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7 **OFFICE OF PUBLIC ACCOUNTABILITY**
8 **PROCUREMENT APPEALS**

9 IN THE PROTEST OF
10 PACIFIC DATA SYSTEMS, INC.,
11 Protestant.

) Docket No. OPA-PA 12-014

) **REPLY OF PACIFIC DATA SYSTEMS,
INC. TO DEPARTMENT OF
EDUCATION'S ANSWER**

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14 The Protestant Pacific Data Systems, Inc. ("PDS") replies as follows to the
15 Answer of the Department of Education.

16 **I. PDS COMPLIED IN ALL RESPECTS WITH THE IFB AND IS THE LOW**
17 **BIDDER.**

18 In its Answer, the Department of Education ("DOE") states that "... As
19 part of the bid, GDOE sought a flat rate for non-warranty repairs for the laptops
20 included in the bid. See Item 4 of the IFB Bid Form ..." In fact, the IFB did not request a
21 flat rate for non-warranty repairs. What it did request is:

22 L. Non-Warranty Service for Laptops

23 GDOE is requesting for non-warranty services to
24 protect the equipment from any events or damage not
25 covered in the standard requested warranty. At a
minimum, the coverage will include but not limited
to accidental drops, spills, AND surges.

26 Please provide the overall non-warranty service plan
27 for the laptops in the proposal. The plan should

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clearly identify its coverage (drops, spills, etc.) and the process to repair the laptops.

Thus, DOE did not request a flat rate for warranty repairs, but rather a plan, specifically an "... overall non-warranty service plan for the laptops in the proposal ..." There is nothing in the IFB which suggests the service plan must be stated as a single flat rate. This is confirmed by the fact that GDOE did not include a quantity in its bid form for Item No. 4, which is conspicuous since a quantity was provided for all the other tangible items to be provided.

It is far more reasonable to read the requirement that the bidders must provide an "... overall non-warranty service plan ..." to require each bidder to explain how it would provide non-warranty service and set out the details in a plan, which then constitutes the legal obligation of the bidder to make non-warranty repairs in accordance with its plan. The IFB cannot be reasonably construed to require a single specific figure to be used in determining the low bidder given the generality of the IFB language. For example, the language "... At a minimum, the coverage will include but not limited to accidental drops, spills, AND surges," invites the bidder to offer non-warranty service for damage caused by events in addition to drops, spills, and surges, which would, of course, result in a higher price. The cost of the service plan will also be affected by multiple other factors, such as whether the repairs are to be made at the GDOE facility, at a local facility on Guam, or at some off-island facility. Are the repairs to be made within 24 hours or 48 hours or 30 days or some other time period? The IFB stated no criteria by which the costs of the different plans could be compared.¹

Of the three bids, PDS did the best job in complying with the language of the IFB by describing in detail the costs for various types of non-warranty service, but

¹ PDS did request GDOE to provide details regarding the non-warranty service, but GDOE's response was of little use. See Question 22 on Exhibit "A," attached hereto.

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2 that is not the point. The point is that oranges and apples cannot be compared in
3 determining the low bidder. As a result and consistent with the absence of any quantity
4 on line 4, the amounts stated on line 4 cannot be utilized as part of determining the low
5 bidder. None of the three bidders understood that Item No. 4 would increase the
6 overall amount of the bid, as demonstrated by the fact that none of the three bidders
7 entered an extended price in the third column of the bid form. It was only GDOE that
8 did this after bid opening, by unilaterally adding \$233,064.00 to the Softchoice bid and
9 \$250,992.00 to the ComPacific bid.

10 The harm that flows from GDOE's current interpretation of the IFB is
11 apparent. If Softchoice is awarded the bid, it will receive an extravagant amount of
12 \$233,064.00 that it did not request and will never earn. If, as PDS estimates, 150 non-
13 warranty repairs are required over 3 years, Softchoice will receive \$1,553.76 per non-
14 warranty repair, almost 3 times the price of a new laptop. On the other hand, if PDS is
15 determined to be the low bidder, then its prices for non-warranty repairs are stated. In
16 the worst case, if all 150 repairs were at the PDS high figure of \$300 for a major repair,
17 PDS would then receive \$45,000.00 over the life of the three year contract for those
18 repairs. The bottom line is that PDS is the low bidder if the amounts stated in line 4 are
19 not included in bid evaluation, and PDS remains the low bidder even under GDOE's
20 calculation which added a grossly excessive amount to both the Softchoice and
21 ComPacific bids.

22 **II. THE DEADLINE FOR OBLIGATION OF ARRA FUNDS HAS BEEN**
23 **EXTENDED UNTIL SEPTEMBER 13, 2013.**

24 GDOE represents in its Answer that "... ARRA funds must be obligated
25 before September 30, 2012, or these funds will expire ..." GDOE surely knows this is a
26 misleading statement, since the United States Department of Education has agreed to
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2 approve the Governor's request for extension of the obligation timeline for DOE ARRA
3 funds until September 30, 2013. See Exhibit "B" attached hereto. The Guam Legislature
4 has now passed implementing legislation per the Governor's request. See Exhibit "C."

5 **III. THE REMEDY.**

6 GDOE provided Purchase Orders dated September 21, 2012 as Exhibit
7 "10" in the Procurement Record. However, the existence of these Purchase Orders in
8 and of themselves do not prove that GDOE has actually entered into a contract with
9 Softchoice. There is no signature on the Purchase Orders signifying receipt by
10 Softchoice nor any evidence that the Purchase Orders were transmitted to Softchoice.
11 The Procurement Record does not reflect any tentative delivery schedule as required by
12 Section 2.5.2 of the IFB. As a result, PDS does not accept that in fact there is an existing
13 contract between GDOE and Softchoice. If there is no contract, then the Public Auditor
14 has authority to cancel the solicitation, or revise it to comply with the law pursuant to 5
15 G.C.A. § 5451. In this case, the revision to comply with the law would require the
16 award to be made to PDS as low bidder.

17 However, even if there is a contract between GDOE and Softchoice, the
18 Public Auditor has authority pursuant to 5 G.C.A. § 5452(a)(1)(ii) to terminate this
19 contract. Softchoice may be able to make a claim for actual expenses reasonably
20 incurred under the contract plus a reasonable profit prior to termination, but such
21 amounts should be nominal given that the Purchase Orders were so recently issued.
22 This is why PDS requested the Public Auditor on Friday, September 28, 2012, to
23 immediately issue a stay of this procurement so that Softchoice does not incur any
24 expenses that it might otherwise incur.

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IV. CONCLUSION.

In conclusion, PDS was clearly the lowest responsive and responsible bidder. Its protest should be granted, and PDS awarded the contract.

DATED this 2nd day of October, 2012.

BERMAN O'CONNOR & MANN
Attorneys for *PACIFIC DATA SYSTEMS, INC.*

By: 

BILL R. MANN

Answer: Yes, please note minimum requirement.

19. Question: Regarding Section 3 – Terms and Conditions, 3-3 License to Conduct Business on Guam; Policy for Local Procurement:

Please advise if Bidders will need to submit the Local Procurement Preference Application form in order to avail of the preference defined in 5 GCA Section 5008. If so, please provide a copy of the form for this purpose.

Answer: The local preference does not apply in this solicitation. This IFB is being supported with grant funds from the US Department of Education ("USDOE"). Due to the high-risk status placed on GDOE by the USDOE, geographical preferences may not be used in procuring items with Federal Funds. EDGAR 34 CFR Part 80.36 (c).

20. Question:

Will GDOE consider an alternate bid item price in addition to our basic bid item price for each of the items in this bid?

Answer: No.

21. Question: Item D IS FOR Laptops with Docking Station (qty 39) and Item E is for Docking Stations (qty 39):

Is GDOE asking for the docking stations to be included as part of Item D?

Answer: Yes, Laptops with Docking stations should include Item E (Docking Station) in price.

22. Question: On the summary Bid Form (copy attached item no. 4 is labeled "Non Warranty services (per laptop"

However, the IFB does not define the technical specifications for this item. Please provide more information regarding the scope of work to be supplied for this item, for example:

- On-Site Service OR Depot Service
- Monday thru Friday OR 7 Days A Week
- 8 am to 5 pm OR 24 Hours
- Labor Only Coverage OR Parts & Labor Coverage

Answer: GDOE is seeking Non-Warranty service that include Labor and Parts coverage. At a minimum, the coverage will include but not limited to accidental drops, spills, AND surges.

23. Question: On the summary Bid Form there is no line item for Item E: Docking Stations:

Please clarify if the summary Bid Form should be modified to show this item?

Answer: Docking Station can be combined with laptop and docking station on Bid Form.

EXHIBIT A

From: Office of the Governor **On Behalf Of** Office of the Governor
Sent: Friday, September 14, 2012 1:00 PM
Subject: U.S. DOE Will Approve ARRA Extension with Conditions

Calvo warns DOE to make this right for students

FOR IMMEDIATE RELEASE

September 14, 2012

U.S. DOE will approve the Governor's request for extension of the obligation timeline of Guam DOE ARRA funds, with conditions. This is the second time the Governor has had to make the extension request on behalf of Guam DOE because of its inability to obligate the federal money.

"This is the last time I'm making this request for them, so they need to hurry up and spend this money," Governor Calvo said. "What's more important than meeting what will be this new deadline is actually repairing the public schools. If they lose these federal funds, it will be another hit against technology for students and teachers, teacher salaries, and classroom supplies."

U.S. DOE will approve the extension with conditions:

1. That Guam will obligate the funds by September 30, 2013;
2. By October 15, 2012, Guam will provide U.S. DOE with the amount of funds obligated by project as of September 30, 2012;
3. On the 15th of each succeeding month, Guam will provide U.S. DOE with a report on the progress in obligating funds and completing the relevant projects;
4. Guam will not oppose any steps by U.S. DOE to recover Trust Account funds not obligated by September 30, 2013; and
5. Guam will not oppose any steps by U.S. DOE to rescind approval of the extension to recover funds if Guam fails to provide the required reports by the dates noted, or does not make adequate progress in completing the capital improvement and technology projects.

"I am calling on Guam DOE to provide all the information and make every single deadline U.S. DOE is requiring of them," Governor Calvo said. "They cannot mess this up again. I will be communicating with the Superintendent on the processes necessary for us to meet all these conditions. I am demanding transparency from Guam DOE, and regular updates to the public about the progress on all the pending projects. There should be no delays considering that public school facilities are not up to standard for our children."

The Governor is hopeful that new Superintendent Jon Fernandez will provide the necessary leadership to meet U.S. DOE's conditions and, more importantly, to get the school repair projects done immediately.

EXHIBIT B

Budget rider makes no sense

“The Governor has had to come to Guam DOE’s rescue twice already because of their inability to spend free money from the federal government,” Governor’s Chief Education Advisor Vince Leon Guerrero said. “It is beyond reason why the chairwoman on education in the legislature would even think that removing DOE from federal grant clearinghouse review is appropriate considering how often these mistakes are made.”

Leon Guerrero is referring to a rider in the recently-passed budget law that removes Guam DOE from federal funds review by the Guam State Clearinghouse. The rider originally was a bill by the speaker, which did not receive a public hearing and which the Governor and Lieutenant Governor opposed. This was done despite that for a third year, Guam DOE will have to pay millions to a third-party fiduciary agent put in place because U.S. DOE does not trust Guam DOE with federal education funds.

“This is just another example of bad legislation being enacted under the cover of darkness that has wide-ranging implications for children and families,” Leon Guerrero said. “This is why we need full transparency from Guam DOE about these funds, and we’re confident Superintendent Fernandez will agree.”

Please call Phillip Leon Guerrero at 929-7467 or Natalie Quinata at 488-6013 for more information.

END

Monday, October 01, 2012



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Guam Guam News

Veto Over-Ride Fails; Lawmakers Pass Alternate Bill #496 to Extend ARRA Funding and Correct Their Mistake

Last Updated on Tuesday, 02 October 2012 08:04

Written by Kevin Kerrigan

Monday, 01 October 2012 17:32



Guam News - Guam News

Guam - Voting strictly on party lines, Guam lawmakers Monday night failed to over-ride Governor Calvo's veto of Bill #516, the ARRA extension Bill.

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The Governor had vetoed Bill #516 Monday and then called a Special Session for Tuesday morning, but Speaker Won Pat called lawmakers back into Emergency Session Monday night in an attempt to override the veto.

Tweet

The Governor explained in his veto transmittal letter to the Legislature that it was "*absolutely imperative to veto the inferior Bill #516.*" He asked for the ARRA extension Bill to be re-passed, without the add-ons tacked onto the measure by lawmakers last week, because of the critical need to extend the availability of federal ARRA funds for use by Guam DOE.

READ Governor Calvo's transmittal letter explaining his Veto of the ARRA extension measure, Bill #516 [HERE](#)

The vote was 9 in favor of the over-ride, 6 against, 1 short of the two-thirds majority needed.

When the veto over-ride of Bill #516 failed, Speaker Judi Won Pat called an amended Bill #496 to the floor. It provides for the ARRA extension, and amendments attached to it reportedly correct the mistake in the FY 2013 Budget bill, and eliminate the provisions the Governor objected to. It was passed unanimously.

READ Bill #496 [this is the original bill, w/o the amendments added Monday night] [HERE](#)

Bill #516 was introduced last week and put to a vote without a Public Hearing. It was introduced by Speaker Judi Won Pat and Appropriations Chair Senator Ben Pangelinan.

Although it's original purpose was to extend the deadline for obligating the ARRA funds for the Department of Education, it became a vehicle for making adjustments to the already approved 2013 budget, including correcting a mistake in the 2013 Budget passed the previous week.

EXHIBIT C

That mistake was in Section 13 of the budget bill which barred payment for the hiring or employment of unclassified employees in 2013. The intent was to save money by preventing any further hiring of un-classified employees. But the effect of the wording was to prohibit payment to all current unclassified employees.

The correction of that error was included in Bill #516. But that's not why the Governor vetoed it.

In his transmittal letter, the Governor said that the most important reason he vetoed it was a provision in the Bill *"would subject the government of Guam to a violation of an order of the District Court of Guam."*

The questioned provision would have re-directed \$3-million originally intended for the Department of Mental Health under the permanent injunction and given that money to UOG, GCC and the Retirement Fund.

The problem, notes the Governor in his letter, is that the \$3-million *"has been fully ear-marked and identified for use to pay into the Trust administered by the Federal Management Team (FMT) in the Mental Health case, as ordered by the District Court of Guam."*

The Governor also called attention to a section of Bill 516, *"unrelated to the ARRA issue"* which he said essentially lifts the hiring restriction of unclassified employees in the legislature and judiciary.

"I am suspicious of the action since the sponsors of the bill never raised this either in session or to the media," writes the Governor, *"Since there was no public hearing on this bill, it seems transparency is lacking."*

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