

**GUAM DEPARTMENT OF EDUCATION**

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FILE NO OPA-PA: 21-005

**OFFICE OF THE PUBLIC AUDITOR  
PROCUREMENT APPEALS**

In the Appeal of

APPEAL CASE NO. OPA-PA-21-005

Pacific Data Systems, Inc. (PDS),

**AGENCY STATEMENT**

Appellant.

COMES NOW the Guam Department of Education (GDOE), by and through its Legal Counsel James L.G. Stake, and files its Agency Statement pursuant to 2 GAR Div. 4 §12105(g), in response to the appeal of Pacific Data Systems, Inc. of GDOE Invitation for Bid (IFB) 028-2021, for Telecommunication Service – Digital Transmission Services (DTS).

**I. RELEVANT BACKGROUND**

On April 28, 2021, GDOE issued its IFB 028-2021 for Telecommunication Service – Digital Transmission Services (hereinafter referred to as the “IFB”). On May 27, 2021, GDOE received bids for the IFB from Pacific Data Systems, Inc. (PDS) and Teleguam Holdings LLC (GTA). On June 4, 2021, GDOE awarded to GTA as the lowest, most responsible and responsive bid for the IFB. On June 9, 2021, PDS protested the award for GTA. On June 29, 2021, GDOE issued its denial of PDS’s protest. On July 15, 2021, GDOE received the notice of receipt of

1 appeal from the Office of Public Accountability (OPA). The following is GDOE's agency  
2 statement in response to PDS's appeal.

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4 **II. GDOE PROPERLY EVALUATED AND AWARDED THE IFB IN ACCORDANCE**  
5 **WITH GUAM PROCUREMENT LAW, RULES AND REGULATIONS, AND THE**  
6 **TERMS AND CONDITIONS OF THE IFB.**  
7

8 Guam Procurement law provides the proper parameters and requirements for the  
9 evaluation and award of competitive sealed bidding. *See* 5 GCA § 5211. Guam Procurement law  
10 states that bids shall be evaluated based on the requirements set forth in the invitation for bids and  
11 that no criteria may be used in bid evaluation that are not set forth in the Invitation for Bids. *See*  
12 5 GCA §5211(e). In addition, the contract shall be awarded with reasonable promptness by  
13 written notice to the lowest responsible bidder whose bid meets the requirements and criteria set  
14 forth in the Invitation for Bids. *See* 5 GCA §5211(g). Guam Procurement Law defines a  
15 responsible bidder as one with the capability in all respects to perform fully the contract  
16 requirements, and the integrity and reliability which will assure good faith performance, and a  
17 responsive bidder is one who has submitted a bid which conforms in all material respects to the  
18 Invitation for Bids. *See* 5 GCA §§ 5201(f), 5201(g). Pursuant to Guam Procurement law,  
19 GDOE's IFB specifically states the criteria to determine bidders' responsibility and  
20 responsiveness. *See* IFB 028-2021, GDOE Procurement Record Bate Stamp pages (hereinafter  
21 GDOE Procurement Record cited as "GDOE") at 122-175.  
22

23 Per the applicable laws referenced and the IFB, GDOE evaluated the bids of PDS and  
24 GTA and determined responsibility and responsiveness and stated, "upon completing the review  
25 of the proposals, it is determined that the proposal submitted by the two bidders met all bid's  
26 minimum scope and specifications." *See* GDOE at 510. Therefore, the determining factor for the  
27 award of the IFB shall be the lowest price. *See* 5 GCA §5211(g). Based on a review of the  
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1 prices submitted, GTA's price (\$470,652.48) is lower than PDS's (\$596,997.36). *See* GDOE at  
2 599. In summary of the above referenced laws, the IFB, and the bids submitted, GDOE properly  
3 evaluated both bids and awarded to GTA.

4 PDS argues that GDOE ignored its specifications on when services should commence.  
5 PDS appears to claim that GTA could not perform all the intended duties on July 1, 2021, and  
6 therefore GTA is non-responsible and non-responsive. This is incorrect and without authority,  
7 because it is not included in the specifications and not required by Guam Procurement law.  
8 GDOE's solicitation states that services shall commence no earlier than July 1, 2021, not that they  
9 shall be complete by then. As required by law, GDOE shall only evaluate bids in accordance  
10 with its published specifications, and GDOE complied because it evaluated according to the  
11 published specifications.

12 Section 3.2.4 Duration of Award, of the IFB, states the award shall be for three (3) years  
13 upon receipt of the Executed Agreement and/or purchase orders but no earlier than July 1, 2021.  
14 *See* GDOE at 130. Amendment 2, of the IFB clarified further that the delivery of services shall  
15 commence on and no earlier than July 1, 2021. *Id.* at 177. Based on the IFB and in accordance  
16 with Guam Law, the evaluation must only use the published criteria, in this case, services starting  
17 no earlier than July 1, 2021. *See* 5 GCA §§ 5211(e), 5211(g). GDOE complied with Guam  
18 Procurement Law because the bids received were evaluated by the requirements of law and  
19 specifications published.<sup>1</sup>  
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25 <sup>1</sup>To be clear, PDS's argument for services to be complete by July 1, 2021 is not in the IFB, and therefore  
26 shall not be used to evaluate bids. *See* 5 GCA §5211(e). However, even if GTA was to be held to a  
27 standard that is not included in the IFB, GDOE maintains the authority to extend a contract. *See* 5 GCA  
28 §5237.

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2 **III. GDOE REVIEWED AND CONFIRMED GTA'S COMPLIANCE WITH GUAM**  
3 **LAW IN ACCORDANCE WITH GUAM PROCUREMENT LAW AND THE IFB.**  
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5 As previously mentioned, GDOE is required to evaluate and award in accordance with  
6 Guam Procurement law, rules and regulations, and the terms and conditions of the IFB, and has  
7 done so. PDS improperly argues and without legal authority that GTA's bid requires additional  
8 confirmation. This simply is not true and not included within Guam Procurement law.

9 The published IFB includes numerous sections to bidders that they shall abide by Guam  
10 Law. Section 4.3 Laws to be Observed, of the IFB, states bidders should be familiar with federal  
11 and local laws, codes, ordinances, and regulations, which, in any manner, affect those engaged or  
12 employed in the work or in any way affect the conduct of the work, and no misunderstanding or  
13 ignorance on the part of the Bidder will, in any way, serve to modify the provision of the of the  
14 contract. See GDOE at 133. Section 3.2.16 Taxes, of the IFB, provides all bidders are  
15 responsible for any taxes or fees that may be assessed or due for performance of work pursuant to  
16 this IFB. *Id.* at 132. Section XIX Compliance with Laws of the sample agreement, also included  
17 in the published IFB, states Contractor (GTA) shall comply with all U.S. and Guam laws,  
18 statutes, regulations and ordinances applicable to this Agreement. *Id.* at 169. GTA bid on this  
19 IFB with the above referenced sections and signed its Agreement that included the same verbiage  
20 on compliance with federal and local laws applicable to the IFB. *Id.* at 15. Therefore, GDOE  
21 complied with Guam Procurement law and properly conducted the IFB within the parameters of  
22 the procurement process.<sup>2</sup>  
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24  
25 <sup>2</sup> GDOE properly proceeded with the IFB in compliance with Guam Procurement Law, and PDS's  
26 allegations that additional confirmation is required is incorrect and unsupported. Despite this, GDOE went  
27 above and beyond and requested through email that GTA's price complies with Guam law. GTA replied  
28 through email that their price conforms to local and federal laws. GDOE at 235-236.

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2 **IV. THE PROCUREMENT PROTEST AND APPEAL IS NOT THE PROPER**  
3 **FORUM TO INVESTIGATE AND ENFORCE PDS'S ALLEGATIONS AGAINST GTA**  
4 **FOR POSSIBLE VIOLATIONS OF THE TELECOMMUNICATIONS ACT.**  
5

6 PDS has put forth numerous allegations of GTA violating the Telecommunications Act,  
7 including that GTA's price is non-responsible and non-responsive based purely on the pending  
8 litigation between GTA and the Office of the Attorney General of Guam. Guam Procurement law  
9 does not provide authority that an accusation of a possible violation of law can be included into  
10 the evaluation of a procurement. PDS incorrectly argues this and without legal authority.  
11 Instead, the relevant Guam Laws, Rules and Regulations, as well as case law, prohibit GDOE  
12 from evaluating a bid by specifications not published in the IFB, and provide that the OPA is not  
13 the proper forum for an investigation and enforcement of alleged violations of the  
14 Telecommunications Act. *See* 5 GCA §§ 5211(e), 5211(g); *see also* 2 GAR Div. 4 §12112.  
15

16 Guam Procurement law strictly provides that bids shall be evaluated based on the  
17 requirements set forth in the invitation for bids and **that no criteria may be used in bid**  
18 **evaluation that are not set forth in the Invitation for Bids.** *See* 5 GCA §5211(e). Therefore,  
19 Guam Law prohibits GDOE from using PDS's allegations of possible violations of the  
20 Telecommunications Act as criteria to evaluate bids within the IFB, because it was not included  
21 anywhere within the IFB. That is not to say GDOE has not made efforts to confirm GTA's price  
22 is in accordance with the law. As stated above, GDOE has conducted the IFB in accordance with  
23 the relevant procurement law and the published terms of the IFB.

24 PDS also argues that GTA's surcharges on the bid form does not breakout the individual  
25 charges, which may include the Gross Receipts Tax/Business Privilege Tax. GDOE's bid form  
26 specifically does not require bidders to provide a breakdown of the individual surcharges for this  
27 service. *See* GDOE at 142. Because a requirement of individual surcharges is not included in  
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1 the bid form nor anywhere within the published specifications, Guam law then prohibits GDOE  
2 from evaluating GTA's bid by these conditions. See 5 GCA §§ 5211(e), 5211(g). Again,  
3 GDOE's evaluation utilized its published IFB specifications.

4 Regarding the Public Auditor's jurisdiction, Guam Procurement Rules and Regulations  
5 state the Public Auditor **shall determine whether a decision on the protest of method of**  
6 **selection, solicitation or award of a contract, or entitlement to costs is in accordance with**  
7 **the statutes, regulations, and the terms and conditions of the solicitation.** See 2 GAR Div. 4  
8 §12112. PDS's allegations against GTA and the Telecommunications Act is outside the scope of  
9 the IFB and outside the jurisdiction of the Public Auditor. *Id.*

10 The proper forum for disputes regarding the Telecommunications Act is with the Guam  
11 Public Utilities Commission (GPUC). See 12 GCA §12207. Guam Law states that it is the  
12 GPUC that shall issue final orders resolving petitions or complaints regarding anything done or  
13 omitted to be done by any telecommunications company in violation of the rules, regulations, and  
14 orders of the GPUC, and that any interested person complaining of violations **shall file a petition**  
15 **or complaint with the GPUC.** *Id.* Therefore, Guam Law authorizes GPUC as the proper forum  
16 to investigate and enforce conflicts regarding the Telecommunications Act and not the OPA. *Id.*

17 Lastly, the OPA has previously decided on a similar matter in a procurement appeal about  
18 allegations of Guam Labor law violations. *In the Appeal of JRN Air Conditioning &*  
19 *Refrigeration, Inc.*, OPA-PA-10-008. The Public Auditor decided that it has the jurisdiction to  
20 hear an appeal of a purchasing agency's written decision on a protest concerning the purchasing  
21 agency's method of source selection, solicitation, or award of a contract. *Id.* at 8. **However, the**  
22 **Public Auditor decided it does not have the jurisdiction to enforce the provisions of Guam**  
23 **Labor laws, or to investigate violations of said statutes, as that rests with the Guam**  
24 **Department of Labor (GDOL).** *Id.* at 9-10. The OPA decided the enforcement of GDOL  
25 statutory provisions is not through the procurement protest and appeal process but an entirely  
26 separate administrative adjudicatory process entrusted to the Guam Department of Labor. *Id.* at  
27

1 9. This is directly analogous to the case at hand because as the GDOL has the authority to  
2 investigate and enforce claims regarding possible labor violations, it is the GPUC with the  
3 authority to investigate and enforce compliance regarding possible Telecommunications Act  
4 violations, and therefore the OPA is not the proper forum for alleged violations of the  
5 Telecommunications Act. *See* 12 GCA §12207; *see also* 2 GAR Div. 4 §12112.

6 In conclusion and based on the aforementioned reasons, GDOE hereby requests that the  
7 OPA dismiss this appeal in its entirety.

8  
9 Dated: July 30, 2021

10 Respectfully submitted,

11 **GUAM DEPARTMENT OF EDUCATION**

12  
13 By:

  
14 **JAMES L.G. STAKE**  
*Legal Counsel*