



Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-24-004, Filing of PAG's Motion to Dismiss and Second Supplement to Record

Jessica L. Toft <jtoft@portofguam.com>

Mon, Nov 18, 2024 at 4:36 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: "Kiana M. Santos" <kmsantos@portofguam.com>, info <info@terlajelaw.com>, legal@terlajelaw.com

Hello Jerrick,

Please accept for filing in OPA-PA-24-004 the Port Authority of Guam's Motion to Dismiss, Second Supplement to Record, and the supplemental document, Purchase Order Number 19985 OS, which is for Tab 19 of the Procurement Record.

Thank you!






Jessica Toft
Port Staff Attorney
Port Authority of Guam
1026 Cabras Highway, Ste. 201
Piti, Guam 96925
Tel: (671) 472-1054
Fax: (671) 477-4445
Email: jtoft@portofguam.com
Website: www.portofguam.com

*** CONFIDENTIALITY NOTICE ****

This email and any files transmitted with it are confidential and intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error, please notify the system manager. This message contains confidential information and is intended only for the individual named. If you are not the named addressee you should not disseminate, distribute or copy this e-mail. Please notify the sender immediately by e-mail if you have received this e-mail by mistake and delete this e-mail from your system. If you are not the intended recipient you are notified that disclosing, copying, distributing or taking any action in reliance on the contents of this information is strictly prohibited.

3 attachments

-  **Purchase Order Number 19985 OS.pdf**
71K
-  **Second Supplement to Procurement Record (signed).pdf**
37K
-  **Motion to Dismiss (signed).pdf**
366K

1 Jessica Toft
2 PORT AUTHORITY OF GUAM
3 *Aturidat / Puetton Guahan*
4 1026 Cabras Highway
5 Suite 201
6 Piti, Guam 96925
7 Tel. (671) 475-5931/35
8 Fax. (671) 477-2689/4445
9 jtoft@portofguam.com

7 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**
8 **PROCUREMENT APPEAL**

9 **IN THE APPEAL OF:**) **DOCKET NO. OPA-PA-24-004**
10)
11 **DATA MANAGEMENT RESOURCES,**)
12 **LLC,**)
13 **Appellant,**) **MOTION TO DISMISS**
14 **and**)
15 **PORT AUTHORITY OF GUAM,**)
16 **Purchasing Agency.**)

17 The Port Authority of Guam (“PAG”), hereby moves for an order dismissing the appeal
18 filed by Data Management Resources, LLC (“DMR” or “Appellant”) in IFB-PAG-008-24, re:
19 Procurement of Desktop Computer Systems and Accessories.

20 **I. RELEVANT BACKGROUND**

21 In May of 2024, PAG issued IFB-PAG-008-24 (“IFB”). *PR, Tabs 1 and 2.* Four vendors
22 timely submitted bids, which were opened on June 12, 2024. *PR, Tabs 11-14.* Pacific Data
23 Systems (“PDS”), submitted a bid for the price of \$50,500.00. Computer Smart/Megabyte
24 submitted a bid for the price of \$53,572.40. DMR submitted a bid for the price of \$58,740.00,
25 and ComPacific submitted a bid for the price of \$69,680.00. *PR, Tab 13.* All of these submissions
26 were opened publicly and their prices were announced to everyone present at the bid opening on
27
28

1 June 12, 2024. *PR, Tabs 11-14*. All of the prices were publicly announced. *Ids.* Cade and Richard
2 Taitano, representing DMR, were present at the bid opening and announcement, including the
3 announcement of all other included documents and items. *Ids.* A Bid Abstract showing the PAG's
4 acceptance of PDS's bid documents and bid price for evaluation was prepared during this same
5 bid opening, while Mssrs. Taitano were present. *Ids.* Mssrs. Taitano witnessed and were aware
6 on June 12, 2024, that PDS had submitted the lowest price quote, which was accepted for
7 evaluation at that time, with the particular technical literature/brochures about which DMR now
8 protests. *Ids.* The bids were evaluated, and on June 28, 2024, Notice of Award announcing PDS
9 as the awarded contractor was issued to all four vendors, including DMR and PDS. *PR, Tab 17.*

12 On July 12, 2024, Appellant filed the first protest document at issue in this appeal
13 ("Protest"). *PR, Tab 20*. This Protest was filed 30 days after the bids were opened to the public,
14 and 14 days after DMR received its Notice of Award. On September 10, 2024, the PAG issued
15 a Decision addressing the Protest. *Id.* The following is PAG's Motion to Dismiss DMR's Appeal.

17 II. DISCUSSION

18 The PAG moves the Office of Public Accountability to dismiss this appeal and all of DMR's
19 claims for the purposes available under the Guam Rules of Civil Procedure Rule 12(b)(1) and
20 (6), including lack of subject matter jurisdiction, failure to state a claim, and/or failure to request
21 appropriate relief.

24 A. Jurisdiction/Timeliness

25 The case law in Guam is clear: "the timeframes set forth in the Procurement Code are
26 jurisdictional in nature—i.e., the failure to abide by these timeframes will deprive the Superior
27 Court of jurisdiction." *DFS Guam, L.P. v. The A.B. Won Pat International Airport Authority,*
28

1 *Guam*, 2020 Guam 20 ¶ 77 (citing *Teleguam Holdings II*, 2018 Guam 5 ¶¶ 20-21; *see also Rivera*
2 *v. Guerrero*, 4 N.M.I. 79 (1993)). “How a protest is framed by the aggrieved bidder—including
3 whether they frame the protest as a challenge to the solicitation, the evaluation, or the award—
4 does not dictate when the time period to file a protest begins to run.” *Id.* ¶ 86 (footnote omitted).

5
6 The complaints contained in DMR’s Protest were untimely filed. “Protests filed after the
7 14 day period shall not be considered.” 2 GAR § 9109(b)(1). DMR complains that PDS’s bid did
8 not include: 1) a bid bond and forms; 2) business licensing; 3) a Special Reminder form; and 4)
9 warranty/sales items. All of the bids were opened publicly on June 12, 2024, including PDS’s
10 priced submission, containing its pricing, forms, and all alleged defects to which DMR objects.
11 All of these portions of PDS’s bid submission have been available to DMR and the public since
12 June 12, 2024. Guam’s Procurement Rules clearly state that:

13
14 Bids and modifications shall be opened publicly in the presence of one or more
15 witnesses, at the time, date, and place designated in the Invitation for Bids. The
16 name of each bidder, the bid price, and such other information as is deemed
17 appropriate by the Procurement Officer, shall be read aloud or otherwise made
18 available..... The opened bids shall be available for public inspection

19 2 GAR, Div. 4 § 3109(1)(2).

20 PDS’s bid was publicly opened, its price quote was announced, and the full contents of
21 its bid, including all documents submitted and not submitted, were made known and were
22 available to DMR on June 12, 2024. *PR, Tabs 11-14*. The Bid Abstract showing the PAG’s
23 acceptance of PDS’s bid forms and bid price for evaluation, including the brochures, was
24 announced and prepared during this same bid opening, with DMR’s representative present. *Ids.*

25 June 12, 2024, is the date that DMR was officially on notice that PDS’s bid was allegedly
26 defective and missing the items of which DMR complains in its Protest. DMR had two
27 representatives present during the bid opening, Cade and Richard Taitano. *PR, Tabs 11-14*. The
28

1 primary terms of PDS's bid and all forms included, including the defects about which DMR now
2 complains, were announced aloud to DMR at this bid opening. *Ids.* DMR was informed of the
3 alleged defects in PDS's bid on this date. *Ids.* The documents and terms of PDS's bid have not
4 changed, and did not change upon the issuance of a Notice of Award. All of DMR's claims are
5 based on allegations that PDS's submission is not acceptable based on items and documents that
6 are alleged to be faulty or lacking in PDS's bid submission. All of the items in PDS's bid upon
7 which DMR bases its Protest were public and actually known to DMR as of June 12, 2024. Yet,
8 DMR did not complain of these facts until after the Notice of Award was issued on June 28, 2024,
9 announcing PDS as the "lowest, responsible, and responsive bid offer" with whom a finalized
10 contract would be entered. *PR, Tab 17.*

13 DMR knew about the defects, and after the bid prices were all publicly read aloud to all
14 present, DMR was also then fully aware that PDS had submitted the lowest price for the IFB on
15 June 12, 2024. Once Cade and Richard Taitano witnessed that PDS had submitted a lower price
16 quote that was accepted for evaluations, DMR had actual notice that if PDS's lowest price bid
17 was not rejected during evaluations, PDS would win the award.

19 DMR also had notice of all documents submitted with PDS's bid form that day. *PR, Tabs*
20 *11-14.* All of DMR's concerns about PDS's bid forms and any lack of documents could have
21 been raised and resolved at this stage of the procurement. *Id.* Yet, DMR made no request that
22 PDS be disqualified and raised no complaints about PDS's bid contents or missing documents at
23 that time. The contents PDS's bid forms were announced out loud to all present, and DMR could
24 have, and should have, further inspected PDS's entire bid when it was opened on June 12, 2024.
25 But DMR did not take any action at all, except to sit and wait.

1 The Supreme Court of Guam has specifically addressed this situation. *DFS v. GIAA*, 2020
2 Guam 20, ¶ 148 (citing *Teleguam Holdings, LLC v. Guam*, 2015 Guam 13 ¶ 35 [hereinafter
3 “*Teleguam Holdings I*”] and *Guam Imaging Consultants, Inc. v. Guam Mem’l Hosp. Auth.*, 2004
4 Guam 15 ¶ 24).

5
6 A party becomes “aggrieved” when they should be aware of a violation of the law or the
7 terms of the solicitation document. *Id.* at ¶ 84 ((*Cf. MSG Grp., Inc. v. Dep’t of Pub. Welfare*, 902
8 A.2d 613, 617 (Pa. Commw. Ct. 2006)). The time period to file a protest does not begin to run
9 only “when a bidder learns that it was not awarded a contract.” *Id.* at ¶ 85 (quoting *In re Acme*
10 *Am. Refrigeration, Inc. v. N.Y.C. Dep’t of Educ.*, 933 N.Y.S.2d 509, 513 (Sup. Ct. 2011)). The
11 time begins to run when the protestor first knew or should have known of facts disqualifying
12 another bidder’s bid from consideration. *Id.* at ¶¶ 84-101. Disqualification of a bid is a remedy
13 that a protestor “could obtain prior to the issuance of an award,” such that a protest on this basis
14 can be “made at any time during the evaluation process” and must be made prior to award. *Id.* at
15 ¶ 96.
16
17

18 Although DMR now complains that PDS’s bid should have been rejected during
19 evaluations (i.e., prior to award) based on the alleged defects in the bid that allegedly violated
20 the terms of the IFB, DMR had notice of these defects on June 12, 2024, but waited to file its
21 Protest (and its request for any records) until July 12, 2024, *after* PDS was announced as the
22 winning vendor by written notice to all vendors who submitted a bid. *PR, 5a and 5b.* As of June
23 12, 2024, DMR had notice that PDS’s bid contained the alleged defects and the lowest price, and
24 that PDS would win the award if its bid was not rejected, yet it waited until after award to ask
25 for rejection of this bid. This is exactly the type of protest situation that the Supreme Court of
26
27
28

1 Guam has now prohibited. *Id.* at ¶ 99. In these circumstances, a protestor cannot wait until after
2 award is announced to file its protest. *Id.*

3 The award was announced through a written Notice of Award issued to PDS as the
4 winning vendor after the PAG “evaluated the bids received,” and a separate written Notice of
5 Award sent to DMR, informing DMR of the contract award. *PR, 5a and 5b.* The Notices of
6 Award sent to both DMR and PDS clearly and unambiguously state that “the PAG Authority of
7 Guam is hereby announcing its award to the following bidder: Federal Contracts Corp.” *Ids.*
8 (emphasis added).
9

10 The June 28, 2024 notices announcing the award of the contract were issued to PDS and
11 DMR *after evaluations were completed* and PDS was found to be the lowest responsible and
12 responsive vendor, in order to make the award to PDS known to all bidders and the public. 2
13 GAR, Div. 4 § 3109(q): “Publicizing Awards. Written notice of award shall be sent to the
14 successful bidder. In procurement over \$25,000, each unsuccessful bidder shall be notified of the
15 award. Notice of award shall be made available to the public.” *Id.* (emphases added); *see also* 5
16 GCA § 5211(g) ((Competitive Sealed Bidding, Award) “Award. *The contract shall be awarded*
17 *with reasonable promptness by written notice to the lowest responsible bidder....”) (emphases
18 added). The bids were evaluated, and a winner was awarded, documented, and made known to
19 everyone, including the successful vendor (PDS) and the unsuccessful vendor (DMR), through
20 these Notices of Award on June 28, 2024. DMR waited until fourteen days after it received this
21 notice to file its Protest. *DMR Protest* (July 12, 2024).
22
23
24*

25 A bidder cannot wait until award is made to protest and complain that another bidder’s
26 bid should have been rejected during evaluations. *DFS v. GIAA*, 2020 Guam 20 at ¶ 99. It is “not
27 the award that was the relevant point of injury; rather, the injury occur[s] when [the agency]
28

1 consider[s] a non-qualifying bid alongside the qualifying bids.” *Id.* at ¶ 96. If DMR wanted the
2 PAG to reject PDS’s bid and not to consider PDS’s bid for award based on defects in the bid and
3 bid forms, DMR was required to file its protest at that time. DMR did not do so. DMR waited to
4 ask for rejection of PDS’s bid until after award was made---after evaluations of the bids had been
5 completed and documented, and well after it knew of the alleged defects in the bid. DMR’s claims
6 regarding defects in PDS’s bid requiring rejection of the bid and disqualification of PDS from
7 award during the evaluations of the bids are therefore, untimely, and should not be considered or
8 addressed.
9

10
11 The Protest was submitted well beyond the 14-day time period of when DMR first knew
12 or should have known of the facts giving rise to its complaints. 5 GCA § 5425(a) and 2 GAR,
13 Div. 4 § 9101(c)(1); *DFS v. GIAA*, 2020 Guam 20 at ¶¶ 95-96; *see also In the Appeal of ASC*
14 *Trust Corporation*, OPA-PA-09-010 (finding that the fourteen-day clock begins when a party
15 should first be aware of facts giving rise to the protest). DMR is not entitled to any relief, and it
16 is not entitled to have any of its complaints considered on the merits.
17

18 19 **B. Failure to Exhaust Administrative Remedies/Standing**

20 DMR failed to exhaust its administrative remedies with respect to its claims. Failure to
21 exhaust administrative remedies deprives a party of standing to pursue its claims. *DFS v. GIAA*,
22 2020 Guam 20 at ¶¶ 50-1. Therefore, DMR does not have standing to make these claims for this
23 reason as well.

24
25 “Complainants should seek resolution of their complaints initially with the Procurement
26 Officer or the office that issued the solicitation.” 2 GAR, Div. 4 § 9101(b). “It is the territory's
27 policy, consistent with [the Guam Procurement Act], to try to resolve all controversies by mutual
28 agreement without litigation. In appropriate circumstances, informal discussions between the

1 parties can aid in the resolution of differences by mutual agreement and are encouraged.” 2 GAR,
2 Div. 4 § 9103(1). DMR never attempted to seek informal resolution of its complaints with PAG
3 prior to submitting its Protest. DMR has never discussed or requested any remedy or resolution
4 of its complaints with PAG by mutual agreement, either before or after award.

5 DMR could have, and should have, raised any concerns about PDS’s bid and bid contents
6 once it knew of the defects and that PDS had submitted a lower bid price, and was the apparent
7 lowest bidder, on May 8, 2024. But more importantly, pursuant to the law, DMR could have,
8 and should have, informally contacted the PAG, through an email, or a phone call, or in person,
9 to raise these concerns during the time of bid evaluations, and before award. These issues could
10 have been informally resolved before a contract was awarded, with no legal consequences to
11 DMR. If DMR truly believed that PDS’s bid should have been rejected for the alleged
12 informalities in its bid forms, DMR could have raised these issues well in advance, without
13 halting the evaluation and awarding process. Yet, DMR did not do so, and fails to offer any
14 reason that it did not do so. Instead, it waited until after award was made, then filed a protest and
15 attempted to obstruct the procurement with its formal protest. *PR, 7a*.

17 DMR should not now be allowed to pursue alleged procurement violations that could have
18 been handled at the informal agency administrative level. Therefore, these claims should be
19 dismissed. *DFS v. GIAA*, 2020 Guam 20 at ¶¶ 50-1; *see also Carlson v. Perez*, 2007 Guam 6 ¶
20 69; and *Limtiaco v. Guam Fire Dep’t*, 2007 Guam 10 ¶ 27.

23 **C. Failure to State a Claim for Redress/Standing**

24 In order to have standing, a plaintiff must adequately establish: (1) an injury in fact (i.e., a
25 “concrete and particularized” invasion of a “legally protected interest”); (2) causation (i.e., a
26 “fairly ... trace[able]” connection between the alleged injury in fact and the alleged conduct of
27 the defendant); and (3) redressability (i.e., it is “likely” and not “merely ‘speculative’” that the
28

1 plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit). *Lujan v. Defenders*
2 *of Wildlife*, 504 U.S. 555, 560–561 (1992).

3 Failure to ask for the appropriate remedy provided by law, failure to specifically set forth
4 the causes of action, or any failure to strictly follow the mandates of the laws or rules conferring
5 jurisdiction upon an adjudicative body deprives the adjudicative body of jurisdiction to hear the
6 matter, and mandates dismissal of the action. *California v. Texas*, 141 S.Ct. 2104, 2115-2116,
7 210 L.Ed.2d 230 (June 17, 2021) (Plaintiffs were deprived of standing by failing to request the
8 appropriate relief available under the law, and by requesting the wrong type of relief); *M.S. v.*
9 *Brown*, 902 F.3d 1076, 1082, 1083-1090 (9th Cir. 2018) (Even where a plaintiff requests relief
10 that could redress a claimed injury, there is no redressability, as required for standing, if the
11 requested relief is beyond the scope of available relief); and *see e.g., Iwachiw v. New York State*
12 *Bd. of Elections*, 186 Misc.2d 577, 719 N.Y.S.2d 800 (N.Y.Sup., 2000)(dismissal appropriate
13 where petition failed to state a cause of action based on vague, conclusory allegations, and failed
14 to request the specific relief provided by statute).

15
16 The underlying Protest filed by DMR failed to both: 1) request appropriate available post-
17 award remedies; and 2) allege any injury that is redressable. The appeal filed by DMR still fails
18 to request the relief available under law, and still fails to allege any injury caused by the PAG's
19 award of a contract to PDS.

20
21 **1) Failure to Request Available Post-award Relief**

22 DMR specifically requests only pre-award relief. "If prior to award it is determined that
23 a solicitation or proposed award of a contract is in violation of law, then the solicitation or
24 proposed award shall be: (a) cancelled; or (b) revised to comply with the law." 5 GCA § 5451.
25 Although not very clearly stated, in its Protest, DMR requested that the PAG go back and reject
26 PDS's bid and award a contract to DMR, and requested that the PAG be prevented from
27 "proceed[ing] further with the solicitation or with the award of the contract" 5 GCA §
28

1 5425(g). Even in this appeal, DMR only makes two discernible requests for action by the OPA:
2 1) that a “stay” be instituted; and 2) that DMR be awarded the contract under the IFB. *Notice of*
3 *Procurement Appeal*, p. 6, Section B (3) and (4). These are all pre-award remedies. *See* pre- and
4 post-award protest remedies at 5 GCA §§ 5451, 5452; and 2 GAR, Div. 4 §§ 9104, 9105, and
5 9106. These remedies are only available prior to award, and cannot be requested retroactively.
6

7 Although it had notice of the alleged defects in its competitor’s bid prior to award, and
8 these pre-award remedies could have been applied if they had been timely requested at that time,
9 DMR waited until after award of the contract to request these remedies.
10

11 Further, DMR never requested revision or cancellation of the IFB, even though it had
12 notice that the IFB possibly contained vague terms as to the specifications. If there is a core
13 source of DMR’s complaints, it seems to be the allegation that PDS’ technical literature did not
14 exactly match the brand name used in the IFB. DMR seems to imply that PDS’ brochures are
15 required by law to exactly match a brand name “specification” because it was listed in the IFB.
16 This is incorrect. Government of Guam agencies are precluded from specifying their
17 requirements solely in terms of a particular company’s product unless the particular brand name,
18 product, or custom feature is essential to the government’s needs, and market research shows that
19 other companies’ similar products lacking the particular brand name feature do not meet the
20 agency’s needs, or cannot be modified to meet the agency’s needs. 2 GAR, Div. 4 §§
21 4103(b)(2)(c)(ii) and 4106(a).
22
23

24 Without any citation to law, DMR seems to imply that the brand name used in the IFB
25 limits the procurement to only this brand name and exactly matching brochures; but use of “brand
26 name or equal” specifications is not intended to limit a procurement to only one specified product.
27 This is why “brand name or equal” specifications shall include a description of the particular
28

1 design, functional, or performance characteristics which are required.” 2 GAR, Div. 4 §
2 4103(b)(2)(b)(iv) (emphasis added). The PAG did not include this required description. However,
3 as noted, DMR did not complain about this failure prior to award.

4
5 DMR could have complained about the failure to include the specific description of the
6 characteristics in the IFB, and could have filed a request for clarification, or could have filed a
7 protest requesting revision; however, it chose not do so, because DMR wrongfully believed that
8 this incomplete purchase description gave it an advantage in competing for this solicitation,
9 because it is the only company that carries the particular brand name products.

10
11 DMR is incorrect in this assumption. Any solicitation containing a “brand name or equal”
12 specification must be justified in writing, and “shall contain explanatory language that the use of
13 a brand name is for the purpose of describing the standard of quality, performance, and
14 characteristics desired and is not intended to limit or restrict competition.” 2 GAR, Div. 4 §
15 4103(b)(2)(b)(v). By law, the use of this brand name is not supposed “to limit or restrict
16 competition” even though DMR wanted that competition limited and restricted to only its brand
17 name offering.

18
19 The PAG agrees that its use of the brand name(s) in this IFB did not explicitly comply
20 with the rules regarding the use of brand names. However, again, DMR did not request the
21 appropriate relief of correction or revision of the IFB and the specification at the time required
22 to do so. Instead, DMR waited, and now claims, that award of a contract to itself is required
23 because the PAG incorrectly used a brand name appellation in the IFB. This is not the allowable
24 remedy.

25
26 All criteria for measuring the actual product’s acceptability must be specifically stated in
27 the IFB in order to be applied. Because there is no objective list of criteria for “DellSupport Pro”
28

1 or “Data Protection Encryption Personal Edition” disclosed anywhere in the IFB, there was no
2 way for PDS’ product offering to be objectively measured for product acceptability and
3 responsiveness for these two particular line items. The question then becomes, who should bear
4 the burden of the agency’s failure to properly describe the desired product? The answer in case
5 law is clear: it is the agency. The agency cannot punish bidders for any noncompliance with an
6 improperly drafted specification description. *Ciba Corning Diagnostics Corp.*, B-223131, Aug.
7 13, 1986, 86-2 CPD ¶ 185 at 4. Where, as here, an agency does not include a list of salient
8 characteristics in a brand name or equal specification, the agency is precluded from rejecting a
9 bid offering an equal product for noncompliance with some unnamed performance or design
10 feature, because there is no stated objective design feature standard against which to measure
11 compliance. *Elementar Americas, Inc.*, B-289115, Jan. 11, 2002, 2002 CPD ¶ 20 at 2.

14 Appellant asks for relief but fails to provide any information or law that would entitle it
15 to the specific relief it seeks, after the fact. Appellant could have, and was required to, request
16 the appropriate remedies prior to bidding and prior to award. Appellant fails to support the relief
17 it seeks now---after the contract has already been awarded to PDS, executed by the parties, and
18 is being performed. *PR, Tabs 17 and 19; Second Supplement to Record.*

20 Even if this appeal were to be sustained, there is no request for any of the available remedies
21 that can be granted on the basis of alleged pre-award defects in PDS’s bid or the IFB, and
22 therefore, this appeal should be dismissed. The appropriate remedies that would be available to
23 DMR now (if it could show standing, jurisdiction, and injury, which it cannot) are limited to
24 post-award remedies. After award, Guam’s Procurement Law clearly sets forth the available
25 remedies: if the awarded contractor has not acted fraudulently or in bad faith, executed contracts
26 may either be: 1) “ratified and affirmed”; or 2) “terminated and the person awarded the contract
27
28

1 shall be compensated for the actual expenses reasonably incurred under the contract, plus a
2 reasonable profit, prior to the termination” 5 GCA § 5452(a)(1); and 2 GAR, Div. 4 § 9106(a).
3 Even if the awarded contractor has acted fraudulently, or in bad faith, the contract may still be
4 ratified, if it is in the best interests of the government of Guam. 5 GCA § 5452(a)(2); and 2 GAR,
5 Div. 4 § 9106(b).
6

7 Where there is no fraud or bad faith, Guam’s Procurement Law and Guam’s Procurement
8 Regulations require contracts to be ratified and affirmed if it is in the best interests of the
9 government. 5 GCA § 5452(a), (1) and (2); 2 GAR, Div. 4 § 9106(a), (b), and (c). PDS has not
10 acted fraudulently or in bad faith; nor has the PAG. DMR does not make a single assertion of
11 bad faith or fraud by PDS or the PAG. DMR complains about defects in PDS’s bid forms, and
12 technical deficiencies. DMR only asserts that that the PAG allegedly made “mistakes” by
13 awarding to PDS.
14

15 There is no legitimate dispute: at the end of the day, PDS, offered the desktop computers
16 and accessories at the lowest price to the PAG. DMR was allowed to, and did, compete on the
17 basis of merit and price for this contract. This competition was open, and DMR complains only
18 that the brochures/technical literature provided with PDS’s bid were flawed, not the offered
19 products themselves. There is no fraud or bad faith in this purchase. It is undeniably in the best
20 interests of the PAG and the people of Guam to make this purchase from PDS. For these reasons,
21 the contract must be ratified and affirmed, and this appeal should be denied and dismissed in its
22 entirety.
23
24

25 2) Failure to Allege Redressable Injury

26 Finally, this appeal cannot be sustained because DMR fails to plead sufficient facts and law
27 to support its claims and survive a GRCP 12(b)(6) motion to dismiss. In order to pursue a protest,
28 DMR must have standing. When standing is at issue, "the relevant inquiry is whether, assuming

1 justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed
2 by a favorable decision." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). This
3 entails two burdens of proof: a) injury; and b) an entitlement to appropriate available relief for
4 that injury. *Id.*

5 In order to be entitled to any relief, DMR must show: 1) that "a solicitation or award of a
6 contract is in violation of law," 5 GCA § 5450; and 2) that it is "aggrieved" by the alleged
7 violation(s) of law. 5 GCA § 5425(a).

8 However, DMR has not set forth any facts or law to show that the award of the contract to
9 PDS is "in violation of law," as required by 5 GCA §§ 5450, 5451, and 5452. DMR appears to
10 claim that the PAG is violating the law, but without any specific citations to any specific laws.
11 All of DMR's claims/requests for relief on appeal rest on the conclusory argument that PDS's
12 price submission should have been rejected, and DMR should have been awarded the contract.
13 However, none of these claims is sustainable because DMR is not entitled to award of this
14 contract under any law.
15

16 Even if every allegation made by DMR is true, Guam law mandates that the PAG must
17 make this purchase from the next lowest bidder, which is Computer Smart/Megabyte.

18 By law, a protest must be filed by an "aggrieved party," which means an actual or
19 prospective bidder whose direct economic interest would be affected. In challenges after the
20 award of a contract under an IFB, this means a bidder that would win the award if the protest
21 were sustained.

22 In this case, DMR cannot win the award. Although its request for relief is that it should be
23 awarded the contract, this outcome is not possible. No matter what factual or legal allegations
24 DMR makes about PDS's bid, or the award to PDS, the outcome is the same: the PAG must make
25 this purchase from the lowest responsive and responsible vendor. If this is not PDS, then it is
26 Computer Smart/Megabyte, which is the next lowest responsive and responsible vendor. Even if
27 PDS's bid is disqualified, as requested, DMR has not filed a protest concerning Computer
28

1 Smart/Megabyte's bid, and that company would then win the award. Under no circumstances is
2 DMR entitled to an award of a contract for this purchase at this time, and therefore, is not
3 aggrieved by the award of a contract for this purchase. Accordingly, there is no "injury ... that is
4 likely to be redressed by a favorable decision." *Simon v. E. Kentucky Welfare Rights Org.*, 426
5 U.S. 26, 38 (1976).

6 DMR demonstrates no entitlement to the relief it has requested. DMR only makes
7 untimely requests for remedies that are not available to it. This appeal, in its entirety, should
8 be dismissed for DMR's failure to plead sufficient facts and law to support DMR's conclusory
9 claims, failure to demonstrate injury, failure to request available and appropriate remedies, and
10 lack of standing and jurisdiction.
11

12 III. CONCLUSION

13 For the foregoing reasons, and with good cause shown, PAG moves the Public Auditor
14 and the Office of Public Accountability to dismiss this appeal and all of DMR's claims for lack
15 of subject matter jurisdiction, standing, failure to request appropriate relief, and failure to state a
16 claim.
17

18
19 Submitted this 18th day of November, 2024.

20 PORT AUTHORITY OF GUAM

21
22 By:  _____

23 JESSICA TOFT
24
25
26
27
28