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In the Procurement Appeal of Data Management Resources - OPA-PA-24-004

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Mon, Oct 21, 2024 at 3:46 PM

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Hafa Adai,

Please see enclosed Data Management Resource LLC's Comments on the Agency Report for filing in the above-referenced matter. If you have any questions, please contact our office at (671) 648-9001. Have a nice day.

Si Yu'os Ma'ase,

Tatiana Anderson

Office Manager

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PROCUREMENT APPEAL OF DENIAL OF PROCUREMENT PROTEST
THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Procurement Appeal of)	DOCKET NO. OPA-PA-24-004
)	
)	
DATA MANAGEMENT RESOURCES,)	COMMENTS ON AGENCY REPORT
LLC.)	
)	
Appellant.)	

I. INTRODUCTION

Appellant, DATA MANAGEMENT RESOURCES, LLC. (“DMR” or “Appellant”) through counsel, Jacqueline Taitano Terlaje of Law Office of Jacqueline Taitano Terlaje, PC., hereby submits its Comments on the Agency Report related to Invitation for Bid No. IFB-PAG-008-024 Desktop Computer Systems with Accessories, submitted by the Port Authority of Guam (“PAG”) to the Office of Public Accountability (“OPA”) on October 10, 2024, and as amended on October 11, 2024, pursuant to 2 GAR §§ 12104(c)(4) and 12108(a).

1 **II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND**

2 The PAG issued IFB-PAG-008-24 seeking bids for Desktop Computer Systems with
3 Accessories to the lowest priced responsive bidder. Procurement Record (“PR”), Tab 2.

4 On June 12, 2024, the PAG held its bid opening of four vendors who submitted bids for
5 IFB-PAG-008-24, including DMR. In particular, the PAG opened the bid for Pacific Data
6 Systems (hereinafter “PDS”), Bidder #3, and the following information contained in the Bid
7 Abstract was noted in the audio recording:
8

9 **[00:40:45]**

10 **Speaker 1:** Now the line items.

11 **Steve Muna:** Ready for bid four?

12 **Speaker 1:** Yeah.

13 **Steve Muna:** I mean the list of it.

14 **Speaker 1:** Yes. Oh, and he also submitted brochures and literature.

15 **Steve Muna:** Oh yeah. Section three, brochures and literature is
16 submitted. Okay?

17 **Speaker 1:** Okay.

18 **Steve Muna:** Ready?

19 **Speaker 1:** Mm-hmm.

20
21
22 **Steve Muna:** Okay, line item one, desktops. Quantity 20, unit measure
23 each. Unit price, 1,782.00. That's 1,782.00. Extended price, 35,640.00. Okay,
24 that's \$35,640 in those times. Okay, moving up to specifications. Windows
25 11 Pro complies. Processor, Intel i7 Core 13700 complies. 30-amp cache
26 up to 5.2 gigahertz complies. Graphic cards, 770 complies. Hard disk drive,
27 512 gigabyte complies. Memory, 32 gigabyte by 2 times 16 complies. Input
28 device, input devices. Wired multimedia keyboard, wired USB optical
mouse, USB speakers, quality headset with microphone, 1080p drive free

1 web camera, all marked complies. Connectors, USB 2.0 ports, USB 3.2
2 Gen 2 ports, USB 3.2 Gen 1 ports, DisplayPort 1.4 or later, Ethernet RJ-45
3 connector, all lines marked complies. Software, Microsoft Office Home
4 and Business 2021, digital delivery client, client system update, development
5 recovery environment, all marked complies. Warranty, ProSupport for
6 software, data protection, encryption, personal edition. ProSupport Plus,
7 accidental damage, 3 years. ProSupport Plus, keep your hard drive, 3 years.
8 ProSupport Plus, next business day on site, 3 years. ProSupport Plus, 7 by
9 24 tech support, 3 years. All lines marked complies. Warranty, advanced
10 replacement under warranty or the accidental damage protection
11 ProSupport should be done within 20 days of local spares. Marked
12 acknowledged, checked yes. Warranty, work for the replacement repair
13 to be performed on site at port facility or at bidder's facility, marked yes.
14 Required responsiveness level for service calls for replacement repairs must
15 be 24 hours, marked yes. Bidding on, ready?

16 [00:44:30]

17 (Emphasis added). PAG did not evaluate the bids at Bid Opening.

18 On June 17, 2024, PAG Procurement Division forwarded the “bid tabulation and bid price
19 form” to the End Users for evaluation. PR, Tab 13.

20 On June 19, 2024, the End Users, Darrel Harris, Arden Bonto and Dennis Perez absent
21 the necessary required brochures and supporting literature, inappropriately concluded that Pacific
22 Data Systems “complie[d]” with the bid specifications, and that the bid was responsive. PR, Tab
23 13. PR, Tab. 13.

24 On June 25, 2024, the PAG in dereliction of its duty to follow Guam Procurement Law in
25 ensuring proper review of bid submission under Guam law and the terms of the IFB, concluded
26 that the “lowest responsible, responsive bidder,” and “lowest, most responsive, and responsible
27 bid” was Pacific Data Systems. PR, Tab 16.

28 Notice of “Bid Status” dated June 25, 2024, was provided to DMR on Friday, June 28,
2024. PR, Tab 15, *See* p. 6. The Bid Status rejected DMR’s bid, and provided

1 “RECOMMENDED FOR AWARD: Pacific Data Systems Item(s) 1.0, 2.0 and 3.0 for the total
2 bid amount of \$50,500.00”. DMR acknowledged the Bid Status on the next business day, Monday
3 July 1, 2024.

4 Prior to the receipt of any acknowledgement of Bid Status, PAG immediately issued a
5 Notice of Award to non-responsive offeror, Pacific Data Systems on June 28, 2024, 3:01 p.m.
6 PR, Tab 17.

7
8 Notwithstanding that this is an IFB over \$25,000.00, PAG failed to provide the Notice
9 of Award to Pacific Data Systems to DMR, as an unsuccessful bidder.

10 DMR within fourteen (14) days of the notification of the Bid Status forwarded on June
11 28, 2024, protested the recommendation of award to Pacific Data Systems, as a non-responsive
12 bidder. Specifically, DMR protested PAG’s failure to abide by the terms of the IFB requirements
13 in finding Pacific Data Systems, a responsive bidder. PR, Tab 20; *See* The basis of DMR’s protest
14 was the failure of PAG to abide by the General Terms and Conditions, Item 21 of the IFB. PR,
15 Tab 1, *See* p. 23 of 50. Descriptive Literature provides as follows:

17 Rejection of the Bid will be required if the descriptive literature(s) do not show that
18 the product(s) offered conform(s) to the specifications and other requirements of
19 this solicitation. Failure to furnish the descriptive literature(s) by the time specified
in the Solicitation will require rejection of the bid.

20 Pacific Data Systems was a non-responsive bidder, and the PAG not only failed to reject the
21 bid, but did not evaluate the bids for conformance to the requirements in compliance with
22 Guam Procurement Law. Notwithstanding, the Port denied DMR’s Protest on September 10,
23 2024. PR, Tab 20.

24 DMR timely filed its appeal on September 25, 2024. *See* Notice of Appeal (Sep. 25, 2024).

26 **1. THE AGENCY ADMITS THAT PACIFIC DATA SYSTEMS WAS A**

1 **NON-RESPONSIVE BIDDER**

2 Importantly, PAG fails to contest DMR’s protest appeal that Pacific Data
3 Systems (hereinafter “PDS”) was a non-responsive bidder by failing to include information
4 required by IFB-PAG-008-24. DMR has protested the Bid Status forwarded to it on June
5 28, 2024, that a proper bid evaluation by the PAG would have revealed the non-
6 responsiveness of PDS’ bid. However, because the PAG did not properly evaluate the
7 bids in conformance with the General Terms and Conditions of IFB-PAG-008-24, it
8 issued a Notice of Award to PDS and did not reject the bid as non-responsive.
9

10 Rather, in an attempt to avoid its obligation to conform to Guam Procurement
11 Law and the terms of IFB-PAG-008-24, PAG now asserts that DMR “should have
12 known” that the PAG would engage in misconduct, and that DMR should have filed a
13 protest upon PAG’s confirmation at bid opening that PDS was the lowest bidder. PAG
14 asserts that PDS’ self-certification and that it had checked the box, confirming that it has
15 “comple[d]” with the required documentation, was notice to DMR that it “knew or should
16 have known” that the certification was false, and that the PAG notwithstanding its legal
17 obligations would fail to reject the non-responsive bid. PAG misses the point of the
18 protest. DMR has protested the Bid Status because the PAG disregarded its legal
19 obligation to review the bids for responsiveness before its award to PDS. PAG’s position
20 herein not only encourages needless and frivolous protests at bid opening, but demands
21 that a bidder assume that every bidder has falsified their bid submission compliance. PAG
22 asserts that DMR should have filed a protest at bid opening without requiring the PAG to
23 review the bid submissions for compliance and determine their responsiveness. This
24 attempt to purportedly shift the obligation upon the vendor to assume that the agency will
25 engage in misconduct and intentionally fail to determine responsiveness of all bids
26
27

1 submitted violates the clear provisions of Guam Procurement Law. This assertion by PAG
2 undermines the integrity of the procurement process and each vendors' good faith reliance
3 an agency will perform its due diligence in throughout the process as required by law.
4

5 **2. DMR PROTEST WAS TIMELY, AND PAG'S FAILURE TO**
6 **AUTOMATICALLY STAY THE PROCUREMENT VOIDS THE**
7 **PROCUREMENT.**

8 On June 28, 2024, DMR was made aware by the Bid Status that the PAG did
9 not conduct its required review and evaluation of the bids submitted to determine
10 responsiveness of the bidders. Within fourteen (14) days of discovering the misconduct,
11 DMR filed its protest on July 12, 2024.

12 This Appeal was within fifteen days after PAG issued its protest decision to DMR
13 on September 10, 2024, and is within the fifteen-day protest appeal period set by 5 GCA §
14 5425(e). Therefore, both DMR's agency level protest and subsequent appeal to the OPA met the
15 timeliness standards required by applicable law and regulation.

16 Additionally, PAG failed to provide notice to all unsuccessful bidders of the Notice
17 of Award. 2 GAR Div 4, § 3109(q) provides:

18
19 Written notice of award shall be sent to the successful bidder. In
20 procurement over \$25,000, each unsuccessful bidder shall be notified
21 of the award. Notice of award shall be made available to the public.

22 There is no dispute that IFB-PAG-008-24 involves a procurement over \$25,000.00.
23 Nevertheless, PAG blatantly ignored the requirement that the Notice of Award to PDS
24 was issued on the same day as the Bid Status. Importantly, the Procurement Record lacks
25 any notice to all unsuccessful bidders of PAG's Notice of Award. It begs the question of
26 the reasons that PAG would intentionally exclude the Notice of Award when on the same
27

1 date it emailed the Bid Status to the other bidders. Notwithstanding the lack of notice,
2 DMR's protest and appeal are timely, and PAG failed to properly stay the protest. 5 GCA
3 § 5429 (g) provides:

4 Automatic Stay. In the event of a timely protest under Subsection (a) of this
5 Section, the government of Guam shall not proceed further with the
6 solicitation or with the award of the contract prior to final administrative
7 resolution of such protest, and any such further action is void.

8 **3. DMR IS AN AGGRIEVED BIDDER.**

9 A party becomes "aggrieved" when they become aware of a violation of one of the
10 procurement law's substantive provisions or the terms of the IFB. *See DFS Guam L.P. v. A.B. Won*
11 *Pat Int'l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 84. Pursuant to 5 GCA § 5425(a),
12 DMR made its protest to the head of PAG, the purchasing agency within fourteen (14) days after
13 DMR learned of the facts giving rise to the protest, i.e., the selection of a non-responsive offeror
14 by the agency. 5 GCA § 5425(a); *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam
15 20, Amended Opinion ¶ 77 citing *Guam Imaging*, 2004 Guam 15 ¶ 25. Therefore, DMR has
16 brought a proper and timely protest, as a statutorily aggrieved bidder.

17 PAG without any legal support asserts that DMR because it is not the lowest bidder cannot
18 be aggrieved. PAG's position contravenes clear legal precedent. In this case, if PAG had not
19 abdicated its duty to properly evaluate the bids, DMR would not be aggrieved by its misconduct in
20 the handling of IFB-PAG-008-24. Rather, PAG while claiming that DMR must be the lowest
21 bidder to be aggrieved fails to account for not only its misconduct, but Guam law granting DMR
22 statutory right to seek redress.

23 **4. PROCUREMENT RECORD DEVOID OF PROPER EVALUATION**

24 IFB-PAG-008-24 lacks any evidence of proper evaluation to determine responsiveness of
25 bidders. Guam law mandates that "each procurement officer shall maintain a complete record of
26 each procurement." 5 G.C.A. § 5249. The law does not provide an exhaustive list of what a
27

1 complete record contains, but instead provides a non- exhaustive list of items that “the record shall
2 include.” 5 G.C.A. § 5249. Under the law, PAG was required by Guam's procurement laws to
3 maintain a procurement record during the IFB process, and to make sure that the record includes
4 everything essential to understanding how the award was made, and why certain agency actions -
5 such as the claimed action of providing one bidder with an exception not afforded others - were
6 made. Guam law categorically and independently prevents an award when the material record of
7 the procurement was not properly maintained.

8 “[A] complete procurement record is required by law for an award,” Teleguam Holdings LLC
9 v. Territory of Guam, 2018 Guam 5, ¶ 35 (Guam May 14, 2018), *citing* 5 G.C.A. § 5250. There is no
10 factual support, or support in the Procurement record, for PAG’s determination to grant PDS an
11 exemption as to the responsiveness requirements of the IFB. Essentially, the Procurement Record
12 contains no support or reasoning for PAG to rely purely on PDS’ self-certification of
13 responsiveness. The PAG cannot abdicate its responsibility to a bidder to determine
14 responsiveness. On June 17, 2024, PAG Procurement Division forwarded the “bid tabulation and
15 bid price form” to the End Users for evaluation. PR, Tab 13. Notably absent from the
16 procurement record is a responsiveness evaluation by PAG Procurement Division or its end-users.

17 PAG’s June 19, 2024 Memorandum fails to indicate how PAG confirmed PDS’
18 compliance. As aforementioned, PDS did not submit any brochures or literature for PAG to cross-
19 reference and the Memorandum does not indicate this fact. Nor does it reflect that PAG’s
20 evaluation included copies of the tabulators’ transcriptions of the Bid Forms from the Bid Opening.
21 Further, the Procurement Record is void of evidence that the Bid Forms nor the attached literature
22 to them were transmitted to the evaluators. Such failure to include the information in the
23 Procurement Record should not and cannot be corrected after certification, and submission
24 following appeal.

25 Furthermore, PAG’s recommendation for award on June 25, 2024, to PDS is inconsistent
26 with Guam law and the terms and conditions of the IFB. The Port’s decision to award the bid to
27 a non-responsive bidder is a *de facto* unfair pricing advantage that aggrieves other offerors. PAG's
28 decision to declare PDS a responsive bidder constitutes a fundamental and material change to

1 the specifications that only benefitted PDS, as no other bidder was allowed to deviate from
2 complying with the terms of the IFB.

3 4 III. CONCLUSION

5 Guam Procurement Law and other applicable rules sets clear requirements for the procurement
6 process. The failure to follow these requirements will void the procurement award.

7 First, a bid that fails to conform to the specifications of the solicitation will be rejected. PR, Tab
8 1, p.23. In this matter, PAG does not deny that PDS's bid was non-responsive and that it failed to reject
9 the bid as required. Rather, PAG tries to excuse its recommendation the procurement be awarded to
10 PDS by shifting its duty to evaluate each bid for its conformity to requirements, and excuse its dereliction
11 of that duty, to the other bidders arguing that the other bidders should have known PAG was derelict in
12 its obligation.

13 Second, notice shall be provided to unsuccessful bidders when the procurement is over
14 \$25,000 and the procurement shall be stayed when a timely protest is made. *See* 2 GAR 4, §3109(q). In
15 this matter, it is undisputed the procurement amount was for over \$25,000 and the Procurement
16 Record does not reflect PAG's issuance of the notice to the unsuccessful bidders as required. DMR
17 protested timely and a stay should have been placed on the procurement, but PAG failed to take the
18 necessary action to ensure the integrity of the procurement process and the rights of all bidders.

19 Third, Guam law provides the process for when an unsuccessful bidder can protest. 5 GCA
20 §5425(a). The law does not require that protest be made by the lowest bidder, but that the party lodging
21 the protest be an aggrieved party. *See* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., 2020 Guam
22 2020. In this matter, it is undisputed that DMR submitted a bid for the procurement at issue and it is
23 aggrieved by PAG's failure to follow Guam Procurement Law as aforementioned.

24 Lastly, under Guam Procurement Law, the soliciting agency is required to maintain a complete
25 record of the procurement record. 5 GCA § 5249 and Teleguam Holdings, LLC v. Territory of Guam,
26 2018 Guam 5. In this matter, the Procurement Record does not contain how PAG determined PDS's
27

1 non-responsive bid that should have been rejected was evaluated to then be considered responsive to
2 allow it to be selected to be recommended for the award.

3 Thus, PAG failed to (1) properly evaluate the bids and reject the PDS's non-responsive bid, (2)
4 issue a notice to the unsuccessful bidders for a procurement amount over \$25,000, (3) issue a stay when
5 a timely protest was made, (4) and PAG failed to maintain a complete procurement record that
6 reflects how PDS's non-responsive bid was determined to be later responsive. Because DMR is an
7 aggrieved bidder, who timely lodges its protest, and because PAG failed to apply the statutorily required
8 stay, or provide the unsuccessful bidders notice as required by 2 GAR Div. 4 § 3109(q), the Notice of
9 Award to PDS should be voided.
10

11
12 RESPECTFULLY SUBMITTED on this 21st day of October, 2024.

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

17 By:

18 
19 _____
20 JACQUELINE TAITANO TERLAJE
21 Attorney for *Data Management Resources, LLC*
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