



Jerrick Hernandez <jhernandez@guamopa.com>

In the Appeal of Pacific Data Systems; Consolidated Appeal No.'s OPA-PA-21-004 and OPA-PA-21-005

Claire Pollard <cpollard@rwtguam.com>

Wed, Sep 8, 2021 at 4:38 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Edwin J. Torres" <etorres@rwtguam.com>

Dear Mr. Hernandez:

Please see the attached *Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction* to be filed in the above-referenced matter. Please feel free to contact our office if you have any questions. Thank you.

--

Regards,
Claire Pollard

RAZZANO WALSH & TORRES, P.C.

139 Murray Blvd. Ste. 100

Hagatna, Guam 96910

(T): 989-3009

(F): 989-8750

**9.8.21 Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction.pdf**

271K

RAZZANO WALSH & TORRES, P.C.
JOSHUA D. WALSH
EDWIN J. TORRES
SUITE 100, 139 MURRAY BLVD.
HAGÁTÑA, GUAM 96910
TELEPHONE: (671) 989-3009
FACSIMILE: (671) 989-8750

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

In the Appeal of

Pacific Data Systems, Inc. (PDS),

Appellant.

CONSOLIDATED APPEAL NOS:

OPA-PA-21-004

OPA-PA-21-005

**OPPOSITION TO MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION**

I. INTRODUCTION

On July 14, 2021, Pacific Data Systems (“PDS”) appealed the decision of the Guam Department of Education (“DOE”) denying PDS’s agency level protest of GDOE bid invitations for Telecommunication Service – Plain Old Telephone Services (“POTS”) and Telecommunication Service – Digital Transmission Services (“DTS”). The DTS and POTS bids were issued by DOE on April 28, 2021. *See* Procurement Record (“PR”), Tab 13. On August 31, 2021, DOE filed a Motion to Dismiss the appeal (“Motion”) claiming that the Office of Public Accountability (“OPA”) does not have the subject matter jurisdiction to review the denial of PDS’s agency level protest. This Opposition is submitted to address the failings of that argument.

//

II. ARGUMENT IN OPPOSITION

DOE claims that the Office of Public Accountability (“OPA”) is without jurisdiction to proceed over this matter. To make this argument, DOE relies upon the statutes that define the power of the Guam Public Utilities Commission (GPUC) and the decade old precedent of *In the Appeal of JRN Air Conditioning & Refrigeration, Inc.*, OPA-PA-10-008. Neither source of law stands for the propositions advanced by DOE.

A. GUAM’S TELECOMMUNICATIONS ACT DOES NOT PREVENT THE OPA FROM DE NOVO REVIEW OF WHETHER OR NOT DOE’S BID PROCESS AND AWARD SELECTION COMPLIED WITH LAW AND THE TERMS OF ITS OWN PROCUREMENT.

Guam’s telecommunications act makes it clear that Teleguam Holdings LLC (“GTA”) — the offeror slated for award in this procurement — can only provide rates for the services quoted to DOE that were provided to the public in accordance with a filed tariff. The law also mandates that the tariff rate cannot be unilaterally altered by GTA; “[u]nless otherwise ordered by the Commission, [GTA], shall file a tariff indicating the rates and charges and the classifications, terms, and conditions of its telecommunications services. The tariff shall be in such form, contain such other information, and **be made available to the public** in such manner as the Commission may require by rule or order.” 12 GCA § 12206 (a) (emphasis added). The law also mandates that “no telecommunications company shall make any change in any rate or charge or any classification, term or condition for any telecommunications service in its tariff except after thirty (30) days prior notice to the Commission or

unless the Commission has previously authorized or approved the change.” 12 GCA § 12206 (b).

DOE argues that since the tariff is set in accordance with the telecommunications act, any review of the tariff can only be done under the auspices of the telecommunications act itself. While Guam’s telecommunications act does provide for a complaint mechanism to address violations, the act is not some exclusive bar to review by the OPA.¹ The Supreme Court of Guam has illuminated the broad jurisdiction of the Public Auditor’s office, and clarified that Guam’s legislature has given the “OPA the power to determine whether a bid award is in accordance with the terms and conditions of a bid solicitation.” *Data Mgmt. Res., LLC v. Off. of Pub. Accountability*, 2013 Guam 27 (Guam Nov. 22, 2013). This is in keeping with the broad sweep of authority given to the public auditor. The public auditor is tasked with sitting in appeal over agency protest decisions. 5 GCA § 5425(e). Part of the duties of the public auditor when sitting in appellate review is to “to require the production of any books, records or documents in the exercise of the powers of the Public Auditor in the carrying out of the Public Auditor’s duties under this Chapter and other laws of Guam.” 1 GCA §1909(d).

¹ DOE explains in its brief that that 12 GCA § 12207 requires that “any interested person complaining of violations **shall file a petition or complaint with the GPUC.**” Motion, 3. (emphasis in original). The statute contains no such mandatory language, and instead allows that “any interested person complaining of anything done or omitted to be done by any telecommunications company in violation of this Article or the rules, regulations and orders of the Commission **may file** a petition or complaint with the Commission.” 12 GCA § 12207 (emphasis added).

Here, PDS protested both the responsiveness and the responsibility of GTA in submitting rates that were offered in violation of law. This is key, because **the bid specifications from DOE required that all bidders seeking an award “shall comply” with all pertinent Federal and /or local laws, rules, and regulations relative to the performance of this contract....**” Procurement Record GDOE-008. DOE ignored reviewing that matter, or GTA’s compliance with law, and denied the protest. The full appellate review of that protest, and the grounds for denial, are properly within the ambit of the OPA. Guam procurement regulations provide that “The Public Auditor shall determine whether a decision on the protest of method of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation.” 2 GAR Div. 4 § 12112. Determining if DOE’s selection of GTA, despite GTA’s failure to meet the requirement of the solicitation of comply with all laws — laws that include the tariff structure — is properly before the OPA.

The OPA’s other powers also militate toward allowing the review that PDS seeks here. The Public Auditor has the power to promote the integrity of the procurement process and the purposes of Guam’s procurement laws. *See* 5 GCA § 5703 (“The Public Auditor’s jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.”). The Public Auditor has the power to review and determine “any matter properly submitted” to him, 5 GCA § 5703, and reviews *de novo* denials of protests in connection with the solicitation or award or award of a contract. *See* 5 GCA § 5425(e). Further, in the

regime of procurement, the OPA holds powers akin to a court, since Guam law allows procurement matters brought before a court to be, without limitation, remanded to the OPA. *See* 2 GAR § 12103(b). Simply put, the OPA has been presented with a procurement appeal of an agency denial of a bid protest. Such an appellate review is the proper province of the OPA, even if the merits of that review — GTA’s illegal pricing— may ultimately cut against the appellant in DOE’s view. The “subject matter jurisdiction” limits articulated by DOE simply do not exist.

B. *IN THE APPEAL OF JRN AIR CONDITIONING & REFRIGERATION, INC., OPA-PA-10-008 IS NOT A BAR TO THE REVIEW PDS SEEKS.*

GTA also argues that *In the Appeal of JRN Air Conditioning & Refrigeration, Inc.*, OPA-PA-10-008 (*JRN Air Conditioning*), provides some sort of *stare decisis* bar depriving the OPA of jurisdiction here. The case does no such thing. In *JRN Air Conditioning*, the appellant raised the responsiveness of an offeror who was not in compliance with 5 G.C.A. §5801 and § 5802 — statutes that mandate that those who contract with the Government of Guam follow established wage and benefit levels. OPA explained that it did not have jurisdiction to **enforce** the provisions of those statutes or to violations of the wage laws. The OPA explained that the offeror’s “failure to comply” with the law was not an issue for the OPA. Notably, the OPA did proceed with a review of the **responsiveness** of offerors *vis a vis* inclusion of the wage determination. The matter was not dismissed, as is suggested by DOE.

Here, the appellant is not asking for the OPA to enforce the tariff or to investigate compliance with the tariff beyond reviewing publicly available data. Rather, the Appellant has appealed DOE’s failure to assure that GTA’s bid complied

with all terms of the bid requirements, including the requirement of compliance with law. The failure to comply with law was ignored by DOE, as was any review by DOE of how that failure to comply with law rendered GTA a non-responsible offeror. Such a review is properly within the province of procurement appellate review. *See, All Phase Environmental, Inc.*, B-292919.2, B-292919.3, B-292919.4, B-292919.5, B-292919.6, B-292919.7, 2004 CPD ¶ 62 (Comp. Gen. 2004) (explaining that a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, i.e., the offeror's ability and capacity to successfully perform the contract at its offered price.); *McKnight Const. Co., Inc. v. Perry*, 888 F. Supp. 1178 (S.D. Ga. 1994); (noting that whether an offeror is responsible concerns the offeror's ability to satisfy the contractual commitments encompassed in its offer.)

III. CONCLUSION

DOE urges the OPA to dismiss PDS's appeal based singularly upon its belief that reviewing whether or not GTA can legally perform is somehow beyond the reach of the OPA. The OPA should reject DOE's invitation, and move this matter forward to an analysis of the merits of the PDS's protest.

Respectfully submitted this 8th day of September, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSHUA D. WALSH
EDWIN J. TORRES
Attorneys for Appellant
Pacific Data Systems, Inc.