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PAG Reply for Motion to Dismiss in OPA-PA-24-004

Jessica L. Toft <jtoft@portofguam.com>

Sun, Dec 1, 2024 at 7:36 AM

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Hello Jerrick,

Please accept this Reply for Motion to Dismiss for filing in OPA-PA-24-004 on behalf of the Port Authority of Guam.

Thank you!



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 **Reply for Motion to Dismiss (e-signed).pdf**
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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,**) **REPLY FOR MOTION TO DISMISS**
14 **and**)
15 **PORT AUTHORITY OF GUAM,**)
16 **Purchasing Agency.**)

17 The Port Authority of Guam (“PAG”), hereby files its reply brief supporting its motion
18 for an order dismissing the appeal filed by Data Management Resources, LLC (“DMR” or
19 “Appellant”) in IFB-PAG-008-24, re: Procurement of Desktop Computers with Accessories.

21 **I. THE FACTS ARE UNDISPUTED**

22 A case must be dismissed under Rule 12(b) if, after assuming the truth of the allegations
23 made and construing them favorably to the complainant, it appears beyond doubt that the
24 complainant can prove no set of facts which would entitle it to relief. *First Hawaiian Bank v.*
25 *Manley*, 2007 Guam 2 ¶¶ 9 and 20.

27 Generally, “[i]f, on a motion under Rule 12(b)(6) ... matters outside the pleadings are
28 presented to and not excluded by the court, the motion must be treated as one for summary

1 judgment under Rule 56.” GRCP 12(b). However, “for documents the authenticity of which are
2 not disputed by the parties; *for official public records; for documents central to plaintiffs' claim;*
3 or for documents sufficiently referred to in the complaint,” courts may properly consider such
4 documents within a 12(b)(6) motion to dismiss. *Alternative Energy, Inc. v. St. Paul Fire and*
5 *Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir.2001) (emphasis added).
6

7 The PAG has filed the Procurement Record of IFB-PAG-008-24 (IFB). It is a public
8 record, it is undisputedly central to the Appellant’s claims, it is the source of all facts referenced
9 in both the Appellant's protest and appeal, and all of the PAG’s responses and filings. Despite
10 DMR’s sudden new claims that PDS did not submit brochures or technical literature with its Bid,
11 the record clearly shows that PDS submitted “Product Literature” at Section 3 of its Bid. *PR, Tab*
12 *12, Section 3, Product Literature*, pp. 38-55. In contradiction, DMR’s original Protest
13 complained about the content of the technical literature, not its existence. Despite DMR’s sudden
14 new claims that there is no contract or purchase order that has been issued in this procurement,
15 the PAG filed a copy of Purchase Order # 19985 OS, executed in July 2024, as part of the record
16 on November 18, 2024. *PAG Second Supplement to Record* (November 18, 2024). This contract
17 is already being performed.
18

19
20 The PAG objects to DMR’s inclusion of its mischaracterizations, depictions, and
21 subjective statements as “facts.” The Procurement Record filed in this appeal is an accurate
22 record of the procedure of all facts in this case, and it speaks for itself.
23

24 II. THE LAW IS UNDISPUTED

25 Assuming all material facts as true, nothing in DMR’s protest or appeal demonstrates that
26 it is entitled, as a matter of law, to the relief sought in its protest and appeal.
27

28 1) DMR’s Protest is Untimely

1 DMR and the PAG agree that the bids were not evaluated on June 12, 2024. The record
2 shows that the bids were opened and reviewed for compliance with formal bid format
3 requirements, and once this was determined, the compliant bids were submitted for evaluation.
4 This is exactly why DMR was required to submit a protest at this time---before evaluations began
5 to determine a winner. If DMR believed that certain documentation was missing or incorrect in
6 PDS's bid, and that it should not have been considered for evaluation, the case law in Guam is
7 clear, this is the time to protest and prevent consideration of the bid. *DFS Guam, L.P. v. The A.B.*
8 *Won Pat International Airport Authority, Guam*, 2020 Guam 20 ¶ 96. DMR fails to set forth a
9 single citation to the contrary.
10

11
12 2) DMR Fails to Claim Violations of Law or of the IFB by PDS

13 A party's complaint must contain at least two separate elements: (1) a short and plain
14 statement of the claim *showing that the pleader is entitled to relief*, and (2) a demand for
15 judgment for the relief to which the pleader seeks. GRCP Rule 8 (a)(2) and (3) (2013) (emphasis
16 added).
17

18 In order to show that it is entitled to any relief for any of its claims, DMR must allege: 1)
19 "a violation of law"; or 2) a violation of the terms of the IFB. 5 GCA §§ 5425, 5450, 5451, 5452;
20 and *DFS Guam, L.P. v. The A.B. Won Pat International Airport Authority, Guam*, 2020 Guam
21 20 ¶ 84.
22

23 DMR's entire protest argument concerning some sort of defect in the bidding process is
24 that PDS's product literature did not contain certain "brand name" references. DMR has never
25 come forth and explicitly stated what content is required and has never once cited to either a law
26 or a provision of IFB-PAG-008-24 that is being violated. The PAG has repeatedly noted the
27 vagueness in this allegation. DMR's protest and appeal both seem somewhat confused about
28

1 what actual requirement of law is at issue in this case. PDS actually submitted brochures and
2 technical literature, so it is not a formal failure to submit. DMR itself does not seem to know the
3 difference between a “brand name” specification and a “brand name or equal” specification, and
4 does not clarify its complaints. Again, the PAG asks: what law is being violated by PDS? What
5 provision of the IFB is being violated by PDS? The answer is none. DMR cannot cite to any law
6 or provision of the IFB because there are no laws or terms of the solicitation that have been
7 violated by PDS in this case.
8

9 3) DMR Fails to Address Its Lack of Entitlement to the Relief It Seeks

10 DMR specifically requests that the award of the contract to PDS be cancelled and that the
11 contract be awarded to DMR. However, DMR has not set forth any facts or law to show that it is
12 entitled to the award of the contract. This is because it is not entitled to the award of the contract.
13 DMR doesn’t even contest this. DMR simply does not address this fact. It asks for award of the
14 contract, but conveniently ignores the fact that this relief is not available; simply claiming that it
15 can protest if it wants to. Sure, DMR can protest and complain if it wants to. However, it cannot
16 win, and it cannot obtain relief for its protest. DMR cannot be awarded the contract. This relief
17 is not available to DMR.
18

19 **III. CONCLUSION**

20 For the foregoing reasons, and with good cause shown, PAG moves the Public Auditor
21 and the Office of Public Accountability to dismiss this appeal and all of Appellant’s claims under
22 Rule 12(b) for lack of subject matter jurisdiction, standing, failure to request appropriate relief,
23 and failure to state a claim.
24

25 Submitted this 30th day of November, 2024.

26 PORT AUTHORITY OF GUAM

27 By: /s/ Jessica Toft
28

JESSICA TOFT

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