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Attorneys for *Data Management Resources, LLC*.

THE OFFICE OF PUBLIC ACCOUNTABILITY – GUAM
HAGATNA, GUAM

In the Appeal of) DOCKET NUMBER. **OPA-PA-12-007**
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)
)
DATA MANAGEMENT RESOURCES, LLC,)
) **APPELLANT’S COMMENTS**
) **TO AGENCY REPORT**
Appellant.)
)
)

COMES NOW Appellant, DATA MANAGEMENT RESOURCES, LLC. (“DMR”), through undersigned counsel and submits its APPELLANT’S COMMENTS to the Agency Report filed on April 17, 2012 by the General Services Agency (“GSA”) Department of Administration (“DOA”).

I. PROCEDURAL AND FACTUAL BACKGROUND

On April 1, 2011, GSA issued Request for Proposal No. RFP/DOA-014-11 Point of Sale (hereinafter “RFP”) for a “Turn-Key” project to design, develop and implement a point-of-sale system which fully integrates payment processing for all Treasurer of Guam transactions. The RFP was issued by GSA on behalf of DOA, Department of Revenue and Taxation (DRT) and departments of the Government of Guam. Agency Report, Tab. 5, ¶1.2 of RFP. On June 17, 2011, Appellant DMR was the sole bidder for the RFP. Agency Report, Tab 6. DMR was deemed to be the Best Qualified Offeror on July 29, 2011. Id., Tab 9.

ORIGINAL

1 Cost negotiations commenced by DMR's submission of its Price Proposal on June 17, 2011. Id.,
2 Tab 11. On August 5, 2011, DMR submitted a cost breakdown for consideration in the cost-
3 negotiations. Id. On August 25, 2011, a cost negotiation meeting was held. The following persons
4 were in attendance:

- 5 1. Elaine P. Fejeran, DRT
- 6 2. Rose Fejeran, DOA
- 7 3. Geri Delgado, DOA
- 8 4. Tom Ashe, BIT (Bureau of Information Technology)
- 9 5. Ken Borja, DOA
- 10 6. Lorraine Guerrero, DRT
- 11 7. Ben Camacho, GSA
- 12 8. Gina Taitano, DMR
- 13 9. Richard Taitano, DMR

14 On August 29, 2011, GSA requested an additional price breakdown of the cost proposal, and
15 DMR submitted a cost breakdown by module, on August 30, 2011. Id.

16 On September 28, 2011, GSA proffered its FIRST COUNTER OFFER in the amount of TWO
17 MILLION, TWO HUNDRED NINETY-FIVE THOUSAND, FIVE HUNDRED EIGHT-TWO AND
18 69/100 USD (\$2,295,582.69). Id., Tab 12. An additional meeting for cost negotiation was held on
19 October 5, 2011. The following persons were in attendance:

- 20 1. Annie Duenas, DRT
- 21 2. Ken Borja, DOA
- 22 3. Geri Delgado, DOA
- 23 4. Elaine Fejeran, DRT
- 24 5. Rosita Fejeran, DOA
- 25 6. Richard Taitano, DMR
- 26 7. Thomas Ashe, BIT
- 27 8. Lorraine Guerrero, DRT

28 On February 7, 2012, the RFP Evaluation Committee requested that DMR delete certain
requirements from its costs proposal and submit its best and final offer to GSA for consideration. Id.
On February 8, 2012, GSA requested that DMR submit its Best and Final Offer no later than February

1 10, 2012. Id. On February 10, 2012, DMR submitted its Best and Final Offer of ONE MILLION,
2 EIGHT HUNDRED TWENTY-THREE, ONE HUNDRED AND 00/100 USD (\$1,823,100.00). Id.

3 On February 29, 2012, DMR received a Notice of Rejection of its Best and Final Offer under
4 RFP/DOA-014-11 based on “insufficient funds for such project”. *See* Notice of Appeal, Exhibit 1.

5 On March 13, 2012, DMR lodged its protest (hereinafter “Protest”). Id., Exhibit 2.

6 On March 16, 2012, DMR received Notice of Decision on the Protest setting forth the basis of
7 the rejection of the protest as a rejection of the proposal under §3115(e)(3)(B) of Title 2, Division 4 of
8 the Guam Administrative Rules and Regulations. Id., Exhibit 3.

9 On April 2, 2012, Appellant timely filed its Notice of Appeal to the Public Auditor.

10 II. LEGAL ARGUMENT

11
12 This Appeal arises out of the Decision on Protest of the Method, Solicitation and Award of
13 Request for Proposal No. RFP/DOA-014-11 related to the rejection of DMR’s best and final offer during
14 cost negotiations. DMR appeals the Decision based on the failure of GSA to evaluate DMR’s Best and
15 Final Offer, as “fair and reasonable”, as required by Title 2, Guam Administrative Rules and
16 Regulations, Division 4, §3114(l) and Title 5, Guam Code Annotated, §5216(e).
17

18 Upon negotiation for compensation for services requested under any Requests for Proposal, the
19 Government of Guam must make a determination of whether the Best and Final Offer is “fair and
20 reasonable” prior to termination of cost negotiations. 5 G.C.A. 5216(e); 2 GAR, Div. 4, §3114(l) and
21 §3115(e)(2); In Re Appeal of Joeten Development, Inc., OPA-PA-11-012 Decision (Sep. 27,
22 2011)(Public Auditor finds that cancellation of invitation for bid violated Guam procurement law).
23

24 Guam Procurement Law provides: 5 G.C.A. §5216(e) provides:

25
26 Award shall be made to the offeror determined in writing by the head of the purchasing
27 agency or a designee of such officer to be best qualified based on the evaluation factors
28 set forth in the Request for Proposals, and negotiation of compensation determined to be
fair and reasonable. If compensation cannot be agreed upon with the best qualified

1 offeror, the negotiations will be formally terminated with the selected offeror. If
2 proposals were submitted by one or more other offerors determined to be qualified,
3 negotiations may be conducted with such other offeror or offerors, in the order of their
4 respective qualification ranking, and the contract may be awarded to the offeror then
ranked as best qualified if the amount of compensation is determined to be fair and
reasonable.

5 2 GAR, Div. 4, §3114(l) further provides that GSA upon negotiation is required to negotiate
6 “compensation determined in writing to be fair and reasonable.”

7 In this case, GSA failed to make any determination that the Best and Final Offer submitted by
8 DMR was not fair and reasonable, as required by law. Notably, upon review of the RFP Procurement
9 Record and the Agency Report, nowhere is there any reference to any evaluation or written
10 determination by the RFP Committee or GSA of the fair and reasonable cost for the services requested
11 under the RFP. Rather, GSA unilaterally determined, absent any consultation with the RFP Committee,
12 to reject the proposal by DMR as unreasonable.

13 Similarly, in In Re Appeal of Joeten Development, Inc., supra., the Department of Revenue and
14 Taxation (DRT) issued an invitation for bid for rental space, and Joeten Development, Inc. was the sole
15 bidder to the invitation. Following the opening of the bid, DRT cancelled the invitation “due to
16 insufficient funds.” Id., at p. 4. The Public Auditor in affirming the protest of Joeten Development, Inc.
17 held that the rejection or cancellation of bids is governed by 5 G.C.A. §5225. In analyzing the
18 cancellation of the bid, the Public Auditor further held that the analysis must also include §3115, Title 2
19 Div. 4 of the Guam Administrative Rules and Regulations, which govern cancellation after bid opening.
20 In finding in favor of Joeten Development, Inc., the Public Auditor in vacating the cancellation of the
21 bid held that GSA failed to comply with the appropriate Procurement regulations and ordered GSA to
determine whether the bid submitted was fair and reasonable.

22 GSA similarly is attempting to reject the Best and Final Offer of DMR based on insufficient
23 funds without a written determination as required by Guam Procurement Law, and Guam Administrative
24 Rules and Regulations. 2 GAR, Div. 4 §3115(d)(2) provides:

25 Cancellation of Solicitation: Rejection of All Bids or Proposals . . . (2) After Opening.
26 (A) After opening, but prior to award, all bids or proposals may be rejected in whole or in
27 part when the Chief Procurement Officer, the Director of Public Works, or the head of a

1 Purchasing Agency determines in writing that such action is in the territory's best interest
2 for reasons including, but not limited to:

- 3 (i) the supplies, services, or construction being procured are no longer required;
4 (ii) ambiguous or otherwise inadequate specifications were part of the solicitation;
5 (iii) the solicitation did not provide for consideration of all factors or significance to the
6 territory;
7 (iv) prices exceed available funds and it would not be appropriate to adjust quantities to
8 come within available funds;
9 (v) all otherwise acceptable bids or proposals received are at clearly unreasonable prices;
10 or
11 (vi) there is reason to believe that the bids or proposals may not have been independently
12 arrived at in open competition, may have been collusive, and may have been submitted in
13 bad faith.

14 DMR submits that a rejection of a proposal in whole must occur at the time of bid opening, and upon an
15 immediate determination that the amount proposed in procurement process is wholly and completely
16 unreasonable. In this case, more than six (6) months of cost-negotiations occurred, prior to GSA's
17 rejection of DMR's proposal. Once negotiation commences, GSA's conduct is governed under
18 §3114(l), amongst other provisions. GSA commenced negotiations with DMR over a six (6) month
19 period. Because negotiations were ongoing, GSA's rejection of DMR's Best and Final Offer absent a
20 written determination that DMR's offer was not fair and reasonable, was erroneous.

21 2 GAR, Div. 4, §3115(e)(3)(B) further provides:

22 As used in this Subsection, *proposal* means any offer submitted in response to any solicitation,
23 including an offer under §3111 (Small Purchases), except a bid as defined in Subsection
24 3115(e)(3)(a) of this Section. Unless the solicitation states otherwise, proposals need not be
25 unconditionally accepted without alteration or correction, and the territory's stated requirements
26 may be revised or clarified after proposals are submitted. This flexibility must be considered in
27 determining whether reasons exist for rejecting all or any part of a proposal. Reasons for
28 rejecting proposals include but are not limited to:

- 29 . . . (iii) the proposed price is clearly unreasonable.

30 GSA has qualified its rejection of DMR's Best and Final Offer as "clearly unreasonable," under 2 GAR,
31 Div. 4, §3115(e)(B)(3). However, as noted by the Procurement Record and Agency Report, Tab 12,
32 GSA's First Counter Offer is indisputably higher than the Best and Final Offer submitted by DMR on

1 February 10, 2012. It is unfathomable; this independent determination of unreasonableness on February
2 10, 2012; when a mere five months earlier, GSA proposed an offer of \$2.2 Million Dollars. Based on
3 the services requested in the RFP, this is prima facie evidence of the fairness and reasonableness of the
4 Best and Final Offer submitted by DMR. Moreover, it is also indicative of other outside factors
5 influencing GSA's determination of this RFP.

6 DMR further alleges that GSA has failed to act in good faith in the negotiation of the RFP, and is
7 prepared to present proof thereof at the formal hearing on the protest, as requested by DMR.

8 9 **III. CONCLUSION**

10 **BASED ON THE FOREGOING**, Appellant seeks ratification and affirmation in this Appeal of
11 its Protest to RFP/DOA-014-11, and requests that the Public Auditor order GSA/DOA to make a
12 determination of "fair and reasonable" compensation for the services requested, and to comply with
13 Guam law related to cost negotiation of RFP/DOA-014-11. Appellant seeks any other relief that the
14 Office of the Public Auditor deems just and appropriate under the circumstances, including costs and
15 attorney's fees where authorized by law.

16 **RESPECTFULLY SUBMITTED** on this 5th day of May, 2012.

17 **LAW OFFICE OF**
18 **JACQUELINE TAITANO TERLAJE, P.C.**

19
20 By: 

21 **JACQUELINE TAITANO TERLAJE**
22 **Attorney for Appellant**