DID) for minimum 150 voice/telephone lines. One (1) PRI will be utilized as a fail over for voice services, hosted at Vendor's site. Second (2nd) PRI will be hosted at GHURA Sinajana Main Office.

Non-Recurring Cost:	-0-
Per Unit Cost:	<u>₱938.52</u>
Monthly Cost:	<u>₱938.52</u>
Annual Cost:	<u>₱11,262.24</u>