

1 **GUAM DEPARTMENT OF EDUCATION**

2 James L.G. Stake, Legal Counsel  
3 501 Mariner Avenue  
4 Barrigada, Guam 96913  
5 Telephone: (671) 300-1537  
6 E-mail: legal-admin@gdoe.net  
7 *Attorney for Guam Department of Education*

RECEIVED  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: 9/29/2021  
TIME: 4:00 PM BY: JMF  
FILE NO OPA-PA: 21-004 & 21-005

6 **OFFICE OF THE PUBLIC AUDITOR  
7 PROCUREMENT APPEALS**

8 In the Appeal of  
9  
10 Pacific Data Systems, Inc. (PDS),  
11  
12 Appellant.

APPEAL CASE NOS.: OPA-PA-21-004 and  
OPA-PA-21-005

**GUAM DEPARTMENT OF EDUCATION'S  
HEARING BRIEF**

13  
14 COMES NOW, the Appellee in the above captioned appeal, the Guam Department of  
15 Education (GDOE), by and through its legal counsel, and submits its Hearing Brief for the September  
16 30, 2021, hearing as follows.

17 **I. BACKGROUND**

18 On April 28, 2021, GDOE issued its Invitation for Bids (IFB) 027-2021 and 028-2021 for  
19 Telecommunication Services (hereafter collectively referred to as "IFBs"). On May 27, 2021, GDOE  
20 received bids for the IFBs from the Appellant, Pacific Data Systems, Inc. (PDS) and Teleguam  
21 Holdings LLC (GTA). On June 4, 2021, GDOE made awards to GTA for both IFBs as the lowest,  
22 most responsible and responsive bid. On June 9 and 10, 2021, PDS protested the awards made for the  
23 IFBs. On June 29, 2021, GDOE issued its denial of PDS's protests. On July 15, 2021, PDS appealed  
24 the denial of its protests for the IFBs to the Office of Public Accountability (OPA). The following is  
25 GDOE's Hearing Brief for the above captioned appeal.  
26  
27  
28

1           **II. GDOE PROPERLY EVALUATED AND AWARDED THE IFBs CONSISTENT WITH**  
2           **THE TERMS AND CONDITIONS OF THE IFBs AND GUAM PROCUREMENT LAW.**

3           Guam Procurement law provides the specific requirements that shall be used for the  
4 evaluation and award of Invitations for Bid. *See* 5 GCA §5211. Guam Procurement law states  
5 that bids **shall** be evaluated based on the requirements set forth in the Invitation for Bids and that  
6 no criteria may be used in bid evaluation that are not set forth in the Invitation for Bids. *See* 5  
7 GCA §5211(e). The contract shall be awarded with reasonable promptness by written notice to  
8 the lowest responsible bidder whose bid meets the requirements and criteria set forth in the  
9 Invitation for Bids. *See* 5 GCA §5211(g). Guam Procurement Law defines a responsible bidder  
10 as one with the capability in all respects to perform fully the contract requirements, and the  
11 integrity and reliability which will assure good faith performance, and a responsive bidder is one  
12 who has submitted a bid which conforms in all material respects to the Invitation for Bids. *See* 5  
13 GCA §§ 5201(f), 5201(g). Pursuant to Guam Procurement law, GDOE's IFB specifically states  
14 the criteria to determine bidders' responsibility and responsiveness. *See* Exhibit A.

15           Pursuant to Guam Procurement law, GDOE evaluated the bids and determined  
16 responsibility and responsiveness consistent with the terms and conditions of the IFB. *See* 5  
17 GCA §5211; *see also* Exhibit C at 312-314. Guam Procurement law states that the determining  
18 factor for the award of the IFBs shall be the lowest price. *See* 5 GCA §5211(g). Based on a  
19 review of the prices submitted, GTA's price is lower than PDS's for both IFBs.<sup>1</sup> *See* Exhibit C at  
20 311 and 312. Therefore, pursuant to Guam Procurement law and consistent with the terms and  
21 conditions of the IFBs, GDOE made proper awards to GTA for the IFBs.

22           In addition, GDOE properly conducted the evaluation here pursuant to the IFB and the law.  
23 *Id.* Guam Procurement law states that IFBs shall be evaluated and awarded pursuant to the terms and  
24

25  
26 <sup>1</sup> *See* Exhibit C at 311 and 313 (IFB 027 bid prices: GTA \$70,782.84 v. PDS's \$137,549.88;  
27 IFB 028 bid prices: GTA \$470,652.48 v. PDS \$596,997.36).  
28

1 conditions set forth in the IFB. *See* 5 GCA §5211. On June 4, 2021, GDOE evaluated the bids  
2 consistent with the IFB and the law and made the awards to GTA. *See* Exhibit B at 208, 213, 259,  
3 and 264; *see also* Exhibit C. In accordance with Guam Procurement law and the IFB, GDOE  
4 properly evaluated the IFB, including the IFB provisions and amendments addressing the services  
5 start date. *Id.*; *see also* Exhibit E at 318-320.

6 Furthermore, Guam Procurement law strictly provides **that no criteria may be used in**  
7 **bid evaluation that are not set forth in the Invitation for Bids.** *See* 5 GCA §5211(e). Here,  
8 the IFB did not require a breakout of individual charges despite what PDS claims. Exhibit A at  
9 22 and 93. Guam Procurement law strictly prohibits GDOE from conducting its evaluation  
10 based on new criteria that is not set forth in the IFBs. *See* 5 GCA §5211(e). Therefore, GDOE's  
11 evaluation and award to GTA was proper.

12 **III. THE OPA DOES NOT HAVE JURISDICTION TO RULE ON APPELLANT'S**  
13 **ALLEGATIONS REGARDING GTA'S SUPPOSED VIOLATIONS OF THE GUAM**  
14 **TELECOMMUNICATION ACT.**

15 PDS's protests and this appeal are fundamentally based on their allegation that GTA  
16 allegedly violated the Guam Telecommunication Act (hereafter referred to as the "Act"). *See*  
17 Appellant's Notice of Appeal of IFB 027 & 028 at 3-5; *see also* Appellant's Opposition to  
18 Motion to Dismiss at 5. PDS makes numerous references and citations to the Act. *Id.* For  
19 example, PDS states in its Notice of Appeal the services proposed under this procurement by  
20 GTA are regulated by the Guam Public Utility Commission (GPUC) and subject to the Guam  
21 Telecommunications Act. *See* Appellant's Notice of Appeal at 4. However, PDS fails to provide  
22 legal authority bestowing jurisdiction over this matter on the OPA. Instead, Appellant puts all its  
23 eggs in one basket: the still pending litigation between GTA and the Office of the Attorney  
24 General of Guam (OAG).

25  
26 The law is clear. The OPA was not bestowed with jurisdiction to determine compliance  
27 with the Guam Telecommunications Act, by GTA or anyone else. *See* 2 GAR Div. 4 § 12112.

1 PDS's allegations that GTA supposedly violated the Act are not part of the selection, solicitation  
2 or award of a contract and are not found anywhere in the terms and conditions of the solicitation.  
3 *Id.* Therefore, the OPA is without jurisdiction to entertain PDS's allegations and thus this matter  
4 should be dismissed.

5 In addition, PDS does not deny that the OPA's jurisdiction is specific and limited to  
6 procurement. PDS reiterates that the Public Auditor has the power to promote the integrity of the  
7 procurement process and the purposes of Guam's procurement laws. *See* Appellant's Opposition  
8 to Motion to Dismiss at 4 (citing 5 GCA §5703 which states, the Public Auditor's jurisdiction  
9 shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA  
10 Chapter 5, Guam Procurement Law). However, the Guam Procurement law sets forth its specific  
11 purposes and its specific authority. Unfortunately for PDS, their allegations based on the Guam  
12 Telecommunications Act are outside the express purpose and authority bestowed on the OPA by  
13 the Guam Procurement law.

14 Instead, disputes regarding the Guam Telecommunications Act are handled by the Guam  
15 Public Utilities Commission (GPUC). *See* 12 GCA §12207. Guam law provides that the GPUC  
16 shall have the authority and jurisdiction to implement and enforce the provisions of the Act  
17 through rulemakings or orders. *See* 12 GCA §12204(b). GPUC has the authority to address  
18 complaints of violations of the Act, and GPUC shall investigate and issue final orders, not the  
19 OPA. *See* 12 GCA §§ 12207, 12311. Therefore, the OPA should dismiss this case because  
20 jurisdiction over this matter involving alleged violations of the Act rests with GPUC and not the  
21 OPA.

22  
23 The OPA decided a similar issue in a clearly analogous case in *In the Appeal of JRN Air*  
24 *Conditioning & Refrigeration, Inc.*, OPA-PA-10-008. In *In the Appeal of JRN Air Conditioning*  
25 *& Refrigeration, Inc.*, the Appellant JRN alleged that the bid award was defective because  
26 Appellee J&B failed to be a responsive bidder by not complying with laws that were outside the  
27 jurisdiction of the OPA: 5 GCA § 5801 and § 5802. *Id.* at 8. This is directly analogous to the  
28

1 claims that PDS brings before the OPA now. In this analogous case, the Public Auditor stated  
2 that to decide the issues therein, the Public Auditor would be required to determine whether J&B  
3 complied with 5 GCA §5801 and § 5802, which was a determination outside of the OPA's  
4 express authority and jurisdiction. *Id.* at 8. Similarly, PDS makes claims based on laws outside  
5 the jurisdiction of the OPA but insists that the OPA address those claims. *See* Appellant's Notice  
6 of Appeal of IFB 027 & 028 at 3-4. Therefore, because PDS's protest and allegations against  
7 GTA are analogous to *In the Appeal of JRN Air Conditioning & Refrigeration, Inc.*, they warrant  
8 applying the same reasoning and ruling in that case: the OPA does not have jurisdiction to make  
9 determinations based on laws outside its authority.

10 Furthermore, the OPA should dismiss this case because jurisdiction over this matter  
11 involving alleged violations of the Act rests with GPUC not the OPA.

12 In conclusion, GDOE properly evaluated the IFBs consistent with Guam Procurement law  
13 and the terms and conditions of the IFBs, and PDS's allegations regarding GTA and their  
14 supposed violations of the Act are outside the jurisdiction of the OPA. Therefore, this appeal  
15 should be dismissed in its entirety.

16  
17  
18 Respectfully submitted this 28<sup>th</sup> day of September, 2021.

19  
20 **GUAM DEPARTMENT OF EDUCATION**

21 By:   
22 **JAMES L.G. STAKE**  
23 *Legal Counsel*