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See Attached - E-File and E-Serve - Data Management Resources, LLC - OPA-PA-22-004

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Mon, Jul 25, 2022 at 3:41 PM

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The attached pleading is E-filed to the Office of Public Accountability and E-Serve to the Office of Jacqueline T. Terlaje - Opposition to Motion for Review of Determination 2 GAR, Div. 4, § 12115.

Please acknowledge email and attachment receipt. Thank you.

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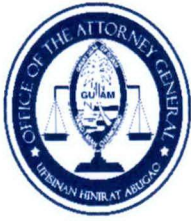
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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

IN THE APPEAL OF:)	DOCKET NO. OPA-PA-22-004
)	
DATA MANAGEMENT RESOURCES,)	
LLC,)	
)	
Appellant,)	OPPOSITION TO MOTION FOR
)	REVIEW OF DETERMINATION
and)	2 GAR, DIV. 4, § 12115
)	
OFFICE OF THE GOVERNOR OF GUAM,)	
)	
Purchasing Agency.)	

The Office of the Governor of Guam (“GOV”), by and through the Office of the Attorney General, hereby submits this Opposition to the Appellant’s Motion for Review of Determination pursuant to 2 GAR, Div. 4, § 12115 in OPA-PA-22-004.

DISCUSSION

Timeliness

Prior to the filing of an Appeal with the Office of Public Accountability (“OPA”), any protestor may protest an agency’s determination to move forward with procurement and award of a contract. However, “[s]aid protest must be filed in writing at the Office of the Public Auditor within two (2) days of receipt by protestor of the notice of determination.” 2 GAR, Div. 4 § 12115(a).

This two-day mandatory time limitation for filing a protest of a written determination to proceed with a procurement without delay is also clearly set forth in 5 GCA § 5425(g)(1) and 2 GAR, Div. 4 § 9101(e)(1). After receiving decisions on its two Letters of Protest, Appellant Data Management Resources, LLC (“DMR”) received notice of GOV’s determination to proceed with the procurement in Request for Proposals RFP-Office of the Governor of Guam-2022-001 (“RFP”) on May 24, 2022. DMR did not timely file a protest of the written determination within two days of the receipt of this notice. Therefore, DMR has waived this issue, and there is no jurisdiction to review this request.

No Automatic Stay of Procurement Process Required After May 24, 2022

At the time that the GOV issued its written determination to proceed with the procurement, the Office of the Governor of Guam had issued formal decisions on both the First Letter of Protest and the Second Letter of Protest. DMR was afforded notice of the written determination to proceed with the procurement, but did not timely protest the determination. DMR filed no further protests after May 24, 2022 and did not file its OPA appeal of the GOV’s decisions on the Letters of Protest until June 8, 2022. Therefore, no protests are or were pending before the agency or the OPA, and neither 31 U.S.C. § 3553(c)(1), 5 GCA § 5245(g), nor 2 GAR, Div. 4 § 9101(e) operate to impose a stay on the procurement process for the RFP.

“Review of Award Pending Protest or Appeal”/Ripeness

No determination to award a contract has issued for the RFP. Pursuant to 2 GAR, Div. 4 § 12115(b): “[a]fter an Appeal is filed with the Public Auditor ... pursuant to 5 GCA § 5425(e) and § 9301(sic) of this Chapter, the Public Auditor shall review and confirm or reject any determination by the Chief Procurement Officer or the Director of Public Works pursuant to 5 GCA § 5425(g) that *award of a contract* without delay pending Appeal is necessary to protect the interests of the government.” *Id.* (emphasis added).

The Procurement Record for this RFP is complete and accurate as of the last supplemental record documents submitted to the OPA on July 18, 2022. The Procurement Record shows that the only procurement actions that have occurred since the filing and resolutions of DMR’s Letters of Protest are: 1) issuance of Amendment #3 scheduling submission of Proposals; 2) submission of Proposals on June 10, 2022; and 3) logging of communications pursuant to 5 GCA § 5249.

No presentations with Offerors have been scheduled, as required under the terms of the RFP. No evaluations have occurred or have been scheduled. No ranking of Offerors has occurred, and no negotiations have occurred or have been scheduled. All of these actions will be required to eventually issue a determination to award a contract. *See* 5 GCA § 5216(e): “Award. *Award shall be made to the offeror determined in writing* by the head of the purchasing agency or a designee of such officer to be best qualified based on the evaluation factors set forth in the Request for Proposals, and negotiation of compensation determined to be fair and reasonable.” *Id.* (emphasis added). This has not occurred yet, and therefore, DMR’s motion is not ripe. *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotations omitted) (“a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”)

Urgent and Compelling Circumstances/Protecting the Substantial Interests of Guam

The RFP only imposes the requirements of Guam's Procurement Law, Guam's Procurement Rules and Regulations, and any mandatory federal terms. Therefore, its terms are not unreasonable, arbitrary, or capricious. DMR fails to allege any injury caused by the RFP's inclusion of the language required by law. DMR sets forth no "substantial interests" that it might have, which could or would require protection through imposition of an indefinite halt of the procurement. DMR alleges no prejudice to its ability to participate in the procurement, and no particular manner in which it is aggrieved by the continuance of the RFP procurement process. If DMR did have any substantial interests that needed protection, it could have requested revision of the RFP and any terms that DMR found objectionable. DMR did not do so, and has never done so.

In contrast, the government of Guam and the GOV have substantial interests in obtaining a new, automated permitting system for the government and public users with federal award funds that have been provided by the U. S. Department of the Interior specifically for this purpose. These funds come with associated deadlines and compliance requirements. If the Office of the Governor violates any of the Department of Interior Standard Award Terms and Conditions or the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards imposed by virtue of receipt of a federal award, penalties and remedies for non-compliance can be imposed on the Office of the Governor, as the non-Federal entity Recipient of the federal award funds. These penalties include loss of the funds and possible debarment or suspension of future funds. See 2 CFR § 200.339, Remedies for Non-compliance; 2 CFR § 200.340(a)(1), Termination ("The Federal award may be terminated in whole or in part as follows: By the Federal awarding agency or pass-through entity, if a non-Federal entity fails to comply with the terms and conditions of a Federal award"); *see also* 2 CFR §§ 200.341, 200.342, 200.343, and 200.208.

GOV previously complied with 5 GCA § 5425(g)(1) and 2 GAR, Div. 4 § 9101(e)(1), and halted the procurement process on the basis of DMR's Letters of Protest, even though its funding was set to expire on September 30, 2022. The RFP was issued on February 7, 2022, however, less than a month and a half later, on March 19, 2022, DMR sent an email in protest of the RFP (Letter of Protest #1"). On April 8, 2022, Appellant sent another email in protest of the RFP on other grounds ("Letter of Protest #2"). GOV took no further action in the RFP after March 19, 2022, except to suspend all actions until GOV issued its denial of both Appellant's protests on May 24, 2022. After issuing the decisions on the Letters of Protest, GOV made a written determination in the procurement record to proceed with the procurement due to the funding requirements, and sent notice of this determination to Appellant on May 24, 2022, resuming the procurement process on May 27, 2022. This constituted an approximate two-month delay of the procurement process.

DMR filed its appeal to the OPA on June 8, 2022. Since that time, as shown by the procurement record, GOV accepted proposal submissions on June 10, 2022; but has otherwise proceeded only perfunctorily with the procurement, in order to avoid any unintended or irrevocable consequences. The OPA is scheduled formally determine the merits of the appeal on September 12, 2022. If GOV does not proceed further with the procurement at all until this date, this will constitute an approximate three-month delay of the procurement process. The entire procurement process will have only been active for approximately two months, while it will have been stayed for more than five months during its pendency.

DMR asserts no meritorious claims and no prejudice to its own interests if the procurement should continue; however, even after resolution of the OPA appeal, DMR will have further opportunity to delay the procurement even further at the Superior Court of Guam and the Supreme Court of Guam. The funding for the procurement has been extended one more year, up to September 30, 2023 (*see* GOV Motion to Dismiss, filed July 13, 2022, Exhibit A); but even if GOV receives rulings in its favor at every

level, the delay associated with this type of review could consume all or nearly all of this time frame, and GOV would find itself back in the situation where it is in danger of losing the funding, or may even lose the funding. *See, e.g., GlidePath Marianas Operations, Inc. vs. Guam Power Authority*, OPA-PA019-010, 20-001, and 20-007 (Decision, September 28, 2020); and https://www.guampdn.com/news/missile-defense-could-abort-gpa-solar-project-with-military/article_46bf56be-0721-11ed-aea0-b31af67fbce6.html (Even after winning all appeals, GPA reports it has lost the opportunity to start the project and contract due to the delay from the procurement protest and appeals by the losing bidder.).

Therefore, there are urgent and compelling circumstances that require the Office of the Governor of Guam to move forward with the procurement process to protect the substantial interests of the government of Guam in this beneficial project and funding source. There are no urgent and compelling circumstances to support a stay of this process.

CONCLUSION

DMR has failed to comply with any of the procedural requirements to raise this issue to the OPA, and has failed to show that it is entitled to review or relief on the merits. Therefore, the GOV respectfully requests that DMR's Motion for Review of the government's written determination to proceed with the procurement in Request for Proposals RFP-Office of the Governor of Guam-2022-001 be denied.

Submitted this 25th day of July, 2022.

OFFICE OF THE ATTORNEY GENERAL
Leevin Taitano Camacho, Attorney General

By:



JESSICA TOFT
Assistant Attorney General