

JUL 29 2011
2:40 PM AC
FILE NO. OPA-PA 11-010

Jacqueline Taitano Terlaje, Esq.
Rachel Taimanao-Ayuyu, Esq.
LAW OFFICE OF JACQUELINE TAITANO TERLAJE, P.C.
888 North Marine Corps Drive, Suite 215
Tamuning, Guam 96913
Telephone 671.648.9001
Facsimile 671.648.9002
Email: info@terlajelaw.com

Attorneys for *Data Management Resources, LLC*

THE OFFICE OF PUBLIC ACCOUNTABILITY – GUAM
HAGATNA, GUAM

In the Appeal of) DOCKET NUMBER. OPA-P11-010
)
DATA MANAGEMENT RESOURCES, LLC) **APPELLANT DMR COMMENTS TO**
Appellant) **AGENCY REPORT AND MOTION TO**
) **COMPEL ENTIRE PROCUREMENT**
) **RECORD**

COMES NOW, Appellant DATA MANAGEMENT RESOURCES, LLC through undersigned counsel pursuant to §12104(c)(4) of the Guam Administrative Rules and Regulations (GAR) and comments to the Agency Report filed by the Bureau of Information and Technology (BIT). DMR further moves the OPA for an Order Compelling the production of the entire procurement record of RFP-OOG-023-10.

On July 26, 2011, undersigned counsel filed with the OPA a Notice and Request setting forth certain information missing from the procurement record submitted by the agency; undersigned counsel requested that this Comment be delayed pending the receipt of the missing records. Notwithstanding the previous request, in order to ensure the preservation of all issues presented to the Public Auditor and its Hearings Officer, this Comment to the Agency Report is submitted under the current scheduling order. Appellant respectfully requests that an opportunity to address any additional evidence be preserved should additional records be produced pertinent to any of the issues raised in this appeal.

COPY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FACTUAL BACKGROUND

BIT issued RFP-OOG-023 for the Guam Enterprise Email System in order to provide comprehensive email, archiving and other related services for all agencies of the Government of Guam. On February 3, 2011, DMR was notified that it was the best qualified offeror, and negotiations commenced. On or about February 4, 2011, DMR and the Selection Panel met to discuss and negotiate the terms of the contract. Specifically, BIT requested data and cost pricing for 3,148 user accounts, and DMR confirmed that it would be willing to provide the email services to the Government of Guam for Thirty-Nine and 00/100 (\$39.00)(USD) per user, per year. DMR was instructed to provide its best offer upon conclusion of the meeting.

On February 15, 2011, the Office of the Governor of Guam issued COS Circular 11-001 related to "Email Service Cooperative Agreement Cost Share" and directing each agency to issue a journal voucher for payment of the services. See Exhibit 4, Notice of Appeal. In the event that an agency failed to issue its journal voucher, the Department of Administration (DOA) was instructed to issue a voucher for the agency. *Id.* COS Circular 11-001 referenced 2,376 accounts identified by agency domain.

A letter dated February 21, 2011 was issued by BIT terminating negotiations for email services under RFP-OOG-023-10. BIT stated, "Please be informed that the government is unable to meet the compensation rate of your final offer." No analysis of a "fair and reasonable compensation" was provided. No justification for the termination of negotiation was provided.

Notice of the intent to terminate negotiations was only received by DMR on April 11, 2011—more than a month after BIT had supposedly decided to terminate negotiations.

DMR after much controversy successfully obtained the cooperative agreement referenced in COS Circular 11-001. Subsequently, on April 15, 2011, an amendment to COS Circular 11-001 was issued by the Office of the Governor deleting its reference to email services, and referencing

1 “government-wide telecommunications assistance and bid planning.” The amended circular referenced
2 **3,143 user accounts** identified by agency domain.

3 On April 12, 2011, DMR lodged a protest with BIT.

4 BIT failed to timely respond within sixty (60) days to the protest.

5 On June 28, 2011, DMR timely appealed to the Public Auditor.

6
7 **A. THE BUREAU OF INFORMATION AND TECHNOLOGY FAILED TO**
8 **NEGOTIATE A REASONABLE COMPENSATION IN GOOD FAITH**

9 BIT was required to conduct the negotiations of RFP-OOG-023-10 in good faith , (5 GCA
10 §5003; 2 GAR §1105) and was obligated to determine a fair and reasonable compensation for the
11 services requested of the vendor taking into account the estimated value of the services, and the scope,
12 complexity and nature of such services. 5 GCA §5216(e); 2 GAR §3114(l).

13 5 GCA §5216(e) provides, in part:

14 Award shall be made to the offeror determined in writing by the head of the purchasing
15 agency or a designee of such officer to be best qualified based on the evaluation factors
16 set forth in the Request for Proposals, and negotiation of compensation determined to
17 be fair and reasonable. If compensation cannot be agreed upon with the best qualified
offeror, the negotiations will be formally terminated with the selected offeror. . .

18 Emphasis added. *See also* 2 GAR §3114(k). 2 GAR §3114(l) provides, in part:

19 **(l) Negotiation and Award of Contract.**

20 (1) **General.** The head of the agency conducting the procurement or a designee of such
21 officer shall negotiate a contract with the best qualified offeror for the required services at
22 compensation determined in writing to be fair and reasonable.

23 (2) **Elements of Negotiation.** Contract negotiations shall be directed toward:

24 (A) making certain that the offeror has a clear understanding of the scope of
work, specifically, the essential requirements involved in providing the required
services;

25 (B) determining that the offeror will make available the necessary personnel and
facilities to perform the services within the required time; and

26 (C) agreeing upon compensation which is fair and reasonable, taking into
27 account the estimated value of the required services, and the scope, complexity, and
28 nature of such services.

1 (4) **Failure to Negotiate Contract With Best Qualified Offeror.**

2 (A) If compensation, contract requirements, or contract documents cannot be
3 agreed upon with the best qualified offeror, a written record stating the reasons therefore
4 shall be placed in the file and the head of the agency conducting procurement or a
5 designee of such officer shall advise such offeror of the termination of negotiations
6 which shall be confirmed by written notice within three days.

7 Emphasis added.

8 Negotiation necessarily includes an exchange of information during which time the qualified
9 bidder and the agency may alter, modify, or change the terms and price of the proposed contract. 2
10 GAR §3101(4)(“Discussions” defined). Thus, where an agency fails to conduct an appropriate written
11 analysis of a fair and reasonable compensation following negotiation discussions, premature
12 termination of negotiations is both arbitrary and capricious. In re Great West Retirement Services,
13 OPA-PA-07-006 Decision (Mar. 13, 2007); Amended Decision (Apr. 11, 2008).

14 In In Re Great West, Great West Retirements Services (“Great West”) bid on a request for
15 proposal to provide services for the Government of Guam Retirement Fund (GGRF). Great West was
16 determined to be the most qualified bidder, and following negotiations submitted its final and best offer
17 to GGRF. Without consideration of whether the cost provided by Great West was comparable to that
18 offered in the open market or comparable to other contracts charged by Great West, the agency
19 terminated negotiation. GGRF failed to make any findings that the final offer presented by Great West
20 was not fair and reasonable. The Public Auditor in finding the applicability of 5 GCA §5216(3) and 2
21 GAR §3114(k) held that an award of contract is appropriate where “the offeror is the best qualified, and
22 successful negotiations of fair and reasonable compensation.” Id. Because Great West was determined
23 to be the best qualified offeror, GGRF was required by law to provide its analysis of whether best and
24 final offer of compensation was fair and reasonable, prior to terminating negotiations. Id.

25 In this case, BIT made no attempt to comply with the clear mandates of Guam law. BIT
26 defends its failure to negotiate in good faith, as required by Guam law, on the basis that the
27 Government of Guam does not have any money to fund RFP-OOG-023-10. Importantly, the record is

1 absent of any attempt by the Government to determine the fair and reasonable compensation for the
2 services requested by it in RFP-OOG-023-10.

3 Upon a determination of compensation, BIT would then be required to determine whether there
4 is adequate funding to proceed with the contract. BIT, however, arbitrarily and capriciously terminated
5 negotiations based on this allegation that there is no funding for email service. Notably, the record is
6 also absent of any determination by the Selection Panel that negotiations should be terminated¹.

7 BIT's claim that it has not immediately identified funding cannot be an excuse to avoid
8 compliance with its obligations. If BIT claims in its Agency Report that it has no funding for RFP-
9 OOG-023-10 for email services, then it begs the question of how the Government of Guam is paying
10 for email services today. Upon information and belief, BIT and other agencies in the Government of
11 Guam have obtained and paid for email services during the pendency of RFP-OOG-023-10. *See*
12 Exhibit 4, Notice of Appeal. Critical in this process is obviously the timeline of the issuance of COS
13 Circular 11-001, and the identification of 3,143 user accounts for Government of Guam domains; the
14 number of user accounts is almost identical to the number of user accounts in RFP-OOG-023-10, shy
15 five users. Whether BIT has acted in good faith in terminating negotiations for RFP-OOG-023-10 in
16 light of these facts, is obviously a question of fact for the Public Auditor and the Hearings Officer.
17

18 Importantly, BIT has not responded to the allegations made by DMR that it did not act in good
19 faith in light of COS Circular 11-001 obtained under the Sunshine Reform Act. Section IVA(9), Notice
20 of Appeal. 2 GAR §12105(g) mandates BIT to fully respond to the allegations of the Appeal. No
21 response has been provided to this allegation. The Public Auditor and her Hearings Officer should
22 order BIT to respond to the allegation of lack of good faith dealings in relation to the procurement of
23 email services – the subject of RFP-OOG-023-10.
24
25
26
27

28 ¹ The absence in the record of the determination of termination of negotiations with DMR is one of the subjects
of the Motion to Compel in this matter.

1 **B. APPELLANT DMR SEEKS AN ORDER COMPELLING THE BUREAU OF**
2 **INFORMATION AND TECHNOLOGY TO PRODUCE THE ENTIRE**
3 **PROCUREMENT RECORD**

4 Notwithstanding the Comments herein, there appears to be missing records not produced by
5 BIT in this process. As set forth in the Notice and Request filed on July 27, 2011, DMR requests that
6 the Public Auditor issue an order requiring BIT to produce digital voice recordings WS40098 through
7 WS400105, WS400116 through WS400119, and WS400121 through WS400133. DMR further
8 requests that the Public Auditor also order BIT to produce all documents related to any meetings held
9 by the Selection Panel wherein they determined that it was appropriate to terminate negotiations.
10 Respectfully, Appellant requests that the Hearings Officer order the Agency to remit the missing
11 records for inspection by Appellant, and any other interested party.
12

13
14
15 **LAW OFFICE OF**
16 **JACQUELINE TAITANO TERLAJE, P.C.**

17
18 By: 

19 **JACQUELINE TAITANO TERLAJE**
20 Attorneys for Appellant
21 *Data Management Resources, LLC*