



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,

DATA MANAGEMENT RESOURCES, LLC

Appellant.

APPEAL NO: OPA-PA-12-007

**DECISION AND ORDER RE OFFICE OF
PUBLIC ACCOUNTABILITY
AUTHORITY TO HEAR NEW ISSUES**

To: **Purchasing Agency:**
General Services Agency, Management
C/O Benjamin M. Abrams and John Weisenberger
Office of the Attorney General
287 West O'Brien Drive
Hagatna, Guam 96910
Telephone: (671) 475-3324

Appellant:
Data Management Resources, LLC
Jacqueline Taitano Terlaje, Esq.
888 North Marine Corps Drive, Suite 215
Tamuning, GU 96913
Telephone: (671) 648-9002

INTRODUCTION

On July 3, 2012, the Hearing Officer, Phillip Torres, convened the continued Motion hearing to address Appellant, Data Management Resources, LLC's ("Appellant"), Motion for Discovery and Extension of Time and the General Services Agency's ("GSA" or "Agency")

Decision and Order - 1

1 Motion to Dismiss. The Hearing Officer, based upon the pleadings filed, granted Appellant's
2 Motion for additional discovery and vacated the August 13 and 14, 2012 dates for hearing on the
3 merits. The Government's Motion to Dismiss was held in abeyance. At that hearing, the
4 Appellant raised, by oral Motion, a jurisdictional issue about the Office of Public
5 Accountability's ("OPA") authority to hear new issues and defenses raised by the Government
6 that are not part of its denial of the protest in the Agency's Decision dated March 14, 2012.

7 On June 14, 2012, the Government of Guam, through the Department of Administration,
8 including GSA, moved to dismiss the Procurement Appeal on multiple grounds. The OPA has
9 not ruled on the Government's Motion. At Page 2 of its Motion, at paragraph I(B), the
10 Government asserted that the Appellant (1) had a competitive advantage in the procurement
11 process and that it had unrestricted "*carte blanche*" access through a data connection, (2)
12 improperly restricted maximum competition by failing to disclose information necessary to the
13 bid process, and (3) had continuous access to confidential and sensitive Government of Guam
14 data rendering the procurement fatally defective.

15 In response, Appellant argues that these matters raised in the Government's motion were
16 not raised in GSA's March 14, 2012 Decision denying the protest, but instead were raised for the
17 first time in the Procurement Appeal before the OPA. As such, Appellant urges that these
18 matters are beyond the jurisdictional authority of the OPA to review. Appellant seeks— through
19 an oral motion presented on July 3, 2012—an Order that the OPA is without jurisdiction to
20 consider and rule on the issues presented and the defenses raised and also requests an Order
21 limiting the scope of discovery to issues raised in the Appellant's protest and in the March 14,
22 2012 Agency Decision.

23 Because the OPA is granted de novo reviewing authority to uphold the integrity of the
24 procurement process, and no statutory bar prevents the Government, as opposed to the Appellant,
25 from presenting new rationale to the OPA justifying the denial of an offeror's bid protest, the
26 Appellant's oral Motion is denied.

1 **DISCUSSION**

2 The Government asserts that the Appellant had an improper advantage through
3 knowledge of the Government’s computer system. This issue was brought up for the first time in
4 the Government’s Motion to Dismiss. The Government contends that this additional rationale
5 justifying the denial of the appellant’s agency level protest was only recently discovered.
6 Appellant argues that the OPA lacks jurisdiction to consider issues raised for the first time by the
7 Government of Guam during an Appeal before the Public Auditor.

8 The jurisdiction of the Public Auditor is found at 5 GCA § 5703, which states, in
9 pertinent part, that:

10 The Public Auditor shall have the power to review and determine *de novo* any
11 matter properly submitted to him or her [...] The Public Auditor’s jurisdiction
12 shall be utilized to promote the integrity of the procurement process and the
13 purposes of 5 GCA Chapter 5.

14 5 GCA § 5703 provides the public auditor with broad jurisdiction to review a matter so
15 long as it is properly submitted to the Public Auditor. As the review is *de novo*, the Public
16 Auditor is not restrained by the Agency interpretation or findings. However, the Public Auditor’s
17 jurisdiction to hear the Appeal is limited by whether the Appeal and issues are “properly
18 submitted” in the first instance.

19 An issue that is not presented in accordance with either procurement regulations or the
20 Guam code is not “properly submitted.” It is well settled that an appeal to the OPA of a
21 procurement protest is dependent upon the existence of an agency level protest and a Decision
22 regarding that protest. The Decision, after a protest is made, shall state the reasons for the
23 actions taken and inform the protestant of its right to an administrative and judicial review. See
24 5 GCA § 5425(c). That Decision of the Officer or Agency must be appealed within fifteen (15)
25 days after receipt of the Decision by the Protestant, as set forth in 5 GCA § 5425(e). Appellants
26 have an obligation at the time of filing their appeal to set forth the issues on appeal. (2 G.A.R. §
12104(b)).

1 Appellant asserts that new issues and defenses outside those set forth in the agency
2 decision are not properly submitted and, thus, the Public Auditor does not have jurisdiction to
3 hear them.^{1/} The Appellant supports its argument with citations to *In Re Appeal Allied Pacific*
4 *Builders, Inc.*, OPA-PA-12-10, Decision and Order Re Purchasing Agency's Motion to Dismiss,
5 Motion for Expedited Decision, and Motion to Dismiss in Part of June 14, 2012, and *In Re*
6 *Appeal of Peter Alexis Ada*, OPA-PA-11-016, Decision of January 6, 2012, and *In Re Captain,*
7 *Hutapea & Associates*, OPA-PA-08-009, Finding and Recommendations of the Hearing Officer
8 dated October 23, 2008, and *In Re Appeal of Guam Publications, Inc.*, OPA-PA-08-007,
9 Decision and Order Re Purchasing Agency's Motion to Dismiss Appellant's Procurement
10 Appeal of August 8, 2008. The cases relied upon by the Appellant are unavailing because they
11 refer to substantive issues raised for the first time by *appellants*.

12 Appellants, when learning of a new matter justifying an agency level protest during an
13 appeal before the OPA, are presented with a clear path of raising those issues in a new protest
14 brought within 14 days after learning of the new basis of aggrievement. The cases relied upon
15 by the Appellant here show this. To the contrary, the responding Agency is provided no such
16 similar mechanism by Guam's procurement law to raise newly discovered rationale for denying
17 an offeror's protest. The only existing mechanism available to the Agency to call attention to
18 such newly discovered rationale is to raise the matter before the OPA directly. Again, the *de*
19 *nov*o nature of the public auditor's review permits the OPA to consider rationale supporting an
20 Agency's decision which were not brought up in the underlying protest decision. Such *de novo*
21 reviewing authority is essential given the Public Auditor's statutory mandate to promote "the
22 integrity of the procurement process" and assure that the procurement code furthers its goal "to
23
24

25 ^{1/}The Public Auditor has jurisdiction to hear questions of its own
26 *jurisdiction* which are timely brought. Any Motion concerning the
jurisdiction of the Public Auditor shall be promptly filed. 2 G.A.R. §
12104 (c) (9).

1 provide for increased public confidence” in the procurement process. 5 GCA §§ 5703 and
2 5001(b)(3). Therefore, Data Management Resource, LLC’s Motion is DENIED.

3
4 **SO ORDERED** at Hagåtña, Guam, on July 13, 2012.

5
6 
7
8 **DORIS FLORES BROOKS, CPA, CGFM**
Public Auditor

9
10 PLDGS:OPA:12-007:002