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FILE NO OPA-PA: 18-004

PACIFIC DATA SYSTEMS
185 ILIPOG DRIVE
HBC BLDG SUITE 204A
TAMUNING, GUAM 96913
TELEPHONE: (671) 300-0200
FACSIMILE: (671) 300-0265

**BEFORE THE
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT PETITION**

IN THE PETITION OF)
TELEGUAM HOLDINGS, LLC dba GTA) DOCKET NO: OPA-PA-18-004
Appellant) INTERESTED PARTY HEARING BRIEF

Comes now Pacific Data Systems (PDS) to provide its Hearing Brief on the Teleguam Holdings, LLC, (dba GTA) Appeal related to the General Services Agency (GSA) Invitation For Bid GSA-064-11.

INTRODUCTION

PDS is an Interested Party in this matter since PDS is the Bidder that GSA has selected for award of a majority of the services involved in this procurement (See EXHIBIT A - GSA Bid Status dated 06-28-2018). With few exceptions, GTA currently provides the Telecommunications Services covered by this procurement to the Government of Guam. The current GTA services are provided at higher prices than the bid prices offered by PDS resulting in higher costs to the Government and continuing

1 revenues to GTA. Since the original award determination made by GSA in 2012 for the
2 services in this procurement, PDS has been involved throughout the many legal
3 challenges that GTA has forced through Guam's procurement process and justice
4 system related to this procurement. Ultimately, PDS brought this case before the
5 Supreme Court of Guam last year in CVA16-017. A decision in the case was released
6 by the Court in May of this year (see Exhibit B) where all issues in the case were
7 decided. This decision resulted in an AMENDED JUDGEMENT in the Superior Court to
8 Civil Case CV03334-13 that affirmed all GSA awards for Parts A-D/F-J in the
9 procurement (only PART E was canceled by the Court Decision - See Exhibit C). GSA
10 was in the process of implementing the AMENDED JUDGEMENT when GTA once
11 again used the procurement appeals process to halt the implementation of the new
12 services. As noted in the GTA appeal and other documents it is GTA's stated goal to
13 prevent any awards in this procurement and to have the procurement completely
14 canceled.
15

16 In GTA's Protest filed on July 09, 2018, and its Appeal filed with the OPA on July
17 26, 2018, GTA seeks to create a new controversy and further delays in the
18 implementation of this procurement. In this Protest and Appeal, GTA makes
19 nonsensical arguments and withholds information from the OPA in an attempt to
20 confuse and obfuscate the facts of the matter in a desperate attempt to have the OPA
21 cancel this procurement or provide grounds for additional judicial appeals.
22
23
24
25

THE GTA APPEAL IS WITHOUT MERIT AND SHOULD BE DENIED

1
2 GTA's Protest and Appeal is based on three points; each of which is without
3 foundation and were properly denied by GSA in their Protest decision. PDS provides
4 the following comments on each of GTA's protest points:

5 1. GTA's PROTEST IS NOT TIMELY - GTA does not raise any new points or
6 issues that have not already been raised and rejected by GSA, the OPA, the Superior
7 Court, or even the Supreme Court. There are no new issues or controversies that GTA
8 can protest. As a point of fact, GSA is simply implementing the Supreme Court decision
9 and the language of the AMENDED JUDGEMENT that GTA approved. By raising this
10 new Protest, GTA seeks to reverse these decisions and start the procurement appeals
11 process all over again, usurping the recent court decisions, and delaying this
12 procurement again. The OPA should not be tricked by GTA's attempt to "game" the
13 appeals process of the procurement system in order to achieve their goal of further
14 delays or cancellation in the implementation of this procurement. The GTA Protest was
15 properly DENIED by GSA as not being timely filed.
16

17 2. THE ISSUE OF THE PROCUREMENT RECORD HAS BEEN DECIDED: GTA
18 once again attempts to use the previously litigated Procurement Record issue in a
19 renewed effort to preclude any award in the bid. The matter has been decided, no
20 further action by the OPA is justified on this issue. No less than the Supreme Court of
21 Guam has decided this issue and all parties involved have agreed that awards made by
22 GSA for all parts of the bid (Parts A-D, F-J) except Part E are affirmed. GSA's actions
23 are proper and in line with the language and instructions of the Superior Court
24
25

1 AMENDED JUDGEMENT. GTA should not be allowed to create new controversies
2 based on a previously litigated and decided issue.

3 3. THIS POINT IS MOOT: The procurement is currently stayed in accordance
4 with applicable law and regulation.

5
6 **THE GTA APPEAL MISREPRESENTS THE COURT'S DECISION**

7 GTA willfully misrepresents the wording and clear order of the AMENDED
8 JUDGEMENT in its Appeal (at page 3 second paragraph) by implying that the Court
9 ordered all Parts of the Bid to be cancelled. This is not true, only Part E of the Bid was
10 ordered to be cancelled. The AMENDED JUDGEMENT order, that GTA approved and
11 signed, clearly states "*The awards made pursuant to all other Parts of said*
12 *procurement are AFFIRMED.*"

13
14 This misrepresentation by GTA is an attempt to misconstrue the facts of this
15 matter before the OPA in an attempt to achieve its desire to thwart any awards being
16 made in the affirmed Parts of the procurement; Parts A-D/F-J. The OPA should not be
17 tricked by GTA's misrepresentation and should DENY the GTA Appeal in its entirety and
18 affirm the actions of GSA in making the awards of Parts A-D & F-J per the Court's
19 instructions.

20
21 **GTA HAS NO RIGHT TO PROTEST**

22 After the Guam Supreme Court ruling was issued on May 14, 2018, GSA
23 diligently began the process to implement this decision. The first step taken by GSA on
24 June 6, 2018 was to send out confirmation letters to each of the bidders that were
25

1 designated for awards in the procurement (Parts A-D & F-J). See Exhibit D for the GSA
2 fax and PDS response on June 6, 2018 confirming the PDS bid submission. See
3 Exhibit E for the GSA fax and GTA response on June 8, 2018. Significantly, in its
4 response, GTA refuses to confirm its bid by checking the NO box of the fax. GTA also
5 does not protest this notice by GSA of its plan to confirm the bid submissions and make
6 awards of the specific services listed.

7 GTA's decision not to confirm its bid submission by checking the NO box,
8 represents a voluntary withdrawal of GTA from the procurement with the clear
9 understanding that NO AWARD can or will be made to GTA in this procurement due to
10 its decision to withdraw its bid. As a direct result of this action by GTA, under 5 GCA
11 §5425(a), GTA no longer has a right to bring a protest in this procurement since it has
12 withdrawn its bid and has no interest in being granted an award in this bid. Instead of
13 being a bonafide bidder with a legitimate interest in an award, GTA's only real interest
14 appears to be to usurp the procurement process and to prevent any bidder from
15 receiving an award in this procurement. For this reason, GTA's appeal should be
16 denied and a finding made that GTA, by its response provided to GSA on 06-08-2018,
17 has voluntarily withdrawn its bid from the procurement and no longer has a right of
18 further protest or appeal in this matter.
19

20
21 **SUMMARY**

22 GTA's protest filing is without merit and GTA lacks the right to make a protest
23 due to its de facto withdrawal of its bid on June 8, 2018. GTA's only goal is to create a
24 new appeal process to further delay the implementation or to cancel this procurement to
25

1 its benefit but to the detriment of the Procurement System and Government of Guam as
2 a whole. GTA's actions are a violation of its Good Faith obligations under 5 GCA §5003
3 and demonstrate GTA's desire to "game the system" to achieve its goals of delaying the
4 implementation or the cancellation of this procurement. The Government of Guam will
5 accrue significant operational efficiencies and cost savings through the implementation
6 of this procurement and GTA provides no valid reasons for why GSA should not be
7 allowed to proceed with the implementation of this procurement. For these reasons we
8 request that the OPA **DENY** this GTA appeal and make the legal findings of fact in this
9 case to preclude further procurement controversies by GTA.
10

11 **RESPECTFULLY SUBMITTED** this 14th day of December 2018.

12 **PACIFIC DATA SYSTEMS**

13
14 
15 _____
16 **JOHN DAY**
17 *President*

- 18 Exhibit A: GSA Bid Status dated 06-28-2018
19 Exhibit B: Decision in Supreme Court case CVA16-017
20 Exhibit C: AMENDED JUDGEMENT in Superior Court Civil Case CV03334-13
21 Exhibit D: GSA Fax and PDS response regarding confirmation of bid submission
22 Exhibit E: GSA Fax and GTA response regarding confirmation of bid submission
23
24
25

Exhibit A

GSA Bid Status dated 06-28-2018

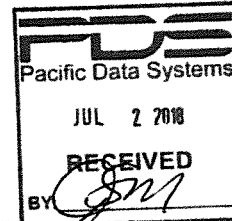
GENERAL SERVICE AGENCY
 (Ahensian Setbision Hinirat)
 Government of Guam
 P.O. Box FG, Agana, Guam 96910
 Tel: 477-1710-13 Fax: 472-4217 / 475-1716/27

Accountability * Impartiality * Competence * Openness * Value

REVISED BID STATUS

June 28, 2018

PACIFIC DATA SYSTEMS (PDS)
 Attn: John Day, President/COO
 185 Llipog Drive, Suite 204A
 Tamuning, Guam 96913
 Tel: (671) 300-0229 / Fax: (671) 300-0265
 Email: john@pdsguam.com



BID INVITATION NO.: GSA-064-11
DESCRIPTION: TELECOMMUNICATION SERVICES

OPENING DATE: December 09, 2011

The following is the result of the above-mentioned bid. Refer to the items checked below.

- Cancelled (in its entirety), or partially cancelled due to:
 - Insufficient funds:
 - Change of specifications; or
 - Insufficient number of bidders.

- Rejected due to:
 - Late submission of bid;
 - No bid security or insufficient bid security; as required by section 11 of the General Terms and Conditions
 - Not meeting the delivery requirement as stated in the IFB;
 - Non-conformance with bid requirement: Bid Form 12 – Did not adhere to equal increments
 - Inability to provide future maintenance and services to the equipment's
 - High Price: Bid Form 10
 - Others Submitted "No Quote" for Bid Forms 8, 8A, 9 and 15

REMARKS: Due to the decision of the Supreme Court of Guam issued on 5/14/18 – Part E Bid Form 11 of the IFB for the GovGuam Wide Area Network (GGWAN) Data Communication Services is canceled and a new bid will be scheduled at a later time and date.

Bid recommended for award: MULTIPLE AWARD

Pacific Data Systems – See attached award

PTI Pacific Inc. dba: IT&E – See attached award

Docomo Pacific – See attached award

Guam Telecom, LLC – See attached award

REMARKS: Thank you for your participation with this bid. Please send your authorized representative to pickup your original bid status and cashier check/bid bond or Standby Letter of Credit.

Claudia S. Acfalle

CLAUDIA S. ACFALLE
 Chief Procurement Officer

Please Print	
ACKNOWLEDGEMENT COPY (Re-fax to GSA)	
Received By:	<u>J. Mantanona</u>
Date:	<u>7/2/18</u>
Company Name:	<u>Pacific Data Systems</u>
Fax to: 475-1727 or 472-4217	

Dell® MFP Laser 3115cn
Monitor Report

Local Name : Pacific Data Systems
Company Logo : Pacific Data Systems
Total Pages Scanned : 1
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The documents were sent.

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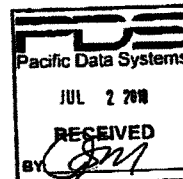
GENERAL SERVICE AGENCY
(Ahaonian Sethison Hinirat)
Government of Guam
P.O. Box FG, Agaña, Guam 96910
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Tel: (671) 300-0229 / Fax: (671) 300-0265
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Docomo Pacific - See attached award

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Accountability * Impartiality * Competence * Openness * Value

REVISED BID STATUS

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Attn: John Day, President/COO
 185 Llipog Drive, Suite 204A
 Tamuning, Guam 96913
 Tel: (671) 300-0229 / Fax: (671) 300-0265
 Email: john@pdsguam.com

BID INVITATION NO.: GSA-064-11
DESCRIPTION: TELECOMMUNICATION SERVICES

OPENING DATE: December 09, 2011

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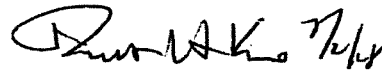
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Docomo Pacific – See attached award

Guam Telecom, LLC – See attached award

REMARKS: Thank you for your participation with this bid. Please send your authorized representative to pickup your original bid status and cashier check/bid bond or Standby Letter of Credit.



CLAUDIA S. ACFALLE
 Chief Procurement Officer

Please Print	
ACKNOWLEDGEMENT COPY (Re-fax to GSA)	
Received By:	_____
Date:	_____
Company Name:	_____
Fax to: 475-1727 or 472-4217	

REVISED 6/28/18 – AWARD
GSA-064-11 TELECOMMUNICATION SERVICES

Bid Form 0 – Point to Point Response to General Requirements of IFB
General Requirements

Bid Form 1 – Point to Point Response to Centrex Telephone Services
Centrex Requirements

Bid Form 2 – Non-Recurring and Monthly Recurring Cost (MRC) for Centrex Telephone Service
Awarded to Pacific Data Systems for being the lowest price offered.

Bid Form 3 – Centrex Telephone Instruments
Awarded to Pacific Data Systems for being the lowest price offered.

Bid Form 4 – Point to Point Response for Non-Centrex Telephone Service
Non-Centrex Requirements

Bid Form 5 – Non-Recurring and Monthly Recurring Cost (MRC) for Non-Centrex Telephones
Awarded to Pacific Data Systems for being the lowest price offered.

Bid Form 6 – Non-Centrex Telephone Instruments
Awarded to Pacific Data Systems for being the lowest price offered.

Bid Form 7 – Point By Point Response for Mobile Telephone Service
Mobile Telephone Requirement

Bid Form 8 – Monthly Recurring Cost for Mobile Telephone Service and Device
Awarded to Docomo Pacific Inc. (BlackBerry - Plan) & (Android - Plan 2)
Rejected Teleguam Holdings LLC due to unable to keep original bid price offered

Bid Form 8A – Mobile Data Card
Awarded to PTI Pacific Inc. dba: IT&E
Rejected Teleguam Holdings LLC due to unable to keep original bid price offered

Bid Form 9 – Evaluation Model for Mobile Telephone Services

Teleguam Holdings, LLC – BlackBerry Plan (Plan 1)
Teleguam Holdings, LLC – Android Plan (Plan 2)
Teleguam Holdings, LLC – iPhone 3 Plan (Plan 3)
Teleguam Holdings, LLC – iPhone 4 Plan (Plan 4)
Docomo Pacific Inc – BlackBerry Plan (Plan 1)
Docomo Pacific Inc. – Samsung Plan (Plan 2)
PTI Pacifica Inc. dba IT&E

Bid Form 10 – ISDN PRI, ISDN BRI, SIP Trunks, and DID's
Awarded to Pacific Data Systems

Bid Form 11 – GovGuam Wide Area Network (1 and 10 Gbps)
Due to the decision of the Supreme Court of Guam issued on 5/14/18 – Part E of IFB for the GovGuam Wide Area Network (GGWAN) Data Communication Services is canceled and a new bid will be scheduled at a later time and date.

Bid Form 12 – Broadband Internet Access Services
Rejected Teleguam Holdings LLC due to unable to keep original bid price offered
Rejected Pacific Data Systems – did not adhere to the “equal increments” requirement
Rejected Guam Telecom LLC – did not adhere to the “equal increments” requirement
a new bid will be scheduled at a later time and date.

Bid Form 13 – Cable, DSL or Wireless Internet Services for Small Offices
Awarded to Pacific Data Systems

Bid Form 14 – Routers Managed Switches, and Network Equipment
Awarded to Pacific Data Systems
Rejected Guam Teleguam Holdings – did not adhere to the bid requirements did not provide a percentage for shipping & installation cost.

Bid Form 15 – Television Services
Awarded to Guam Telecom, LLC
Rejected Teleguam Holdings LLC due to unable to keep original bid price offered
Pacific Data Systems – Submitted a “No Quote”

Exhibit B

Decision in Supreme Court case CVA16-017



Filed

Supreme Court of Guam, Clerk of Court

IN THE SUPREME COURT OF GUAM

**TELEGUAM HOLDINGS LLC AND
ITS WHOLLY OWNED SUBSIDIARIES,**
Plaintiff-Appellee,

v.

**TERRITORY OF GUAM; DEPARTMENT OF ADMINISTRATION,
GENERAL SERVICES AGENCY; THE OFFICE OF PUBLIC
ACCOUNTABILITY,**
Defendant-Appellees,

and

PACIFIC DATA SYSTEMS, INC.,
Defendant-Appellant.

Supreme Court Case No. CVA16-017
Superior Court Case No. CV0334-13

OPINION

Cite as: 2018 Guam 5

Appeal from the Superior Court of Guam
Argued and submitted on May 31, 2017
Hagåtña, Guam

E-Received

5/14/2018 2:26:10 PM

Appearing for Defendant-Appellant

Pacific Data Systems, Inc.:

Bill R. Mann, *Esq.*

Berman O'Connor & Mann

Bank of Guam Bldg.

111 Chalan Santo Papa, Ste. 503

Hagåtña, GU 96910

Appearing for Plaintiff-Appellee

Teleguam Holdings LLC:

Vincent C. Camacho, *Esq.*

Camacho Calvo Law Group LLC

134 W. Soledad Ave., Ste. 401

Hagåtña, GU 96910

Appearing for Defendant-Appellee

Government of Guam:

Marianne Woloschuk, *Esq.*

Assistant Attorney General

Office of the Attorney General

Civil Litigation & Solicitors Division

590 S. Marine Corps Dr., Ste. 706

Tamuning, GU 96913

BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

CARBULLIDO, J.:

[1] This appeal arises out of a lengthy government procurement dispute regarding the Government of Guam’s attempt to procure comprehensive telecommunication services. Defendant-Appellant Pacific Data Systems, Inc. (“PDS”) appeals a final judgment of the Superior Court granting summary judgment to Plaintiff-Appellee Teleguam Holdings LLC (“GTA”) and canceling the entirety of a ten-part Invitation for Bids (“IFB”). PDS seeks appellate review of the Superior Court’s procedure for reviewing decisions of the Public Auditor and whether the trial court erred in canceling the IFB. In response, GTA argues that PDS lacks appellate standing and that the cancellation and proceedings below were proper.

[2] We conclude that PDS has appellate standing. Further, we reverse the portion of the Superior Court’s Judgment canceling Parts A-D and F-J of IFB GSA-064-11 and affirm the portion of the Superior Court’s Judgment canceling Part E of IFB GSA-064-11.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] In 2011, the Government of Guam General Services Agency (“GSA”) issued a ten-part Invitation for Bids, IFB GSA-064-11, for a comprehensive telecommunications system for the executive branch. The IFB stated: “Each Part of the IFB shall be treated separately for bid submission and shall not affect the other Parts of the bid.” Record on Appeal (“RA”), tab 1, Ex. 1 at 25 (Invitation for Bid, June 22, 2011). Part E of the IFB sought bids for dedicated GovGuam Wide Area Network (“GGWAN”) Data Communication Services. The GGWAN was divided into 1 Gbps and 10 Gbps services. In response to public questions from IT&E, the GSA

stated: “There will only be one contract awarded for each Part.” RA, tab 45 at 1847 (Gov’t Ex. List, Mar. 25, 2014). When asked if this would restrict competition and increase overall pricing, the GSA responded: “Smaller awards would require far more administrative time, technical resources, and cause confusion over who is responsible for what service at a location within a Part. The administrative overhead would be very high. As such, these Parts are the traditional components that are bid for larger organizations.” *Id.*

[4] Part E garnered two bidders—GTA and PDS. For the 1 Gbps service, GTA bid \$750 per month per node and PDS bid \$870 per month per node. Both bidders waived installation charges. For the 10 Gbps service, GTA bid \$9,400 per month per node, and PDS bid \$1,500 per month per node. GTA bid an additional installation charge of \$48,832 per node. In April 2012, the GSA issued a Bid Status recommending the award of both GGWAN services to PDS based on GTA’s high price. In May 2012, the GSA issued a Revised Bid Status with the same recommendation. GTA filed a timely protest with the GSA, which was denied.

[5] GTA appealed to the Public Auditor. GTA argued that the GSA’s single award of Part E to PDS was improper because its 1 Gbps bid was lower than PDS’s. After instructing the parties to develop the record, the Public Auditor held a two-day hearing in the Office of Public Accountability.¹ Afterwards, the Public Auditor issued Consolidated Decisions, in which she affirmed the single award of Part E to PDS. In her decision, the Public Auditor found that “[t]he intent of the IFB was to issue a consolidated, centralized telecommunications bid for services to

¹ We note a discrepancy here that PDS raised in the trial court. Guam procurement law gives jurisdiction over appeals from the GSA to the Public Auditor, not the Office of Public Accountability. *See* 5 GCA § 5703. As the parties actually appeared before the Public Auditor and the Decision was signed by the Public Auditor, the discrepancy seems merely technical and does not impact the substantial rights of any party in this litigation. However, in future procurement appeals, the Public Auditor should be mindful of the capacity in which she is acting as to eliminate any confusion over issues of jurisdiction. In this opinion, we refer only to the “Public Auditor.”

GovGuam, with consideration given to economies of scale and standardizing telecommunications services and equipment for GovGuam.” RA, tab 1, Ex. 2 at 14 (OPA Consol. Decs., Mar. 6, 2013). She also found that “GSA hired a consultant concerning the IFB. As to [Part E], GovGuam wanted only one provider, envisioning one carrier to increase efficiency and to avoid incompatibilities, duplicate costs, and other potential problems which might arise with more than one provider.” *Id.*

[6] GTA disagreed and filed a Verified Complaint in the Superior Court challenging the Public Auditor’s decision. GTA named the Territory of Guam;² the Department of Administration, General Services Agency; the Office of Public Accountability;³ and Pacific Data Systems, Inc. as defendants. As an initial matter, the parties disagreed with how the case should proceed in the Superior Court. PDS argued that the Superior Court sits in an appellate capacity over challenges to OPA actions by merely receiving briefs and hearing oral arguments. It further asserted that no discovery should be permitted. GTA argued that an appeal of a Public Auditor decision under 5 GCA § 5480 is a “civil action,” which is governed by the Guam Rules of Civil Procedure. RA, tab 25, Ex. A at 1 (Statement Re: Disagreement of Scheduling Order, Aug. 1, 2013). According to GTA, the trial court has the discretion to permit discovery and supplement the agency-submitted record. In the action below, the trial judge permitted further discovery, but limited it to issues not already on the record.

² Title 1 GCA § 420 prohibits the use of the term “Territory of Guam” in official government documents, instead requiring the term “Guam.” The first caption and reference to the Territory of Guam as a party remains to ensure consistency with the case documents and proceedings below. The remaining references are to Guam.

³ The Attorney General entered an appearance in this appeal, but failed to file any briefs (or even a notice of waiver of briefs). The Government’s failure to participate does not hinder review of the issue in this case.

[7] During discovery in the trial court, GTA deposed Dr. Norman Okamura—the consultant hired by GSA to help prepare the IFB. Through the deposition, the parties discovered that the GSA failed to keep proper records of minutes of meetings with Dr. Okamura and the Government, records of communications between Dr. Okamura and the Government, drafts of the IFB worked on by Dr. Okamura, and other paper and materials used by Dr. Okamura in the development of specifications. Since the procurement record was incomplete, the court determined that it could not affirm any award under the IFB. The court vacated the Public Auditor’s decision, remanded the case to the Public Auditor, and ordered a new decision in light of the new findings that the record was incomplete. The Public Auditor issued a Decision on Remand which contained the following analysis: “No new evidence was presented that alters the Public Auditor’s previously issued Consolidated Decisions.” The case returned to the Superior Court.

[8] Back in the Superior Court, both GTA and PDS filed motions for summary judgment stating that no genuine issue of material fact remained in dispute. PDS argued that the Public Auditor’s decision was proper and should be affirmed. GTA argued that the Public Auditor’s decision should be overturned as arbitrary, capricious, clearly erroneous, and contrary to law. The court denied PDS’s motion for summary judgment and granted GTA’s cross-motion. The court found that the Public Auditor’s decision on remand was “so devoid of analysis . . . that the Court now rules that the deficiencies in the procurement record . . . have not been cured.” RA, tab 138 at 7 (Dec. & Order, Aug. 18, 2016). Based on this, the court found that the Public Auditor’s decision upholding the procurement award violated Guam law.

[9] The Superior Court looked to the procurement statutes for the proper remedy. It found that, under Guam procurement law, the proper remedy depends on whether the procurement is in the pre-award or post-award stage. The court found that the procurement was still in the pre-award stage and determined that the only appropriate statutorily prescribed remedies were revision or cancellation. Because the procurement was incurably incomplete, the trial court found revision impossible. The trial court canceled the entire ten-part IFB. PDS now appeals.

II. JURISDICTION

[10] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 7 GCA §§ 3107, 3108(a) (2005); 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-140 (2018)).

III. STANDARD OF REVIEW

[11] The Superior Court's grant of a motion for summary judgment is reviewed *de novo*. *Newby v. Gov't of Guam*, 2010 Guam 4 ¶ 10.

IV. ANALYSIS

[12] Government procurement law is a unique statutory scheme, which enables the government to acquire necessary goods and services to ensure the proper functioning of government. *See* 5 GCA § 5030(o) (defining procurement). Guam's procurement law is governed largely by statute. *See* 5 GCA §§ 5001-5908. Under this statutory scheme, we review the specific issues raised by the parties. First, we review whether PDS has appellate standing in this matter. Second, we analyze whether the Superior Court's jurisdiction was properly invoked over the entire IFB or only Part E. Third, we discuss the appropriate procedure for the Superior Court to follow when handling an "appeal" from a decision of the Public Auditor. Finally, we

determine whether the Superior Court employed the appropriate remedy when faced with a materially incomplete procurement record.

A. PDS Has Standing to Appeal the Superior Court’s Order Canceling the Entire IFB

[13] GTA argues that PDS does not have standing to appeal because bidders have no pecuniary interest in pre-award procurements. *See* Appellee’s Br. at 12-13 (Feb. 13, 2017) (citing *C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 199 (D.C. Cir. 2002)). Further, GTA argues that the automatic stay of procurement actions, *see* 5 GCA § 5425(g) (2005), deprives PDS of any interest in this litigation. *See* Appellee’s Br. at 12-13 (citing *C&E Servs.*, 310 F.3d at 200-01).

[14] Standing is a threshold matter, *see Benavente v. Taitano*, 2006 Guam 15 ¶ 14, which questions “the power of the court to entertain the suit.” *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). In Guam, standing may be conferred either constitutionally or statutorily. *Benavente*, 2006 Guam 15 ¶ 20. Constitutional standing requires a party to show injury-in-fact, a causal connection between the injury and conduct complained of, and redressability by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). For statutory standing, the court analyzes “the relevant statute to determine upon whom the Legislature conferred standing and whether the Petitioners . . . fall in that category.” *Benavente*, 2006 Guam 15 ¶ 19 (citation omitted). A party must be “legally aggrieved” to have standing. *See Gov’t of Guam v. 162.40 Square Meters of Land More or Less, Situated in Municipality of Agana*, 2011 Guam 17 ¶ 11 (citation omitted). While standing in general focuses on the harm caused by the underlying facts, for appellate standing, a party must show “an adverse effect of the judgment.” *Id.* ¶ 10 (citation omitted).

[15] Regarding statutory standing, we note the absence of any independent statute creating standing. *See Benavente*, 2006 Guam 15 ¶ 23. Additionally, the parties have focused their arguments on constitutional or common-law standing. *See* Appellee’s Br. at 9-18; Appellant’s Reply Br. at 1-5 (Mar. 1, 2017). Contrary to GTA’s assertions, we find PDS has constitutional or common-law standing.

[16] GTA’s argument that PDS lacks constitutional standing is fatally doomed by its own actions. GTA sued PDS in this action, which is at least an implicit acknowledgment of PDS’s pecuniary interest in the outcome of this litigation. *See* RA, tab 1 at 1 (Verified Compl., Mar. 20, 2013). Indeed, GTA and PDS both engaged each other through years of litigation prior to arriving in this court. *Compare* RA, tab 1 at Ex. 2 (OPA Consol. Decs., Mar. 6, 2013), *with* Notice of Appeal (Oct. 12, 2016). Our cases dictate a finding of standing.

[17] In *162.40 Square Meters*, this court found standing where the appealing party had purchased land from the government following condemnation. 2011 Guam 17 ¶ 12. The plaintiffs alleged that the landowners lacked standing on appeal because only the government has eminent domain power. *Id.* ¶ 8. PDS, like the landowners in *162.40 Square Meters*, entered into an agreement with the government. GTA sought, albeit through lawful means, to interfere with this agreement. The law recognizes pecuniary interests in prospective contractual and business relations as sufficient to provide the minimal, yet necessary, showing required for appellate standing. *See, e.g., Pedersen v. United States*, 191 F. Supp. 95, 102 (D. Guam 1961) (“The right to pursue a lawful business is a property right” (quoting *Kamm v. Flink*, 175 A. 62, 66 (N.J. 1934))); *Ullmannglass v. Oneida, Ltd.*, 927 N.Y.S.2d 702, 705-06 (App. Div. 2011) (finding plaintiffs stated a claim for interference with prospective contractual relations). Indeed, contrary

to GTA's restrictive interpretation of pecuniary interest for standing purposes, Guam procurement law contemplates suits, *see* 5 GCA § 5480(a) (2005), and protests, *see* 5 GCA § 5425(a)-(b) (2005), by both "actual" and "prospective" bidders, offerors, and contractors, 5 GCA §§ 5425, 5480. By losing even a "prospective" contract, PDS suffers an "adverse effect of the judgment" sufficient to confer appellate standing in a case where it was already a party.

[18] GTA's reliance on *C&E Services* is equally misplaced. In *C&E Services*, the appealing party was complaining about the District of Columbia's procuring agency's cancellation of the bid process. 310 F.3d at 200-01. *C&E Services* was not a case about standing, but instead addressed whether there was a sufficient property interest created to maintain a due process suit against the government. *Id.* PDS is not complaining about GSA's actions. PDS is appealing a Superior Court action *instituted by GTA* which impacts its business and contractual relations with Guam's executive branch. While we need not determine whether PDS would have a claim if GSA issued a Cancellation of Invitations for Bids under 5 GCA § 5225, PDS certainly has standing to appeal both pre-award and post-award challenges to procurements brought by other actual and prospective bidders, offerors, and contractors when it would otherwise have been awarded the contract and is made a party to the suit. The Government of Guam has still not canceled or withdrawn the proposed award, which indicates its intent to contract with PDS. This shows an "adverse effect of the judgment" sufficient to confer appellate standing.

B. The Superior Court's Subject-Matter Jurisdiction Was Properly Invoked Only Over Part E of the IFB

[19] "A court's lack of subject matter jurisdiction over an action may . . . be raised at any time, including after trial has concluded and for the first time on appeal, and may not be waived or excused by the parties." *Taitano v. Lujan*, 2005 Guam 26 ¶ 21. Guam courts have a duty to

police their jurisdiction and power. *See People v. Gomia*, 2017 Guam 13 ¶ 8; *People v. San Nicolas*, 2016 Guam 21 ¶ 15; *see also Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (“When a requirement goes to subject matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties . . . have not presented.”).

[20] The jurisdiction of the Superior Court is invoked when a petition or complaint is filed. *See* Guam R. Civ. P. 3 (“A civil action is commenced by filing a complaint with the court.”). While subject-matter jurisdiction relates to a court’s competency and exists both before and after an action, a party seeking relief on a particular subject must properly invoke the jurisdiction. *Compare Parker Bros. v. Fagan*, 68 F.2d 616, 618 (5th Cir. 1934) (“Jurisdiction of the subject-matter of an action is a power to adjudge concerning the general question involved therein, and is not dependent upon the state of facts which may appear in a particular case, or the ultimate existence of a good cause of action in the plaintiff therein.” (quoting *Malone v. Meres*, 109 So. 677, 727 (Fla. 1926))), *with Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts [in the complaint] is improbable, and ‘that a recovery is very remote and unlikely.’” (citation omitted)). Guam law requires that a protestant seeking to challenge a GSA procurement award before the Public Auditor must file an appeal with the Public Auditor “within fifteen (15) days after receipt by the protestant of the notice of [protest] decision.” 5 GCA § 5425(e). Further, “any person receiving an adverse decision . . . may appeal from a decision by the Public Auditor to the Superior Court” 5 GCA § 5707(a) (2005). Actions in the Superior Court “shall be initiated within fourteen (14) days after receipt of a final administrative decision.” 5 GCA § 5481(a) (2005).

[21] GTA timely filed an appeal with the Public Auditor. *See* In the Appeal of Teleguam Holdings, LLC, No. OPA-PA-12-018 (Procurement Appeal, Nov. 5, 2012). GTA also timely filed an appeal in the Superior Court. RA, tab 1 (Verified Compl.). However, in both appeals, GTA sought review of only Part E. RA, tab 1 at 8-9 (Verified Compl.). GTA did not request the Superior Court cancel the entire IFB until it filed its Amended Verified Complaint on November 23, 2015. *See* RA, tab 111 at 13 (Am. Verified Compl., Nov. 23, 2015). This amendment came much too late. In amending its petition, GTA did not change just factual allegations, but sought to invoke the Superior Court’s jurisdiction over the entire IFB, not just Part E. Since the Superior Court’s jurisdiction over Parts A-D and Parts F-J was not invoked within fourteen days of the Public Auditor’s decision, the Superior Court lacked the authority to cancel those portions. Where the Superior Court’s jurisdiction is not timely invoked, the Superior Court lacks the authority to exercise that jurisdiction. The Public Auditor’s decision became final over the other Parts when GTA did not timely commence an action in the Superior Court. 5 GCA § 5425(f). While the subject matter of an IFB may be appropriate for review in the Superior Court, that jurisdiction must be timely invoked to allow the Superior Court to exercise its power to review the claim.

[22] Finding no basis for the Superior Court’s exercise of jurisdiction over Parts A-D and Parts F-J of IFB GSA-064-11, we reverse the portions of the Superior Court’s Order and Judgment canceling those parts. Yet, the Superior Court’s jurisdiction was properly invoked over Part E, and we now analyze the Superior Court’s review of that Part.

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C. The Superior Court Properly Reviews the “Whole Record” in a Timely Filed “Civil Action” as an Exercise of Its Original Jurisdiction

[23] A significant portion of the dispute in the Superior Court centered around the proper procedure for handling an “appeal” from a decision of the Public Auditor to the Superior Court. *See* 5 GCA § 5707(a). PDS argued that the action should be handled like an appellate proceeding, where the court’s decision is made on only the administrative record submitted by the Public Auditor. Essentially, the proposed process was: (1) briefing, (2) oral arguments, and (3) a decision. No discovery would be permitted. RA, tab 25 at 1-2 (Statement Re: Disagreement of Scheduling Order, Aug. 1, 2013). GTA argued that this court’s ruling in *Town House Department Stores, Inc. v. Department of Education*, 2012 Guam 25, dictates that appeals from the Public Auditor’s decision are “civil actions” and are governed by the Guam Rules of Civil Procedure, which permit discovery. Appellee’s Br. at 18-19; *see also* RA, tab 25 at 1-2 (Statement Re: Disagreement of Scheduling Order). We agree with GTA that procurement appeals from Public Auditor decisions proceed as “civil actions” and that the trial court’s procedures, in this case, did not exceed the scope of its discretion. However, we take this opportunity to outline how the Superior Court should review decisions of the Public Auditor.⁴

1. A party seeking to challenge the Public Auditor’s procurement decision must timely file a civil action in Superior Court naming the proper defendants.

[24] In *Town House*, this court held that the term “action” in 5 GCA § 5480(a) means civil action. 2012 Guam 25 ¶ 28. Our rules similarly contemplate that there is only “one form of

⁴ In the Superior Court, the Attorney General’s Office posited that two alternate tracks for review of procurements may exist: (1) appellate review through the Public Auditor or (2) filing a petition in the Superior Court after the GSA denies a protest. *See* RA, tab 32 at 2-3 (Guam Resp. Br. Re: Standards of Review, Oct. 21, 2013). Bypassing the Public Auditor appears to be available in at least cases where the Public Auditor is recused. *See* 2 Guam Admin. R. & Regs. § 12116.

action to be known as ‘civil action.’” Guam R. Civ. P. 2. In *Data Management Resources, LLC v. Office of Public Accountability*, this court clarified that the *Town House* holding’s intended “focus was on providing formal notice to the adverse parties of the lawsuit.” 2013 Guam 27 ¶ 26. Under 5 GCA § 5480, it is also necessary to name government defendants to overcome sovereign immunity. *Town House*, 2012 Guam 25 ¶ 33. The statutes also specify certain government officials upon whom service must be made. 5 GCA § 6209 (2005) (requiring service upon the Claims Officer and Attorney General).

[25] As to how civil actions in procurement appeals are filed, we hold that consistent with Superior Court rules, a civil action is commenced by filing a complaint in the Superior Court. Guam R. Civ. P. 3. The complaint should name and be served upon all relevant defendants. *See* Guam R. Civ. P. 4(c). The complaint should comply with the Guam Rules of Civil Procedure and any other applicable laws. *See* Guam R. Civ. P. 7-16.

[26] GTA complied with these requirements.

2. The civil action proceeds under the laws and rules applicable to the Superior Court.

[27] Next, we hold that the law and rules applicable to the Superior Court, including the Guam Rules of Civil Procedure, govern “appeals” from Public Auditor decisions. While the parties provide substantial argument on this point, we look first to Guam statutes for the rule. Under Guam Procurement Law, 5 GCA § 5480, “[a]ll actions permitted by this Article shall be conducted as provided in the Government Claims Act.” 5 GCA § 5480(f). The Government Claims Act provides, in part: “All actions brought under this Chapter shall be governed by the law and rules of procedure of the Superior Court of Guam. Service of process shall be made upon the Claims Officer and upon the Attorney General.” 5 GCA § 6209. Based on this

statutory language, PDS's attempt to create only appellate review by the Superior Court is unduly restrictive. Additionally, limiting the Superior Court to appellate review would require piecemeal adaptation of the Guam Rules of Appellate Procedure, which only govern proceedings in this court. *See* Guam R. App. P. 1. ("These rules govern procedure in appeals to the Supreme Court of Guam from the Superior Court of Guam and in other proceedings before the Supreme Court."). It would also circumvent the Superior Court's "original . . . jurisdiction over all causes in Guam" as provided in the Organic Act. 48 U.S.C.A. § 1424-1(d). Procurement appeals are governed by law and rules of procedure of the Superior Court of Guam, which include the Guam Rules of Civil Procedure. Special rules for procurement cases would complicate procurements, instead of simplifying them. *See* 5 GCA § 5001(b)(1) (2005).

[28] The case below correctly proceeded according to the law and rules applicable to the Superior Court.

3. The Superior Court must consider the "whole record" when reviewing actions of the Public Auditor.

[29] GTA and PDS dispute what record the Superior Court may consider when reviewing the Public Auditor's procurement decisions. Therefore, we must ask: What evidence may the Superior Court consider in these actions, and is further discovery permitted?

[30] Under the Guam Rules of Civil Procedure, discovery is broadly permitted. *See* Guam R. Civ. P. 26-37; *cf. Payton v. N.J. Turnpike Auth.*, 691 A.2d 321, 326 (N.J. 1997) ("New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery."). Further, trial judges have broad discretion in overseeing litigation and discovery. *See, e.g., Guam Econ. Dev. Auth. v. Affordable Home Builders, Inc.*, 2013 Guam 12 ¶ 16 ("[W]e must give due deference to the trial court for matters lying within its discretion"); *Wenz v. Nat'l Westminster Bank*,

PLC, 91 P.3d 467, 469 (Colo. App. 2004) (finding “regulation of pretrial discovery” to be “within the trial court’s discretion”). Having already held that the laws and rules applicable to the Superior Court govern procurement appeals, we find that discovery is not prohibited in these actions.

[31] While it would certainly be inadvisable to allow re-discovery of items already exchanged during the proceedings before the Public Auditor, nothing prohibits the trial court from overseeing additional discovery of matters not already developed on the record. The Superior Court is entitled to examine “the whole record,” *see, e.g., Guam Mem’l Hosp. Auth. v. Civil Serv. Comm’n (Chaco)*, 2015 Guam 18 ¶ 16, not just that which GSA or the Public Auditor unilaterally chooses to submit. Effective review depends on the presentation of all relevant materials. *See, e.g., Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983). Like federal district courts, the Superior Court must be enabled to conduct “a thorough, probing, in-depth review.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In *Fagan v. Dell’Isola*, we performed a thorough review of a decision of the Worker’s Compensation Commissioner and impliedly criticized the Superior Court for not conducting a sufficient review. 2006 Guam 11 ¶ 43. Unlike its federal counterparts, the Superior Court is governed by the processes set out in Guam Procurement Law and the Government Claims Act, not the federal Administrative Procedures Act. Since “the law and rules of procedure of the Superior Court of Guam” control Superior Court actions in procurement appeals, the Guam Rules of Civil Procedure apply and additional discovery is allowed to establish the whole record. 5 GCA § 6209. Indeed, in this case, the Superior Court authorized

and GTA conducted discovery only to the extent it was not previously developed before the Public Auditor. In instances where parties seek duplicative or irrelevant discovery, the other party may move the Superior Court for an order limiting discovery. Guam R. Civ. P. 26(b)(2).

[32] After discovery, the trial court may entertain dispositive motions or conduct a trial on any outstanding and disputed factual questions. The standard of review when weighing the evidence is supplied by statute. 5 GCA § 5704 (2005). First, “[a]ny determination of an issue or a finding of fact by the Public Auditor shall be final and conclusive unless arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law.” *Id.* § 5704(a). Second, “[a]ny decision of the Public Auditor, including any determination regarding the application or interpretation of the procurement law or regulations, shall be entitled to great weight and the benefit of reasonable doubt, although it shall not be conclusive on any court having competent jurisdiction.” *Id.* § 5704(b). This means that *factual* findings made by the Public Auditor are ordinarily not to be re-litigated. Unless the appealing party successfully challenges the competency or jurisdiction of the original fact-finder—here, the Public Auditor—issues of judicial economy, fairness to the parties, and compliance with the purposes of Guam procurement law, 5 GCA § 5001(b)(1)-(8), counsel against endless re-litigation. In procurement actions, the Superior Court could recite the Public Auditor’s facts in any decision it made, or the parties could reference them by paragraph number in motions for summary judgment, should the material facts be uncontested. In ruling, the Superior Court may set aside the Public Auditor’s factual findings only if they are arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law. However, the Superior Court has the opportunity to pass on *legal* questions *de novo*. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law

is.”). If there is an ambiguous question of law, the Superior Court may reference the conclusions of the Public Auditor and should consider with great weight and benefit of reasonable doubt the Public Auditor’s conclusions, but is in no way bound to follow them. 5 GCA § 5704(b). Appeals from the Superior Court are heard in this court.

[33] Limitations on what the Superior Court may consider would remove a safeguard in maintaining a procurement system of quality and integrity. *See* 5 GCA § 5001(b)(7). The Superior Court appropriately allowed discovery to ascertain the whole record. It also properly considered both the Public Auditor’s findings and the additional evidence in conducting a thorough and probing review.

D. GTA Established that the Procurement Record Was Materially Incomplete

[34] Guam law specifies that “[e]ach procurement officer shall maintain a complete record of each procurement.” 5 GCA § 5249 (2005). The statute further identifies the specific records that must be kept. *Id.* § 5249(a)-(e). These records include “a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement,” *id.* § 5249(b), and “brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications,” *id.* § 5249(d). The statutes also require a complete record and dictate that “[n]o procurement award shall be made . . .” without one. *Id.* § 5250.

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1. The Public Auditor must substantively engage the evidence in the record.

[35] GTA, through the deposition of Dr. Okamura, discovered that the procurement record was missing drafts of the IFB and communications with Dr. Okamura—the government-hired expert. The Superior Court, on this basis, vacated the Public Auditor’s original decision and remanded for consideration of the new evidence. On remand, the Public Auditor did not engage in a substantive analysis of the evidence or procurement record, but instead simply refused to change her decision. She stated: “No new evidence was presented that alters the Public Auditor’s previously issued Consolidated Decisions.” RA, tab 77, Ex. A at 6 (Dec. on Remand, Dec. 15, 2014); RA, tab 78, Ex. 1 at 6 (Dec. on Remand, Dec. 14, 2014). This was improper. The Public Auditor, like the Superior Court and GSA, is bound by the language of the procurement statutes. Once GTA established that the procurement record was incomplete and that issue was before the Public Auditor, she was required to substantively engage it. The procurement statute specifies that the Public Auditor’s decision must be “in writing,” 5 GCA § 5702 (2005), and the Guam Administrative Rules and Regulations state that “[t]he Public Auditor’s final decision . . . shall recite the evidence relied upon . . .” 2 GAR § 12110(a). This provision contemplates real analysis of the issues. Since the trial court properly presented the Public Auditor with questions related to an incomplete procurement record—and a complete procurement record is required by law for an award—a reasoned decision was required. Because the Public Auditor failed to substantively analyze the incomplete record and its potential consequences, we agree with the trial court that the Public Auditor’s decision on remand was “devoid of analysis.” RA, tab 138 at 7 (Dec. & Order, Aug. 18, 2016).

2. Prejudice is not required under 5 GCA § 5250.

[36] Title 5 GCA § 5250 states simply that “[n]o procurement award shall be made unless . . .” the record is certified as complete. 5 GCA § 5250. PDS argues that, even if the procurement record is incomplete, GTA must show it was “prejudiced” by the incompleteness. Appellant’s Br. at 38 (Jan. 13, 2017). Under PDS’s theory, GTA cannot prevail because it was not the lowest bidder. However, PDS reads a prejudice requirement into 5 GCA § 5250 that does not exist and fails to capture the complete harm that may result from an incomplete record. First, potential harm is not merely shown through a showing of being the lowest bidder. In this case, GTA presented itself as the lowest bidder for the 1 Gbps service and argued that the GSA’s decision to award only one contract for both the 1 Gbps and 10 Gbps service was arbitrary and capricious. If the contents of the missing communications and drafts contained information regarding the costs and benefits of linking the 1 Gbps and 10 Gbps services, the missing evidence may directly address GTA’s claims. However, the contents of the drafts and communications will never be known, as the procurement officers failed to abide by their statutory mandate to keep records. PDS would have us hold that GTA must show prejudice essentially by establishing the contents of the missing records. This would require GTA to prove a negative. The procurement statute does not require this level of showing, which would be impossible for any litigant.

[37] Guam procurement law allows that “[a]ny actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency.” 5 GCA § 5425. An aggrieved party is “[a] party entitled to a remedy.” *See Party*, Black’s Law Dictionary (10th ed. 2014). GTA claims

aggrieved-party status by alleging that the single award for 1 Gbps service and 10 Gbps service was improper and by showing it was the lower bidder for the 1 Gbps service. Whether GTA ultimately wins its claimed remedy is a question for litigation, but its protest and complaint are sufficient to allow GTA to complain of the procurement award and the incomplete records relating to the award. *See Twombly*, 550 U.S. at 556 (well-pleaded complaint rule). Our reading of 5 GCA § 5250 reveals no prejudice requirement.

[38] In the absence of a complete record, GTA is entitled to challenge the award.

3. An appealing party must show that missing procurement records were material to the procurement.

[39] While we hold that a showing of prejudice is not required, we do find that an appealing party must establish that the items missing from the procurement record were material to the procurement. *See Precise Sys., Inc. v. United States*, 120 Fed. Cl. 586, 601-03 (Fed. Cl. 2015) (setting aside procurement award for materially incomplete record); *cf. United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913 (4th Cir. 2003) (finding that false statements by procurement bidders must be material to impose liability); *FMC Corp. v. Manitowoc Co.*, 835 F.2d 1411, 1414-15 (Fed. Cir. 1987) (finding that documents missing from patent application must be material to hold patent invalid). Missing procurement records are material when, as a result of their absence, judicial review is thwarted in determining whether the appealing party is entitled to the relief requested. *See Material*, Black's Law Dictionary (10th ed. 2014) ("3. Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential."). GTA has satisfied a "materiality" standard.

[40] In its Verified Complaint, GTA complained that GSA arbitrarily and capriciously failed to split the 1 Gbps service from the 10 Gbps service, resulting in higher costs. RA, tab 1 at 2-8 (Verified Compl.). The GSA's stated reason for linking the services was that higher administrative costs and confusion would result from multiple providers. *See, e.g.*, RA, tab 45 at 1847 (Gov't Ex. List, Mar. 25, 2014). However, if the savings from multiple providers would outweigh any additional administrative costs, the GSA would have been required to consider this cost analysis. *See* 5 GCA § 5001(b)(5). There is no substantive evidence related to the GSA's conclusion regarding higher administrative costs, and the incomplete record thwarts judicial review of the matter. Complete and thorough judicial review of the cost analysis is impossible in this case because documents from and communications with Dr. Okamura, the government-hired expert, are missing. If the documents existed, they might have supported the Government's position or they might not have.⁵ However, it is sufficient for our materiality analysis that the documents may have included this information and their absence impacts our decision-making. Because there are material records missing from the procurement record, GTA's challenge to Part E of the procurement was proper.

4. The Superior Court did not exceed its authority in canceling Part E of IFB GSA-064-11.

[41] The Superior Court's order canceling Part E is also proper based on the facts of this case. Dr. Okamura's deposition revealed the incomplete procurement record, and on remand to the Public Auditor, the record was not completed. *See* RA, tab 60 at 21, 74 (Dep. Tr. of Norman

⁵ If the documents contained no analysis of costs, we would still be skeptical of the basis for the GSA's conclusion of higher administrative costs and confusion. It appears from the record before us that the GSA reached this conclusion without reference to any underlying facts or evidence-based analyses. While we express concern here, the incomplete record otherwise thwarts our review, and we need not decide today whether the absence of this cost analysis renders the procurement arbitrary, capricious, or contrary to law.

Okamura, Ph.D., June 19, 2014). The trial judge found that the record was materially incomplete and that the record could not be made complete; he canceled the IFB. RA, tab 138 at 7, 9 (Dec. & Order). Guam procurement law allows both pre-award and post-award procurements to be canceled or terminated if the solicitation, proposed award, or contract is in violation of law. *See* 5 GCA § 5451 (2005) (pre-award remedies); *id.* § 5452 (2005) (post-award remedies). In this case, the Superior Court found the procurement to be in the “pre-award” stage. RA, tab 138 at 8 (Dec. & Order).⁶ We find no reason to disturb this finding, and we determine that cancellation and revision were both appropriately considered remedies. The trial judge properly observed that the law requires a complete procurement record. 5 GCA § 5250. When faced with this materially incomplete procurement record, the trial judge acted within the law when he canceled Part E.

[42] Since GTA showed the procurement record was materially incomplete and the trial judge has the authority to cancel an award where the procurement record is incomplete, Part E was not improperly canceled.

V. CONCLUSION

[43] First, because GTA sued PDS in the Superior Court and PDS’s interests were adversely impacted, we conclude that PDS has appellate standing in this case.

[44] Second, because the Superior Court’s jurisdiction was not properly invoked over Parts A-D and Parts F-J of IFB GSA-064-11, we **REVERSE** the portion of the Superior Court’s Judgment canceling those parts. Finally, since GTA demonstrated that the required procurement

⁶ The parties dispute whether the procurement was “pre-award” or “post-award.” While in some cases the election of certain remedies is relevant, cancellation is allowed in both stages. Even if the trial court’s conclusion regarding the ripeness of the award was wrong, the elected remedy is still not an abuse of discretion here.

record was materially incomplete and the trial judge canceled Part E consistent with the statutorily prescribed remedies, we **AFFIRM** the portion of the trial court's Judgment canceling Part E of IFB GSA-064-11.

/s/

F. PHILIP CARBULLIDO
Associate Justice

/s/

ROBERT J. TORRES
Associate Justice

/s/

KATHERINE A. MARAMAN
Chief Justice

Exhibit C

AMENDED JUDGEMENT in Superior Court Civil Case CV03334-13

Berman O'Connor & Mann
Received

FILED
SUPERIOR COURT
OF GUAM

JUL 24 2018

Time: 4:58 By: RP

2018 JUL 24 PM 2:04

CLERK OF COURT

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PACIFIC DATA SYSTEMS, INC.

IN THE SUPERIOR COURT OF GUAM

TELEGUAM HOLDINGS LLC AND ITS
WHOLLY OWNED SUBSIDIARIES,

CIVIL CASE NO. CV0334-13

Plaintiff,

AMENDED
JUDGMENT

vs.

TERRITORY OF GUAM; DEPARTMENT
OF ADMINISTRATION, GENERAL
SERVICES AGENCY; THE OFFICE OF
PUBLIC ACCOUNTABILITY; PACIFIC
DATA SYSTEMS, INC.,

Defendants.

Based on the Opinion of the Supreme Court of Guam, *Teleguam Holdings LLC v. Territory of Guam, et al.*, 2018 Guam 5, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Part E of the procurement IFB GSA 064-11 is CANCELLED. The awards made pursuant to all other Parts of said procurement are AFFIRMED. Each side shall pay its own costs.

IT IS SO ADJUDGED this _____ day of JUL 24 2018, 2018.

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Superior Court of Guam.

Original Signed By:
HON. ARTHUR R. BARCINAS

HONORABLE ARTHUR R. BARCINAS
Judge, Superior Court of Guam

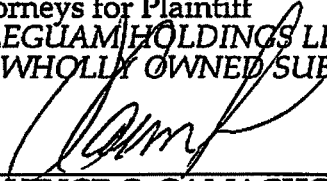
JUL 24 2018

Joseph L. Bednec, Jr.

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APPROVED AS TO FORM:

CALVO CAMACHO LAW GROUP
Attorneys for Plaintiff
TELEGUAM HOLDINGS LLC AND
ITS WHOLLY OWNED SUBSIDIARIES



By: **VINCE C. CAMACHO**

OFFICE OF THE ATTORNEY GENERAL
Attorneys for Defendant
TERRITORY OF GUAM;
DEPARTMENT OF ADMINISTRATION,
GENERAL SERVICES AGENCY



By: **FRED NISHIHIRO**

Exhibit D

GSA Fax and PDS response regarding confirmation of bid submission

Eddie Baza Calvo
Governor



GENERAL SERVICES AGENCY
Government of Guam
148 Route 1 Marine Drive Corp
Piti, Guam 96915

Ray Tenorio
Lt. Governor

Edward M. Birns
Director, Dept. of Admin.

Vincent Arriola
Deputy Director

May 29, 2018

PACIFIC DATA SYSTEMS (PDS)
Attn: John Day, President/COO
185 Ilpog Drive, Ste. 204A
Tamuning, Guam 96913
Tel: (671) 300-0202 / Fax: (671) 300-0265
Email: john@pdsguam.com

Re: TELECOMMUNICATION SERVICES – GSA-064-11

Buenas yan Hafa Adai. We would like to confirm based on the decision of the Supreme Court if the price offered on GSA-064-11 for Telecommunication Services for the Government of Guam remains the same.

Yes, Price Remains the same

No, Remarks: _____

Your quick response to this matter will be greatly appreciated as time is of the essence.

Si Yu'os Ma'ase'

Robert Kono,
Chief Procurement Officer (Acting)

Concurred by:

5-29-2018

John Day, President/COO, Date:

ACKNOWLEDGEMENT COPY

RECEIVE BY Jay Cruz
DATE 6 June 2018

Please Print
ACKNOWLEDGEMENT COPY (Re-fax to GSA)
Received By: <u>CSM</u>
Date: <u>5-29-18</u>
Company Name: <u>Pacific Data Systems</u>
Fax to: 475-1727 or 472-4217
E-mail to: gsaprocurement@gsadoa.guam.gov

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Page: 1 (Last Page)

Local Name : Pacific Data Systems
Company Logo : Pacific Data Systems

Total Pages Scanned : 1
Total Pages Sent : 1

Transmission Information

No.	Job#	Remote Station	Start Time	Dura.	Pages	Mode	Contents	Result
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The documents were sent.

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GSA PURCHASING

02:13:50 p.m.

05-29-2018

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Eddie Baza Calvo
Governor



Edward M. Biras
Director, Dept. of Admin.

GENERAL SERVICES AGENCY
Government of Guam
148 Route 1 Marine Drive Corp
Piti, Guam 96915

Ray Tenorio
Lt. Governor

Vincent Arriola
Deputy Director

May 29, 2018

PACIFIC DATA SYSTEMS (PDS)
Attn: John Day, President/COO
185 Hipog Drive, Ste. 204A
Tamuning, Guam 96913
Tel: (671) 300-0202 / Fax: (671) 300-0265
Email: john@pds.guam.com

Re: TELECOMMUNICATION SERVICES - GSA-064-11

Buenas yan Hafa Adai. We would like to confirm based on the decision of the Supreme Court if the price offered on GSA-064-11 for Telecommunication Services for the Government of Guam remains the same.

Yes, Price Remains the same

No, Remarks: _____

Your quick response to this matter will be greatly appreciated as time is of the essence.

Si Yu'as Ma'ase'

Robert Kono
Robert Kono,
Chief Procurement Officer (Acting)

Concurred by:

John Day
John Day, President/COO, Date: 5-29-2018

Please Print	
ACKNOWLEDGEMENT COPY (Use on M/GSA)	
Received By:	<i>CPM</i>
Date:	<i>5-29-18</i>
Company Name:	<i>Pacific Data Systems</i>
Fax to: 478-1727 or 478-4217	
E-mail to: gsaprocurement@gsa.guam.gov	

Exhibit E

GSA Fax and GTA response regarding confirmation of bid submission

Eddie Baza Calvo
Governor



Edward M. Birns
Director, Dept. of Admin.

GENERAL SERVICES AGENCY
Government of Guam
148 Route 1 Marine Drive Corp
P.O. Box 96915

Ray Tenorio
Lt. Governor

Vincent Arriola
Deputy Director

TeleGuam Holdings, LLC
Attn: Roland Certeza, CEO/President
624 North Marine Corps Drive
Tamuning, Guam 96913
Tel: (671) 644-0116 / Fax: (671) 644-0103

June 6, 2018

Re: TELECOMMUNICATION SERVICES – GSA-064-11

Buenas yan Hafa Adai. We would like to confirm based on the decision of the Supreme Court if the price offered on GSA-064-11 for Telecommunication Services for the Government of Guam remains the same.

Bid Form 8A – Mobile Data Card

BlackBerry Plan (Plan 1)
Android Plan (Plan 2)
iPhone 3 Plan (Plan 3)
iPhone 4 Plan (Plan 4)

Bid Form 10 – ISDN PRI, IDN BRI, SIP TRUNKS, AND DID'S

1. Integrated Services Digital Networking PRI Interface (23B+1D)
2. Integrated Services Digital Networking (Basic Rate Interface – 128 Kbps)
3. SIP Per Trunk Rate
4. DID Number Block of 25 Numbers

Bid Form 12 – Broadband Internet Access Services

01 to 25 Mbps Broadband Internet Access with SLA for Capacity, Latency and Hops to US
26 to 50 Mbps Broadband Internet Access with SLA for Capacity, Latency and Hops to US
51 to 75 Mbps Broadband Internet Access with SLA for Capacity, Latency and Hops to US
75 to 100 Mbps Broadband Internet Access with SLA for Capacity, Latency and Hops to US
101 to 125 Mbps Broadband Internet Access with SLA for Capacity, Latency and Hops to US
126 to 150 Mbps Broadband Internet Access with SLA for Capacity, Latency and Hops to US
151 to 175 Mbps Broadband Internet Access with SLA for Capacity, Latency and Hops to US
175 to 200 Mbps Broadband Internet Access with SLA for Capacity, Latency and Hops to US

Bid Form 15 – Television Services

Analog and digital television service (GTA Essential Package: 39 ch. +1 set top box)
Analog and digital television service (GTA Choice Package: 110 ch. +1 set top box)

Yes, Price Remains the same for Bid Forms 8A, 10, 12, and 15


No, Remarks: GTA's position is that any award of this IEB is contrary to the Guam Procurement Law.

Your quick response to this matter will be greatly appreciated as time is of the essence. Please respond before of business at 5:00pm.

Si Yit'os Ma'ase'


Claudia S. Acfalle
Chief Procurement Officer

Concurred by:



Roland Certeza, CEO/President

Please Print	
ACKNOWLEDGEMENT COPY (Re-fax to GSA)	
Received By:	Leah Superales
Date:	June 06, 2018
Company Name:	Teleguam Holdings, LLC dba: GTA
Fax to: 475-1727 or 472-4217	
E-mail to: gsaprocurement@gsadoa.guam.gov	