



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

October 6, 2015

Claudia S. Acfalle
Chief Procurement Officer
General Services Agency
148 Route 1 Marine Corps Drive
Piti, Guam 96915
VIA FACSIMILE: (671) 475-1727 / 472-4217

Re: Notice of Receipt of Appeal – OPA-PA-15-012

Dear Ms. Acfalle,

Please be advised that Pacific Data Systems, Inc. (PDS) filed an appeal with the Office of Public Accountability (OPA) on October 5, 2015 regarding the General Services Agency (GSA) procurement actions related to IFB No. GSA-080-15 for the following:

1. Telecommunication/Network "Optical Fiber Solutions"

OPA has assigned this appeal case number OPA-PA-15-012.

Immediate action is required of GSA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA's office and on its website at www.opaguam.org. The notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), please submit one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated, to OPA by **Tuesday, October 13, 2015**, five work days following receipt of this notice of appeal; and one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Tuesday, October 20, 2015**, ten work days following receipt of this notice of appeal.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to Pacific Data Systems, Inc. (PDS). OPA respectfully asks that GSA provide one original and two copies of the procurement record as the Guam Procurement Law and Regulations require only one copy. The three procurement record copies requested by OPA are distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Thyrza Bagana at 475-0390 ext. 215, or tbagana@guamopa.org should you have any questions regarding this notice.

Sincerely,



for **Rodalyn May A. Gerardo, CIA, CGFM, CPA, CGAP, CGMA**
Audit Supervisor

Enclosure: Notice of Appeal – OPA-PA-15-012

Cc: John Day, President of Pacific Data Systems, Inc.



Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL

PART I - To be completed by OPA

In the Appeal of)
) NOTICE OF APPEAL
)
Pacific Data Systems, Inc (PDS))
(Name of Company), APPELLANT) Docket No. OPA-PA _____
)
_____)

PART II - Appellant Information

Name: Pacific Data Systems, Inc (PDS)
Mailing Address: 185 Ilipog Drive, Suite 204A
Tamuning, GU 96913
Business Address: same as above
Email Address: John@pdsguam.com
Daytime Contact No: 671-300-0202
Fax No.: 671-300-0265

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: October 5, 2011
TIME: 3:40 PM BY: AL
FILE NO OPA-PA: 11-012

PART III - Appeal Information

- A) Purchasing Agency: General Services Agency (GSA)
B) Identification/Number of Procurement, Solicitation, or Contract: IFB Bid GSA-080-15
C) Decision being appealed was made on 09-18-2015 (date) by:
[X] GSA Chief Procurement Officer _ Director of Public Works _ Head of Purchasing Agency

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

- D) Appeal is made from: (Please select one and attach a copy of the Decision to this form)
[X] Decision on Protest of Method, Solicitation or Award
Decision on Debarment or Suspension
Decision on Contract or Breach of Contract Controversy
(Excluding claims of money owed to or by the government)
Determination on Award not Stayed Pending Protest or Appeal
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

- G4S Security Inc.



Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL

PART IV - Form and Filing

In addition to this form, the Rules of Procedure for Procurement Appeals require the submission together with this form of additional information, including BUT NOT LIMITED TO:

1. A concise, logically arranged, and direct statement of the grounds for appeal;

This is a Procurement Appeal made under Guam Administrative Rules and Regulations, Chapter 12 §12201 by Pacific Data Systems (PDS) regarding a timely Protest made by PDS of a Notice of Intent to Award decision made by the General Services Agency (GSA) in the above referenced procurement. The original protest by PDS in this Appeal was made on September 17, 2015 (see Exhibit 1). This appeal is made due to a failure by GSA to evaluate the issues contained in the PDS Protest, instead GSA erroneously denied the PDS Protest without an evaluation and determination of the issues defined by PDS. The reasons used by GSA to justify its denial of the PDS protest conflict Guam Procurement Law and Regulation and with prior GSA decisions. This reckless GSA decision sets a new and dangerous precedent that must now be resolved by the OPA in order to prevent future procurement controversies over this issue.

On September 18, 2015, GSA denied the PDS Protest filed on September 17, 2015, as untimely (see Exhibit 2) stating that PDS should have made its protest of deficiencies in the G4S bid at the time that PDS became aware of this issue in July after a Freedom of Information Act request made by PDS and PDS was provided with a copy of the G4S bid by GSA.

GSA's decision regarding the PDS Protest ignores the fact that PDS was not protesting the deficiencies of the G4S bid, but the GSA evaluation and award decision revealed for the first time to PDS in the GSA Notice of Intent to Award decision sent to PDS by GSA on September 3, 2015. The PDS Protest clearly states the basis of the Protest is the Notice of Intent to Award decision by GSA. Since the PDS Protest was made within 14 days of the time PDS became aware of the GSA decision and Notice of Intent to Award, the PDS Protest was timely and the issues defined in the PDS Protest must be evaluated by GSA with a proper determination made.

Instead of a making a proper evaluation and determination of PDS's protest as required by Guam Procurement Law (reference 5 GCA § 5425(b)), GSA instead denied the protest as untimely for the unjustifiable reasons stated in its Protest Decision (see Exhibit 2). It is important to note that not only does GSA's decision in this protest contradict law and regulations, it also contradicts previous decisions made by GSA regarding similar procurement protests made related to protests made specific to deficiencies of a bidders submission revealed at the time of the public bid opening. For example, on December 23, 2011, PDS made a protest in GSA IFB-064-11 regarding deficiencies in a bidder's submission observed by PDS at the public bid opening. PDS submitted a timely protest to GSA defining these deficiencies (see Exhibit 3) and on January 9, 2012, GSA denied the PDS protest as premature stating as follows:

_____ *"The issue raised in your protest is whether the failure of a particular bidder (GTA) to file a proper Major Shareholder Disclosure constitutes an automatic rejection of the bid. To file a protest, 2 GARR, Division 4 Section 9101(c)(2) states:*

Subject of Protest: Protestors may file a protest on any phase of solicitation or award including, but not limited to specifications, preparations, bid solicitation, award or disclosure of information marked confidential in the bid or offer.



Appendix A: Notice of Appeal Form PROCUREMENT APPEAL

*The protest is not of any action of the General Services' Agency, but rather is the action of a bidder's submission. **At the moment, General Services Agency has not taken any action on whether to approve or disapprove the submission of the Major Shareholder Disclosure or determine whether the bidder is responsive. As such, the request for protest is premature and is denied.** The General Services Agency will keep in mind the issue raised by the protestor when determining the responsiveness of all prospective bidders." (emphasis added)*

Now in this procurement, GSA has taken a completely different position that is contrary to the previous determination made by GSA in the above referenced procurement protest. Failure by GSA to follow procurement law and past precedent is evidence of GSA violation of its good faith obligations under 5 G.C.A. §5003 and threatens the integrity of the procurement process.

The GSA decision made in this PDS Protest is reckless and without foundation in law or regulation and sets a hazardous precedent that will create many future procurement controversies. The GSA protest decision denying the PDS Protest as untimely translates into placing a burden on bidders to protest any and all procurement issues within 14 days of a bid opening or otherwise risk these issues being dismissed as untimely if raised at a later date in the procurement process (for example after an award decision by the procurement Agency).

On one hand, GSA got it right in its protest decision of January 9, 2012, but then got it wrong in the decision issued in this protest on September 18, 2015.

PDS now makes this appeal to the Public Auditor in an effort to have the OPA resolve this situation by either overturning the GSA protest denial and remanding the protest issues defined by PDS back to GSA for a proper review and determination or a de novo review by the OPA of the PDS Protest issues with the OPA making a determination regarding these issues in this procurement.

2. A statement specifying the ruling requested;

PDS requests that the OPA resolve this situation by either overturning the GSA protest denial and remanding the protest issues defined by PDS back to GSA for a proper review and determination or that the OPA undertake a de novo review of the PDS Protest with the OPA making a determination regarding these issues in this procurement.

3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

Exhibit 1: PDS Protest of GSA Notice of Intent to Award Decision filed on 09/17/2015

Exhibit 2: GSA Protest Decision sent to PDS on 09/18/2015

Exhibit 3: PDS Protest in GSA-IFB-064-11 made on 12/23/2011

Note: Please refer to 2 GAR § 12104 for the full text of filing requirements.



Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL

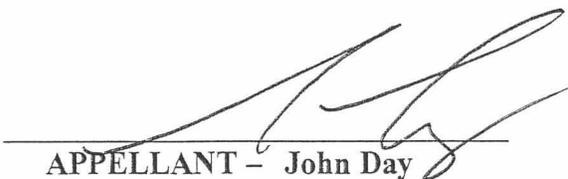
PART V - Declaration Regarding Court Action

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 5th day of October, 2015.

By: _____


APPELLANT - John Day

Authorized Representative of Pacific Data Systems

Suite 401 DNA Building
238 Archbishop Flores St.
Hagåtña, Guam 96910



FAX

To:	Claudia S. Acfalle Chief Procurement Officer General Services Agency	From:	Doris Flores Brooks Guam Public Auditor Office of Public Accountability
Phone: Fax:	(671) 475-1707 (671) 475-1727/472-4217	Pages:	7 (including cover page)
CC:	John Day President Pacific Data Systems, Inc.	Date:	October 6, 2015
Phone: Fax:	(671) 300-0202 (671) 300-0265	Phone: Fax:	475-0390 x. 215 472-7951

Re: OPA-PA-15-012 Notice of Receipt of Appeal

Urgent For Review Please Comment Please Reply Please Recycle

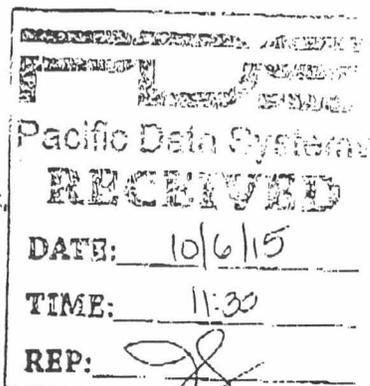
Comments:

Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver.

Thank you,
Thyrza Bagana
Audit Staff
tbagana@guamopa.org

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Suite 401 DNA Building
238 Archbishop Flores St.
Hagåtña, Guam 96910



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Phone:	(671) 475-1707	Pages:	7 (including cover page)
Fax:	(671) 475-1727/472-4217		
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Fax:	(671) 300-0265	Fax:	472-7951

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Thank you,
Thyrza Bagana
Audit Staff
tbagana@guamopa.org

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OCT/07/2015/WED 11:27 AM OPA

FAX No. 671 4727951

P. 002/007



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Doris Flores Brooks, CPA, CQFM
Public Auditor

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G.S.A.

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RECEIVED

October 6, 2015

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Suite 401, DNA Building
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www.guamopa.org • Hotline: 47AUDIT (472-8348)