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

PROCUREMENT APPEALS

IN THE APPEAL OF PACIFIC DATA SYSTEMS Appellant.	**APPEAL NO: OPA-PA-12-012** **DECISION AND ORDER**

I. INTRODUCTION

This is a Decision of the Public Auditor for an Appeal filed on August 29, 2012 by Pacific Data Systems (hereinafter referred to as "PDS") regarding the Invitation for Bid No. GSA-064-11 ("IFB"), issued by the General Services Agency ("GSA") on June 22, 2011 seeking, amongst other things, Telecommunication Services, Mobile Telephone Services, Integrated Services Digital Networking (ISDN) and Primary Rate Interface (PRI).

The Public Auditor finds that she does not have the jurisdiction to hear PDS's appeal at this time because GSA has not rendered a decision on PDS's May 9, 2012 protest. However, the Public Auditor has the authority to compel GSA to produce the decisions on protests. Accordingly, the Public Auditor orders the Chief Procurement Officer of GSA to produce a decision required by 5 GCA § 5425(c) and (d) and 2 GAR, Div. 4, Chap. 9, §9101(g) on PDS's May 9, 2012 protest and any other pending protests related to the IFB, no later than thirty (30) days after the date of the decision in this matter and that the Public Auditor requires GSA's decision be immediately delivered to PDS, the other Protestants and the Public Auditor.

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II. FINDINGS OF FACT

The Public Auditor, in reaching this decision, has considered and incorporated herein the procurement record and all documents submitted by the parties. Based on the aforementioned procedural and substantive record in this matter, the Public Auditor makes the following Findings of Fact:

1. On or about June 22, 2011, GSA issued Invitation for Bid No. GSA-064-11.[1]

2. Eight amendments to the IFB were issued between July 6, 2011 and November 23, 2011. The bid opening date was extended seven times from the originally stated July 20, 2011 to December 9, 2011.[2]

3. The Bid was opened by the GSA on December 9, 2011.[3]

4. On April 27, 2012, the Bid status form was sent to PDS informing it that its Bid had been rejected, in part, for various reasons but also recommending it for award of certain items and services along with awards to Teleguam Holdings, LLC ("GTA") and PTI Pacifica, Inc. ("IT&E").[4]

5. On April 30, 2012, PDS protested to the GSA on six areas, one of which PDS claimed that GSA did not consider PDS's Local Procurement Preference application in the award of Bid Form 10 and that PDS should be the lowest responsive and responsible bidder after application of the 15% Local Procurement Preference.[5]

6. On May 3, 2012, GSA denied PDS's April 30, 2012 protest, denying PDS's local procurement preference argument.[6]

7. On May 9, 2012, PDS via its legal counsel Berman O'Connor & Mann, submitted a second protest to GSA, alleging that (a) GTA's affidavit disclosing ownership and

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[1] Newspaper Publication dated June 22, 2011, Exhibit 14, GSA Procurement Record filed on May 24, 2012 and Page 1 of 56, IFB No. GSA-064-11, Exhibit 5, GSA Procurement Record in Procurement Appeal case number OPA-PA-12-011.
[2] IFB Amendment Nos. 1 through 8, Exhibit 7, Id.
[3] Bid Abstract and Register, Exhibit 6, Id.
[4] Bid Status, Exhibit 9, Id.
[5] Protest Letter from PDS President John Day to GSA Chief Procurement Officer Claudia Acfalle on April 30, 2012, Exhibit 1, Id.
[6] Response Letter from GSA Chief Procurement Officer Claudia Acfalle to PDS President John Day on May 3,2012, Exhibit 2, Id.

commission violates 5 G.C.A. § 5233, (b) GTA failed to meet the requirements of the IFB by improperly conditioning its bid, (c) the joint bid submission by Teleguam Holdings LLC, GTA Telecom LLC, GTA Services LLC, and Pulse Mobile LLC was improper and must be rejected, (d) GTA has failed to specify the spin number of the entity that is intended to provide a specific service, and (e) GTA failed to submit a certificate of authority.[7]

8. On May 10, 2012, Docomo Pacific, MCV, and IT&E each filed protests with GSA, citing similar issues as those noted in PDS's May 9, 2012 protest.[8]

9. On May 17, 2012, PDS filed an appeal with the Office of Public Accountability ("OPA") on GSA's May 3, 2012 protest decision. The appeal was assigned case number OPA-PA-12-011.[9]

10. On May 18, 2012, GTA via its legal counsel Carlsmith Ball LLP, protested to GSA on the grounds that GSA's revised May 3, 2012 Bid Status erroneously rejected GTA's bid submission for Bid Forms 2 and 3 and instead awarded these items to PDS.[10]

11. On August 29, 2012, PDS filed this appeal with OPA, stating that GSA has not issued a decision on its May 9, 2012 protest nor engaged PDS in any discussions to resolve the protest. PDS stated that this appeal is made in an effort to have OPA compel GSA to issue a decision on PDS's protest, as well as any other pending protests related to this procurement.[11]

12. There is no record on file that GSA issued a decision on PDS's May 9, 2012 protest or any of the other protests filed between May 9, 2012 and May 18, 2012.

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[7] Protest Letter from Bill R. Mann of Berman O'Connor & Mann on PDS's behalf to GSA Chief Procurement Officer Claudia Acfalle on May 9, 2012, Exhibit 16, GSA Agency Report filed on May 31, 2012 in Procurement Appeal case number OPA-PA-12-011.

[8] Protest Letters from Guam Telecom LLC (MCV) Business Services Director Sean D. Miles, Docomo Pacific, Inc. General Counsel James W. Hofman II, and PTI Pacifica Inc. (IT&E) General Counsel Steven Carrara to GSA Chief Procurement Officer Claudia Acfalle on May 10, 2012, Exhibit 16, Id.

[9] Notice of Appeal filed on May 17, 2012 in Procurement Appeal case number OPA-PA-12-011, Page 1.

[10] Protest Letter from Vincent C. Camacho of Carlsmith Ball LLP on behalf of Teleguam Holdings, LLC on May 18, 2012, Exhibit 16, GSA Agency Report filed on May 31, 2012 in Procurement Appeal case number OPA-PA-12-011.

[11] PDS Notice of Appeal filed on August 29, 2012 for OPA-PA-12-012, Pages 2-3.

13. On September 5, 2012, OPA issued its decision on PDS's May 17, 2012 appeal, case number OPA-PA-12-011, pertaining to local procurement preference.[12]

14. On September 12, 2012, GSA submitted its Agency Report on this appeal and confirmed that no decision has been made on PDS's May 9, 2012 appeal.[13]

15. On September 14, 2012, PDS submitted its response to GSA's Agency Report, stating that "GSA has chosen to use the PDS appeal as a justification for doing nothing further in the procurement... GSA's position is based on a mistaken belief that the stay of the procurement referenced in its report (5 GCA Section 5425g) justifies GSA ceasing any and all work to resolve or to make a determination in the pending protests." PDS also reiterated its "request that the OPA deal with this matter on an expedited basis in order to restore the integrity of the procurement process and force GSA to deal with the pending issues".[14]

III. ANALYSIS

A. The Public Auditor does not have the jurisdiction to hear PDS's appeal at this time.

This matter is not ripe for the Public Auditor's review because GSA has not rendered a decision on PDS's May 9, 2012 protest. The Public Auditor has the power to review and determine *de novo* any matter properly submitted to her. 5 G.C.A. § 5703 and 2 G.A.R., Div. 4, Chap. 12, § 12103(a). The Public Auditor has the jurisdiction to hear an appeal of a purchasing agency's written decision on a protest concerning the purchasing agency's method of source selection, solicitation, or award of a contract. 5 G.C.A. § 5425(e), and 2 G.A.R., Div. 4, Chap. 12, §12201(a). Both PDS and GSA stated that there is no decision on PDS's May 9, 2012 protest. Further, GSA admitted that it had not rendered decisions on other existing protests on the IFB. Without a GSA decision on PDS's May 9, 2012 protest, this matter is not

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[12] GSA Certification of Record filed on September 6, 2012 for OPA-PA-12-012, Attachment #15.
[13] GSA Agency Report filed on September 12, 2012 for OPA-PA-12-012, Page 1.
[14] PDS Comments on Agency Report filed on September 14, 2012 for OPA-PA-12-012, Pages 1-2.

properly before the Public Auditor and the Public Auditor does not have the jurisdiction to hear it.

B. The Public Auditor has the authority to compel the Chief Procurement Officer of GSA to produce the Decision on the Protests.

The Public Auditor has the authority to compel the production of documents by any employee of the Government of Guam. 5 G.C.A. § 5703 and 2 G.A.R., Div. 4, Chap. 12, § 12103(a). Further, the Public Auditor shall use this authority to promote the integrity of the procurement process and purposes of 5 G.C.A. Chapter 5 Id. The Public Auditor finds that compelling GSA to issue its decision on all pending procurement protests is necessary to preserve the integrity of the procurement process because a further delay in rendering the decision will result in a violation of the Protestants' substantive due process rights.

GSA's decision on PDS's May 9, 2012 protest, as well as the protests of the other Protestants, are required by Guam Procurement Law and Regulations. If a protest is not resolved by a mutual agreement, GSA has an obligation to promptly and expeditiously issue a decision in writing stating the reasons for the actions taken, informing the Protestant of its right to administrative and Judicial review, and providing the Protestant with a copy of the Decision. 5 G.C.A. § 5425(c) and (d), and 2 G.A.R., Div. 4, Chap. 9, § 9101(g).

The Guam Procurement Law requires all parties involved in the negotiation, performance, and administration of territorial contracts to act in good faith. 5 G.C.A. § 5003. Since the May 2012 filing of protests by PDS and the other Protestants, there is no evidence that GSA has tried to resolve the protests, citing the Stay of Procurement caused by PDS's May 17, 2012 filing of an appeal as the reason that no action has been taken on the procurement.

IV. CONCLUSION

Based on the foregoing, the Public Auditor hereby determines the following:

1. The Public Auditor does not have the jurisdiction to hear PDS's appeal at this time because GSA failed to produce a decision on PDS's May 9, 2012 protest.

2. Pursuant to 5 G.C.A. § 5703 and 2 G.A.R., Div. 4, Chap. 12, § 12103(a), the Public Auditor hereby orders the GSA Chief Procurement Officer to issue Decisions on PDS's May 9, 2012 protest and all other pending protests relevant to GSA-064-11 as required by 5 G.C.A. § 5425(c) and (d) and 2 G.A.R., Div. 4, Chap. 9, § 9101(g) no later than thirty (30) days of receipt of this Decision and submit said Decisions to PDS, the other Protestants and the Public Auditor.

This is a Final Administrative Decision. The parties are hereby informed of their right to appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative Decision (5 G.C.A. § 5481(a)).

A copy of this Decision shall be provided to the parties and their respective attorneys, in accordance with 5 G.C.A. § 5702 and shall be made available for review on the OPA website, www.guamopa.org.

SO ORDERED this 28th day of September, 2012.

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Re:	OPA-PA-12-012: Decision and Order		

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Thank you,
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