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OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

In the Appeal of Pacific Data Systems, Inc. (PDS), Appellant.	APPEAL CASE NO. OPA-PA-21-005 **REBUTTAL TO COMMENTS ON AGENCY REPORT**

COMES NOW the Guam Department of Education (GDOE), by and through its Legal Counsel James L.G. Stake, and files its Rebuttal to Comments on Agency Report, pursuant to 2 GAR Div. 4 §12104(c)(4), 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 (DTS) (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 appeal from the Office of Public Accountability (OPA). On July 23, 2021, GDOE filed the Procurement Record regarding the appeal, and on July 30, 2021 its Agency Report. On August 9, 2021, GDOE received PDS's

Comments on the Agency Report and Agency Statement. The following is GDOE's Rebuttal to Comments on the Agency Report.

II. GDOE PROPERLY EVALUATED AND AWARDED TO GTA, AS THE LOWEST, MOST RESPONSIVE AND RESPONISBILE BIDDER IN ACCORDANCE WITH THE IFB AND LAW.

As previously argued, section 3.2.1 of the IFB states, the IFB shall be awarded to the lowest, most responsive and responsible bid. *See* GDOE Procurement Record Bate Stamp (hereafter cited as "GDOE") at 130. A responsible bidder is one with the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance, and a responsive bidder is one who has submitted a bid which conforms in all material respects to the Invitation for Bids. *See* 5 GCA §§ 5201(f), 5201(g). GDOE evaluated GTA's bid and has determined that they have the capability in all respects to perform fully the contract requirements, and submitted a bid that conforms in all material respects to the IFB. GDOE at 600. GTA is also the lowest bidder. *Id.* at 599. Pursuant to Guam Procurement Law and the IFB, GDOE properly awarded to GTA as the lowest, most responsible and responsive bid. *Id.* at 605.

As stated above, on April 28, 2021, GDOE issued the IFB. On May 17, 2020, GTA signed Amendment 2 Acknowledgment Form, and on May 26, 2021, GTA signed its bid form that states, by submission of this bid the company is making an offer to provide the services and products described in GDOE IFB 028-2021. *See* GTA signed Bid Form and Amendment 2 Acknowledgment Form, GDOE at 393 and 398. On June 4, 2021, GDOE analyzed the bids according to the IFB and the law. *See* Analysis and Recommendation, GDOE at 599. Lastly, on June 4, 2021, GDOE awarded to GTA in accordance to their bid, the IFB, and the law. *See* Notice of Award, GDOE at 605. Therefore, GDOE properly evaluated and awarded the IFB.

PDS's arguments[1] do not devalue or undermine GDOE's evaluation and award during the procurement process, because GDOE properly evaluated and awarded pursuant to the IFB, GTA's bid, and the law throughout the process. *See* GDOE at 393, 398, 599, & 605.

III. GDOE PROPERLY EVALUATED THE IFB, AND THE OPA IS NOT THE PROPER FORUM TO INVESTIGATE ALLEGATIONS REGARDING A SEPARATE PENDING LAWSUIT.

Guam Procurement law states that no criteria may be used in bid evaluation that are not set forth in the IFB, and as previously mentioned GDOE evaluated and awarded in accordance to the terms of the IFB and the law. *See* 5 GCA §§ 5211(e), 5211(g). In addition, the OPA is not the proper forum for an investigation and enforcement of alleged violations[2] of the Telecommunications Act. *See* 2 GAR Div. 4 §12112. PDS again alleges possible violations of law and that GDOE should evaluate and award the IFB pursuant to their allegations. This is incorrect and without legal support. As stated above, GDOE shall evaluate and award according to the terms and conditions of the IFB. *See* 5 GCA §§ 5211(e), 5211(g). Regarding jurisdiction, as previously argued, the OPA has decided on a directly analogous case, and GDOE respectfully requests that the OPA also dismiss this appeal because the enforcement and investigation of this subject matter rests with the Guam Public Utilities Commission (GPUC). *See In the Appeal of JRN Air Conditioning & Refrigeration, Inc.,* OPA-PA-10-008 at 9-10; *see also* 12 GCA §12207. Therefore, GDOE properly evaluated and awarded the IFB, and this matter should be dismissed.

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[1] PDS's arguments do not affect the evaluation and award process because GDOE properly evaluated using the contents of the bids and the IFB. PDS now argues rigid enforcement issues, which GDOE has the authority to address in numerous ways; however, it does not negatively affect the evaluation and award during the IFB process because GDOE properly evaluated and awarded the bids to the terms of the IFB. *See* 5 GCA §5237(a) (regarding a purchasing agency's authority to extend a contract).

[2] To be clear, PDS has not provided authority to evaluate bids outside the terms of the IFB. In addition, PDS has only provided allegations at this point, pursuant to a pending litigation between GTA and the Office of the Attorney General of Guam. GDOE at 609.

IV. PDS'S ARGUMENT REGARDING AN ALLEGED AUTOMATIC STAY IS UNTIMELY AND PROHIBITED BY LAW.

On June 4, 2021, GDOE awarded to GTA as the lowest, most responsible and responsive bid for the IFB. *See* Notice of Award, GDOE at 605. On August 9, 2021, PDS now brings a brand new issue regarding the Automatic Stay straight to the OPA.[3] *See* PDS Comments on Agency Report at 5. Under Guam Procurement Law, a protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto. *See* 5 GCA § 5425(a). Procurement law strictly forbids PDS's brand new allegation regarding the automatic stay and GDOE's award, more than sixty (60) days after the fact. *Id.* Therefore, GDOE respectfully requests the OPA dismiss this additional claim as untimely along with the appeal. *Id.*

V. GDOE PROVIDED THE PROCUREMENT RECORD IN ACCORDANCE WITH THE PROCUREMENT RULES AND REGULATIONS.

On July 23, 2021, GDOE filed the Procurement Record as required by this appeal, to the OPA and PDS. Guam Procurement rules and regulations state, the head of a Purchasing Agency shall submit to the OPA a complete copy of the procurement record relevant to the appeal within five (5) working days of receiving notice of an Appeal, in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents. *See* 2 GAR Div. 4 §§ 12104(c)(3), 12105. GDOE submitted timely and in accordance with the requirements set forth in the procurement rules & regulations.[4] *See generally* GDOE Procurement Record. As stated above, GDOE filed the Procurement Record to the tribunal OPA and to opposing counsel PDS. Regarding PDS's bid, GDOE

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[3] Guam Law mandates protests first exhaust their administrative remedies prior to appealing to the OPA. *See* 5 GCA §5425(a). Here, PDS has failed to exhaust their administrative remedies regarding this brand new allegation because it was not raised as an issue in their June 9, 2021 protest.

included a supplemental confidentiality notice to the OPA, on August 9, 2021 regarding PDS's own documents.[5] Therefore, GDOE filed the Procurement Record as provided in the relevant rules and regulations.

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

Dated: August 16, 2021

Respectfully submitted,

GUAM DEPARTMENT OF EDUCATION

By: _____
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[4] PDS did not provide legal authority for the requirement of a certified record. *See* PDS Comments on Agency Report at 7. Without legal authority, GDOE is not aware of a requirement that it is statutorily mandated to satisfy.

[5] GDOE provided PDS's bid in a limited capacity pursuant to this appeal. The procurement record was filed to the OPA as the hearing tribunal of this protest, as well to opposing counsel and owner of the bid, PDS. The OPA also did not post the entire procurement record on their website, only the table of contents. Relevant procurement case law addresses inadvertent disclosures only where the protester demonstrates that the recipient of the information received an unfair advantage, or that the protester was otherwise competitively prejudiced by the disclosure. *See In the Matter of Inmarasat Government, Inc.*, B- 419583 (2021) WL 2476481 at 7; *see also In Matter of: S & K Aerospace, LLC.*, B- 411648 (2015) WL 7348967 at 6 (The Comptroller General decided it will sustain a protest based on improper disclosure only where the protester demonstrates that it was in some way competitively prejudiced by the disclosure). This case is distinguishable, in that the IFB 028-2021 evaluation and award occurred more than one (1) month before the submission of the procurement record for this appeal. To be clear, the submission of the procurement record as required by this appeal, did not affect the evaluation and award process, and was only provided to the OPA and the owner of the bid, PDS. There is no evidence of an unfair competitive advantage or prejudice, because the procurement record was only provided to the OPA and PDS.