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OPA-PA-21-004; OPA-PA-21-005; In the Appeal of Pacific Data Systems, Inc. (PDS)

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Thu, Sep 30, 2021 at 12:03 PM

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Hafa Adai,

Please see attached Interested Party Teleguam Holdings dba GTA LLC's Opposition to Motion in *Limine* for filing in the above-subject matter.

Thank you.

Regards,

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 **Opp'n Mot. Limine - OPA - WBB 9.29.21.pdf**
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RELEVANT FACTUAL BACKGROUND

On April 28, 2021, the Guam Department of Education (“GDOE”) issued two separate invitations for bid (the “IFBs”) for procurement of Plain Old Telephone Services (IFB27-2021) and Data Transmission Services (IFB28-2021). GTA and PDS each submitted bids in response to the IFBs. On May 27, 2021, the bids were opened publicly. GDOE issued notices of award for both of the IFBs to GTA on or about June 4, 2021. On or about June 9 and 10, 2021, PDS protested the award of both IFBs to GTA, in letters served on GDOE.

No Notice of Stay was served on GTA related to the PDS protest. Instead, GDOE accepted from GTA executed contracts related to the IFBs on June 14, 2021. There was discussion between GTA and GDOE representatives related to GTA’s performance after that date.

On September 7, 2021, GDOE transmitted to GTA fully executed contracts for both IFBs with a congratulatory letter stating services shall commence no earlier than October 1, 2021. On September 11, 2021 GTA engineers and technicians began working on the facilities necessary to perform under the contracts. On September 20, 2021, GTA submitted a Local Service Request (“LSR”) to PDS to begin the porting process. PDS did not respond to this request.

Also on September 20, 2021, the GDOE and PDS argued motions before the Public Auditor. During these proceedings, PDS alleged that an automatic stay was in place related to this procurement. GDOE maintained its position that the awards related to the IFBs were already made and no stay was in place. PDS’s counsel also made representations related to a Superior Court Civil Case (CV0217-21) where PDS alleged GTA is a named defendant. In response to questioning by the OPA that he could not un-ring the bell related to the civil case, Counsel for PDS conceded that he had only read the Complaint, but asserted that the case was about deceptive trade practices and pricing by GTA, which he argued bears on GTA’s responsibility as a bidder and awardee in this matter. Motion Hearing,

proceedings before OPA at 24:00-26:00 (Sept. 21, 2021).

The substance of GDOE's Motion to Dismiss concerns the OPA's jurisdiction under the procurement appeal to address alleged violations of the Guam Telecommunications Act and the GTA General Exchange Tariff.

On September 21 and 24, 2021, GTA sent LSRs for porting and the transition of services in the IFB in anticipation of October 1, 2021. PDS responded on September 24 confirming receipt of the LSRs, and stating that PDS placed a hold on further processing of the orders pending legal review by Counsel to PDS, Attorney J. Walsh. To date, PDS declines to release the ports. On September 24, 2021, Attorney Walsh responded to email communication with GTA stating PDS's position is that a stay is in place.

GTA personnel then reviewed the record in this matter on Saturday, September 25, 2021 to determine the status of the contracts they were awarded. After reviewing the issues still to be addressed on appeal, and GDOE's and PDS's positions related to the same, GTA took immediate steps to assert its interest in this matter.

The Arriola Law Firm entered its appearance on behalf of GTA on September 27, 2021. GTA also communicated with GDOE on September 27, 2021 informing GDOE of the status for transition of services to meet the October 1 deadline. To date, no notice of stay has been provided to GTA.

ARGUMENT

I. GDOE Awarded the Contract and GTA Relied on that Award.

No protest letter was served on GTA on June 9 and 10, 2021 related to the IFBs. Instead, GTA submitted signed agreements in response to the Notices of Award on June 14 and engaged with GDOE personnel about performance. GDOE responded to GTA's communications. There was no indication by GDOE that the contract or performance were stayed. Indeed, GDOE maintains that position in its

opposition to PDS's motion for injunctive relief. GDOE and GTA engaged in substantive discussions about this procurement after June 9 and 10, the date PDS Served GDOE with its protests.

When a pre-award protest is filed, Guam law mandates an automatic stay of a solicitation **and** award of a contract prior to the final resolution of the protest. See 5 G.C.A § 525425(g). Here, GDOE denied the PDS protests on or about June 29, 2021. When PDS filed its notices of appeal on or about July 14, 2021, it did not aver that a stay was in place. Instead, the Parties litigated this via motion practice for the first time on appeal. The Injunctive Relief Motion was not served on GTA. The issue of whether a stay was in place was not made known to GTA until September 24, 2021, in Attorney Walsh's email to a GTA representative.

GTA was not aware that a stay was in place, or that PDS took that position. Indeed, a review of the record in this matter demonstrates this was not brought before the Public Auditor until August 30, 2021 via Motion. Once GTA was made aware that the stay was at issue and there was a live controversy related to the award, GTA retained counsel and entered its appearance in this matter.

II. The Public Auditor has Discretion to Allow GTA to participate in this Appeal.

Proceedings before the Public Auditor are mandated to be "as informal as may be reasonable and appropriate under the circumstances." 2 GARR § 12108(d). However, there are no regulations that specifically limit the time during which an interested party may enter its appearance during an appeal. Here, PDS has alleged violations of the Guam Telecommunications Act and the GTA General Exchange Tariff. GDOE has engaged with PDS about the Public Auditor's jurisdiction to address these issues. However, GDOE also continued to engage GTA about performance. The fully executed agreements related to the IFBs were provided to GTA on September 7, 2021 and GTA was given a commencement date of October 1, 2021. This conduct related to award and performance was an indication to GTA that the protest by PDS was resolved finally. Indeed, the Parties appear to be

litigating the issue of the Stay, and there is no dispute that the Stay was not addressed until raised by PDS on August 30, 2021, during this appeal, for the first time. Therefore, GTA did not have notice that a stay was at issue.

GTA's reliance on GDOE's conduct is reasonable, as they are the Government entity and contracting party related to the IFBs. GDOE received the protests, not GTA. Once GTA was made aware that the stay issue and appeal were still in play – via email from PDS's counsel on September 24, 2021, in response to GTA's attempts to perform under the contracts, GTA immediately took steps to assert its interest in this matter. GTA requests that the Public Auditor exercise discretion and allow GTA to represent its interests in response to PDS's claims. Doing so will not prejudice PDS or the Government, especially since PDS has requested the alternative relief of a continuance of the hearing in this matter.

III. GTA seeks to respond to the September 20, 2021 allegations of deceptive trade practices and GTA's responsibility.

Attorney Walsh misrepresented the litigation in CV0217-21 by confining his representations to the unverified Complaint filed in that matter. GTA has a significant and substantial interest in responding to these one-sided allegations by Attorney Walsh. The Complaint filed in CV0217-21 was filed on or about February 26, 2021. GTA filed an Answer on March 23, 2021, and asserted counterclaims that the Complaint was brought in bad faith, for purposes of harassment and is groundless.

The Complaint was filed by the Attorney General suing in the name of the Government of Guam and alleges that GTA engaged in deceptive trade practices by assessing the Business Privilege Tax (BPT) increase of 1% enacted in P.L. 34-87 on its customers. The AG alleges that it was an "illegal" surcharge and that GTA assessed the BPT Increase without sufficient notice. However, the General Exchange Tariff #1 ("GET#1") applicable to GTA specifically authorizes GTA to assess BPT and any

BPT increases on its customers *without notice*. Further, GET#1 was specifically approved by the Public Utilities Commission (“PUC”) in an Order dated April 2005 and constitutes an agreement between GTA and PUC. Equally important, GTA’s customer agreements authorize the assessment of the BPT Increase. GTA was completely transparent in notifying customers of the BPT Increase assessment on its website, at store locations with large display signs, placards at cashier stations and service desks, and on social media.

Moreover, discovery in the civil action reveals that the AG failed to investigate the case properly.

Two consumer complaints filed against GTA were found to be sham complaints, submitted by GTA’s competitor Docomo, which were never investigated by the AG.

As aptly stated by the Public Auditor on September 20, 2021, PDS cannot un-ring the bell related to allegations about CV217-21. GTA now enters its appearance, seeking leave to respond to the allegations made by PDS’s counsel, especially as they relate to GTA’s responsibility in responding to the IFBs related to the Telecommunications Act and the General Exchange Tariff. These allegations were not specified in the Notice of Appeal filed related to the denial of PDS’s protests. These allegations were made last week at the hearing before the OPA. GTA seeks leave to respond to these allegations during these proceedings.

CONCLUSION

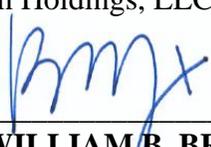
For the foregoing reasons, Teleguam Holdings Guam, LLC respectfully requests leave of the Public Auditor to participate in these appeal proceedings. Such participation does not appear likely to prejudice either GDOE or PDS. GTA requests the opportunity to respond to and rebut the unchecked and incomplete allegations made by PDS. The Appeal here was made as GDOE was engaging with GTA about performance. GTA relied on that conduct. It appears this appeal is morphing into issues beyond the jurisdictional issues first raised in the Notice of Appeal. Due to the issues now being

addressed outside of the original jurisdictional questions, GTA requests leave to represent its significant and substantial interest in this matter.

Dated at Hagåtña, Guam: _____.

ARRIOLA LAW FIRM
Counsel for Interested Party
Teleguam Holdings, LLC dba GTA

By: _____


WILLIAM B. BRENNAN