



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

PROCUREMENT APPEALS

IN THE APPEAL OF,
PACIFIC DATA SYSTEMS, INC.

Appellant

APPEAL NO: OPA-PA-10-005
DECISION RE APPELLANT'S MOTION
TO COMPEL GUAM COMMUNITY
COLLEGE TO PROVIDE COMPLETE
AGENCY REPORT

To: **Purchasing Agency:**
Guam Community College
C/O Sarah A. Strock, Esq.
Cabot Mantanona, LLP
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Appellant:
Pacific Data Systems, Inc.
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Interested Party:
Teleguam Holdings, LLC, dba GTA Teleguam
C/O Jeffrey A. Cook, Esq.
Cunliffe & Cook, P.C.
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Hagåtña, Guam, 96910
Facsimile: (671) 472-2422

Decision Re Appellant's Motion to Compel- 1

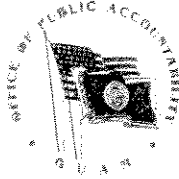


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1 **THIS MATTER** came before the Hearing Officer Anthony R. Camacho, Esq. on
2 November 23, 2010 for a hearing on Appellant's Motion to Compel the Guam Community
3 College to Provide a Complete Agency Report. Sarah A. Strock, Esq., represented the
4 Purchasing Agency. Bill R. Mann, Esq., represented the Purchasing Agency. Jeffrey A. Cook,
5 Esq., represented interested party Teleguam Holdings, LLC dba GTA Teleguam. After hearing
6 the oral arguments of the parties and after reviewing the briefs of the parties and after conducting
7 an *in camera* review of the proprietary and confidential portions of the Purchasing Agency's
8 procurement record, the Public Auditor hereby Finds and Orders the following:
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10 1. The Purchasing Agency is required to submit a complete copy of the procurement
11 record to the Office of Public Accountability (OPA) to include a copy of the bid that is being
12 considered for award or being protested if any had been submitted prior to the protest, and the
13 OPA may disclose such information to the public unless it is proprietary, confidential, or
14 otherwise permitted to be withheld by law or regulation. The Chief Procurement Officer (CPO),
15 the Director of the Department of Public Works (DPW), or the head of the purchasing agency
16 shall submit to the Public Auditor a complete copy of the procurement record relevant to the
17 appeal within five (5) working days of receiving notice of an appeal. 2 G.A.R., Div. 4, Chap.
18 12, §12104(c)(3).¹ Additionally, the Purchasing Agency is required to submit, with its Agency
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20 ¹ Generally, Guam Community College (GCC) is exempt from the centralized
21 procurement regime created by 5 G.C.A. §5120, but is governed by Articles 1,
22 3, 6, 7, 10, 11, and 12 of Guam's Procurement Law. 5 G.C.A. §5125.
23 Further, although GCC is authorized to promulgate its own procurement
24 regulations pursuant to 5 G.C.A. §5131, GCC has adapted Guam's Procurement
25 Regulations as its procurement regulations. See GCC Procurement Policy No.



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2 Report, a copy of the bid that is being considered for award or being protested if any had been
3 submitted prior to the protest. 2 G.A.R., Div. 4, Chap. 12, §12105(b). The OPA can disclose to
4 the public information bearing on the substance of an appeal except where information is
5 proprietary, confidential, or otherwise is permitted or required to be withheld by law or
6 regulation. 2 G.A.R., Div. 4, Chap. 12, §12106. Further, persons who wish to keep such
7 information confidential shall so request by specifically identifying such information within
8 documents submitted and indicating on the front page of each document that it contains
9 proprietary or confidential information, or information permitted or required to be withheld by
10 law or regulation. Id. Here, the Appellant filed its protest and subsequent appeal in this matter
11 after the bids for the solicitation were received and opened by the Purchasing Agency. Further,
12 the Purchasing Agency submitted a complete copy of the procurement record in this matter, to
13 include Interested Party TeleGuam Holdings, LLC., dba GTA Teleguam's (GTA) bid which is
14 the subject of the Appellant's protest and appeal. However, the Purchasing Agency marked
15 substantial portions of GTA's bid as proprietary and confidential and not open for public
16 inspection. Whether or not the sealing of these portions of GTA's bid is proper is at the heart of
17 the Appellant's motion to compel and will be examined by the OPA.

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19 2. The OPA shall review *de novo*, whether GTA's bid was properly marked as proprietary and
20 confidential. GTA's arguments that the Public Auditor lacks authority to reveal information that
21 has been identified as confidential and proprietary by the Purchasing Agency has no merit. The
22 Public Auditor shall have the jurisdiction to review and determine *de novo* any matter properly
23 submitted to her and no prior determination shall be final and conclusive on the Public Auditor
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25 228 adopted on August 2, 2010 pursuant to GCC Board of Trustee Resolution No.
26 9-2010.

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28 Decision Re Appellant's Motion to Compel- 3

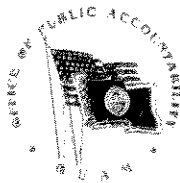


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2 or upon any appeal of the Public Auditor. 5 G.C.A. §5703. Thus, the Public Auditor has the
3 authority to determine whether materials submitted to her in an appeal are properly designated as
4 confidential and proprietary and the Purchasing Agency's prior determination that the materials
5 are confidential and proprietary is not binding on the Public Auditor.
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7 3. Portions of GTA's Bid were improperly designated as proprietary and confidential
8 information. Generally, a purchasing agency must maintain a complete record of each
9 procurement that shall include, in relevant part, the brochures and submittals of potential
10 vendors, manufacturers, or contractors. 5 G.C.A. §5249(d) and 2 G.A.R., Div. 4, Chap. 3,
11 §3129(4). Further, the aforementioned procurement record is a public record and any person
12 may inspect and copy any portion of the procurement record. 5 G.C.A. §5251 and 2 G.A.R.,
13 Div. 4, Chap. 3, §3131. Making the procurement record a public record is necessary to enforce
14 the procurement system's purpose and policy of requiring public access to all aspects of
15 procurement consistent with the sealed bid procedure and the integrity of the procurement
16 process. 5 G.C.A. §5001(b)(8) and 2 GAR, Div. 4, Chap. 1 §1102(7). Thus, GTA's Bid is a
17 public record unless portions of its bid were properly designated as trade secrets or proprietary
18 data. A bidder may request that its trade secrets or other proprietary data be kept confidential
19 and not be disclosed to the public. 2 G.A.R., Div. 4, Chap. 3, §3109(1)(2). If the bidders
20 designates portions of its bid as a confidential trade secret or proprietary data, the Procurement
21 Officer shall examine the bids to determine the validity of any requests for non-disclosure of
22 trade secrets and other proprietary data identified in writing and if the Procurement Officer does
23 not agree with such designation, the Procurement Officer must advise the bidder in writing. 2
24 G.A.R., Div. 4, Chap. 3, §3109(1)(3). Here, GTA designated sections of its bid as confidential
25 and proprietary. These sections are Section 6 concerning GTA's response including its
26 Executive Summary. Section 7 concerning GTA's Avaya Solution. Section 8 concerning
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Decision Re Appellant's Motion to Compel- 4



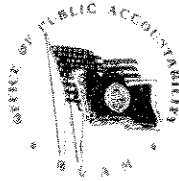
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2 GTA's Avaya Diagrams. Section 10 concerning GTA's Cisco Solution. And Section 11
3 concerning GTA's Cisco Diagrams. A review of the procurement record indicates that the
4 Purchasing Agency did not advise GTA that any of GTA's proprietary and confidential
5 designations were rejected. Thus, the Purchasing Agency agreed with GTA's designations.
6 The issue the Public Auditor must now decide, *de novo*, is whether GTA correctly designated the
7 sections of its bid, and whether any of these section should be disclosed to the public pursuant to
8 2 G.A.R., Div. 4, Chap. 12, §12106.

9 All of the prices and makes and models or catalogue numbers of the items offered,
10 deliveries, and terms of payment in GTA's bid are part of the public portion of the procurement
11 record regardless of their proprietary or confidential designation. Such information shall be
12 publicly available at the time of bid opening regardless of any designation to the contrary. 2
13 G.A.R., Div. 4, Chap. 3, §3109(1)(2). Here, the procurement record indicates that the bids were
14 opened on June 10, 2010. Thus, all of the prices and makes and models or catalogue numbers of
15 the items offered, deliveries, and terms of payment in GTA's bid are part of the public portion of
16 the procurement record regardless of their proprietary or confidential designations. GTA argues
17 that it has already disclosed the portions of its bid pertaining to pricing that should not have been
18 designated as confidential and proprietary.² The Appellant confirms that it has received a
19 supplement to the procurement record consisting of four (4) pages from GTA's bid which had
20 previously been designated as proprietary by GTA.³ However, an *in camera* Review of the parts
21 of GTA's bid marked proprietary, or confidential, or both, reveals that more of GTA's bid must
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23 ² Page 3, GTA's Opposition to Motion to Compel GCC to Provide Complete Agency
24 Report, Filed on November 12, 2010.

25 ³ Line 19, Page 1, Appellant's Reply on its Motion to Compel GCC to provide
26 Complete Agency Report, filed on November 19, 2010.

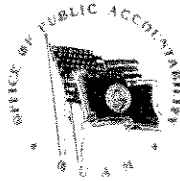


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2 be unsealed to comply with 2 G.A.R., Div. 4, Chap. 3, §3109(1)(2). Specifically, page 26 of
3 Section 7 of GTA's Bid concerning tax, and pages 30 and 31 (only the portion concerning tax) of
4 Section 10 of GTA's bid are public documents as they pertain to the pricing of GTA's bid.
5 Pages 84-108 attached to Section 7 of GTA's Bid, and pages 1-14 of the Cisco Unified
6 Communications Manager Version 7.1 Data Sheet attached to Section 11 of GTA's Bid are
7 public documents as they pertain to the makes and models or catalogue numbers of the items
8 GTA is offering in its bid. Pages 16-19 and page 23 of Section 7, and pages 22-25 and pages 28-
9 29 of Section 10 of GTA's Bid are public documents as they pertain to delivery of products and
10 services. Page 26 (as it pertains to Commercial Terms) and pages 27-31 of Section 7, and page
11 31 (as it pertains to Commercial Terms) and pages 32-35 of Section 10 of GTA's Bid are public
12 documents as they pertain to GTA's proposed terms of payment. Thus, the aforementioned
13 documents became public documents at the time of the bid opening despite their proprietary or
14 confidential designations.

15 Documents that are not actually proprietary or confidential will not treated as such
16 despite their designations. Confidential information means any information which is available to
17 an employee only because of the employee's status as a Government of Guam employee and is
18 not a matter of public knowledge or available to the public on request. 2 G.A.R. Div. 4, Chap. 1,
19 §1106(37). Although the terms "trade secret" and "proprietary" data are not defined in Guam
20 Procurement Law, the aforementioned definition of confidential information would apply to such
21 data insofar as it is a bidder's company or product information that is not a matter of public
22 knowledge or it is information concerning a bidder's company or products that is generally not
23 available to the public on request. Here, the product descriptions contained in pages 84-108
24 attached to Section 7 of GTA's Bid, and pages 1-14 of the Cisco Unified Communications
25 Manager Version 7.1 Data Sheet attached to Section 11 of GTA's Bid, are public documents as
26 they contain standard product descriptions that are available to the public upon request.

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28 Decision Re Appellant's Motion to Compel- 6



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2 4. All sealed portions of GTA's bid that are designated proprietary that were not unsealed as set
3 forth above, shall retain their proprietary or confidential, or both, designations and remain sealed.
4 The unsealed portions of GTA's bid set forth above shall be disclosed to the public upon request
5 pursuant to 2 G.A.R., Div. 4, Chap. 12, §12106.
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8 **SO ORDERED** this 10th day of December, 2010 by:

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13 DORIS FLORES BROOKS, CPA, CGFM
14 PUBLIC AUDITOR
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26 Decision Re Appellant's Motion to Compel- 7
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