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

# FAX

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| **To:** | **Ms. Carmen T. Charfauros**<br>**Supply Management Administrator**<br>Department of Education<br>501 Mariner Avenue<br>B-Building, Suite 116<br>Barrigada, Guam 96913<br>Phone: (671) 475-0438<br>Fax: (671) 472-5001<br>Email: ctcharfauros@gdoe.net | **From:** | **Benjamin J.F. Cruz**<br>**Public Auditor**<br>Office of Public Accountability |
| | | **Pages:** | 12 (including cover page) |
| **CC:** | **Mr. Joshua D. Walsh, Esq.**<br>**Attorney for Appellant Pacific Data Systems, Inc.**<br>Razano Walsh & Torres, P.C.<br>139 Murrary Blvd.<br>Hagåtña, Guam 96910<br>Phone: (671) 989-3009<br>Email: jdwalsh@rwtguam.com | **Date:** | July 15, 2021 |
| | | **Phone:**<br>**Fax:** | (671) 475-0390 x. 204<br>(671) 472-7951 |

**Re:** OPA-PA-21-005 Notice of Receipt of Appeal

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**Comments:**

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Thank you,

Jerrick Hernandez, Auditor

jhernandez@guamopa.com

**OFFICE OF PUBLIC ACCOUNTABILTY**
Suite 401 Pacific News Building, 238 Archbishop Flores St., Hagåtña, Guam 96910
Phone: (671) 475-0390 / FAX: (671) 472-7951

July 15, 2021

Ms. Carmen T. Charfauros
Supply Management Administrator
Department of Education
501 Mariner Avenue
B-Building, Suite 116
Barrigada, Guam 96913

VIA FACSIMILE: (671) 472-5001

Re: Notice of Receipt of Appeal – OPA-PA-21-005

Dear Ms. Charfauros,

Please be advised that Pacific Data Systems, Inc. (hereinafter referred to as "PDS" filed an appeal with the Office of Public Accountability (OPA) on July 14, 2021, regarding the Department of Education's (DOE) response to PDS' protest of the procurement award for GDOE-IFB 028-2021 for Telecommunication Service – Digital Transmission Services (DTS). OPA has assigned this appeal case number OPA-PA-21-005.

Immediate action is required of DOE 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 first eight pages of 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), the submission of 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 is required no later than **Friday, July 23, 2021**, five work days following this Notice of Receipt of Appeal. We also request 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 **Friday, July 30, 2021**, ten work days following receipt of this notice.

When filing all other required documents with our office, please provide one original and one copy to OPA (electronic filings will be acceptable), and serve a copy to PDS. Although the Guam

Procurement Law and Regulations require only one copy of the procurement record, OPA respectfully asks that DOE provide one original and one electronic file of the said record, which will be distributed as follows: Copy-1: Master File; and Copy-2: Public Auditor and/or Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 204 or jhernandez@guamopa.com should you have any questions regarding this notice.

Sincerely,

Benjamin J.F. Cruz
Public Auditor

Enclosure: First Nine Pages of the Notice of Appeal – OPA-PA-21-005

Cc: Joshua D. Walsh, Esq., Attorney for Appellant PDS

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

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

**PART I.**

In the Appeal of

Pacific Data Systems, Inc. (PDS),

Appellant.

**DOCKET NO. OPA-PA-** 21-005

**NOTICE OF APPEAL**

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 7/14/2021
TIME: 4:53 ☐AM ☒PM BY: Jeff via Email
FILE NO OPA-PA: 21-005

## PART II: APPELLANT INFORMATION

| | |
|---|---|
| Appellant's Name | Pacific Data Systems, Inc. (PDS) |
| Appellant's Mailing Address | 185 Ilipog Drive, Suite 204A, Tamuning, Guam 96913 |
| Appellant's Business Address | 185 Ilipog Drive, Suite 204A, Tamuning, Guam 96913 |
| Appellant Representative's Direct Email Address | John@pdsguam.com |

Appellant is represented by legal counsel in this appeal. For purposes of this appeal, please direct correspondence to Pacific Data Systems, Inc. ("PDS") counsel, Joshua D. Walsh and of Razzano Walsh & Torres, P.C.

| | |
|---|---|
| Counsel's Mailing Address | 139 Murray Blvd. Ste. 100, Hagatna, Guam 96910 |
| Counsel's Telephone | 671-989-3009 |
| Counsel's Facsimile | 671-989-8750 |
| Counsel's Direct Email Address | jdwalsh@rwtguam.com |

## PART III: APPEAL INFORMATION

A. Purchasing Agency: Guam Department of Education ("GDOE").

B. Solicitation Number: GDOE IFB 028-2021 for Telecommunication Service – Digital Transmission Services ("DTS")

C. The Decision being appealed was provided to the Appellant on June 29, 2021. The Decision was made by the Supply Management Administrator, Ms. Carmen T. Charfauros.

D. This Appeal is made from the Denial of Procurement Protest on Award provided to PDS on June 29, 2021.

E. The name of the only competing offeror known to Appellant is: Teleguam Holdings LLC ("GTA").

## PART IV: STATEMENT OF GROUNDS FOR APPEAL

### A. THE GROUNDS FOR APPEAL

#### 1. Relevant Procedural and Factual History

The Guam Department of Education ("GDOE") issued the Invitation for Bid GDOE IFB 028-2021 on April 28, 2021.[1] On May 27, 2021, 2 bidders, Pacific Data Systems ("PDS") and Teleguam Holdings LLC ("GTA"), submitted bids in response to the bid invitation. GDOE conducted a public opening of the bids, and summarized the results of that bid opening in a Bid Abstract.[2] On June 4, 2021, GDOE PDS a Bid Status and Award Notification.[3] Because the prices submitted by offeror GTA were submitted in violation of law, and because GTA could not meet the performance dates specified with the agency, PDS submitted a protest on June 9, 2021, of the notice designating GTA for award.[4] On June 29, 2021, the Agency denied the protest.[5] This appeal to the OPA followed.

#### 2. DOE's Protest Decision is Flawed, in that DOE did not substantively engage with the merits of PDS's protest regarding GTA's price.

DOE's June 29, 2021, denial of PDS's protest did not substantively address the allegations that GTA had submitted a price that was barred by Guam law, violative

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[1] The original Invitation for Bid, and subsequent amendments, are attached to this Notice of Appeal **as Attachment A.**

[2] The Bid Abstract is attached to this Notice of Appeal as **Attachment B.**

[3] The Bid Status form is attached to this Notice of Appeal as **Attachment C.** The Award Notification of June 4, 2021, is attached to the Notice of Appeal as **Attachment D.**

[4] PDS's Agency level protest is attached to this Notice of Appeal as **Attachment E.**

[5] The GDOE Protest Denial of June 29, 2021, is attached to this Notice of Appeal as **Attachment F.**

of the Guam Telecommunications Act, and subject to the GTA General Exchange Tariff approved by the by the Guam Public Utility Commission (GPUC). Rather, DOE demurred on the issue, and explained that "GDOE does not have the authority to enforce and investigate allegations and violations of the [telecommunications] act...." GDOE is wrong to have not engaged with the issue.

**3. An Award to GTA based upon the price offered by GTA would violate Guam law. Because of this, GTA is a non-responsible and non-responsive bidder.**

The services proposed under this procurement by GTA are regulated by the Guam Public Utility Commission ("GPUC") and subject to the Guam Telecommunications Act. *See Generally* Chapter 12, 12 G.C.A. These services are also subject to the GTA General Exchange Tariff approved by the GPUC. *See,* 12 G.C.A. §12206. The pricing proposed by GTA in this procurement does not conform to the GTA tariff filed and approved by the GPUC for these services.[6] GTA's submission of a bid price that violates its established tariff violates the law, and more specifically violates the requirements of the IFB that requires all bidders to comply with all applicable "laws and regulations."[7] To be certain, it does not matter that GTA has violated its pricing tariff by departing downward from it, as the Telecommunications Act specifically prevents a regulated entity like GTA from unilaterally charging less than the tariff. *See,* 12 G.C.A. §12206 (c)(1) ("Unless otherwise ordered by the

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[6] The GTA Tariff for services provided under this procurement — Telecommunication Service Telecommunication Service – Digital Transmission Services — is attached to this Notice of Appeal as **Attachment G.**

[7] IFB Proposed Contract pg. 8.

Commission or provided by or under authority of this Article, no telecommunications company shall (1) charge, demand, collect or receive a greater or less or different compensation for such service than the charges specified in its tariffs")

4. **An Award to GTA based upon the price offered by GTA would allow GTA to provide an anti-competitive bid price. Because of this, GTA is a non-responsible and non-responsive bidder.**

Guam's telecommunications Act mandates that GTA shall not "engage in any anti-competitive act or practice" when providing telecommunications services. *See,* 12 G.C.A. §12205(d). GTA's offer to DOE of a price that is artificially deflated and that lies below GTA's established tariff rate constitutes an intentional anti-competitive act meant to drive PDS from the marketplace. That price submission violates the law and GTA's bid should therefore have been rejected.

5. **DOE did not substantively engage with whether or not GTA's price submission violates Guam law and does not properly reflect the Gross Receipts Tax/Business Privilege Tax.**

PDS's agency level protest informed GDOE that GTA has been targeted by a civil action brought by the Office of the Attorney General of Guam for deceptively passing along the increased costs of Guam's Gross Receipts Tax/Business Privilege Tax to customers "as an illegal surcharge over and above the price of goods represented to consumers." Complaint, CV0217-21 (Superior Court of Guam. February 26, 2021), at 1. [8] GTA's surcharges for the transmission services on the bid form in this procurement similarly does not breakout the individual charges, which may include the Gross Receipts Tax/Business Privilege Tax. As such, the form of

[8] The complaint in CV0217-21 is attached to this Notice of appeal as **Attachment H.**

GTA's bid submission violates the law, and should have been rejected. At a minimum, GDOE should have engaged with the matter, and provided a more substantive response than merely averring that the bid form does not have a space for such a breakdown. Given GTA's alleged deceptive pricing behavior, DOE should have satisfied itself that the price quoted by GTA does not, as it has done with other consumers, deceptively include the GRT as an improper surcharge, and that GTA remains a responsible offeror.

**6. DOE committed an error in ignoring its specification on when services should commence.**

PDS's agency level protest informed DOE that GTA could not meet the July 1 services start date, and as such, GTA would be non-responsive to that bid specification and lack the responsibility to perform. DOE responded in its Protest Denial that July 1 was not a specified start date, but rather was a date that services could not start before. GDOE is in error, as DOE specified and subsequently clarified those services must begin "on and no earlier" than July 1, 2021. Though GDOE did not provide PDS with copies of the GTA Technical proposal that describes the GTA plan for installing the proposed services, PDS is aware of the timelines required to install the required services at each of the GDOE locations and also to transfer the existing GDOE numbers from the PDS network to the GTA network. At the time of bidding, GTA could not meet a performance timeline demanding that services start on July 1, 2021. As such, GTAcould not responsibly perform the requirements of the IFB, and it bid should have been rejected.

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## B. RULING Requested

PDS respectfully requests that the Office of Public Accountability Order the following:

(1) That DOE must disqualify GTA from eligibility for Award under this IFB, as GTA' price proposal violates Guam's telecommunications act, and as such was non-responsive to the IFB;

(2) That DOE must disqualify GTA from eligibility for Award under this IFB, as GTA could not have, as a responsible offeror, begun service as specified by the agency on July 1, 2021;

(3) That DOE must determine GTA to be a non-responsible offeror given GTA's anti-competitive actions at submitting artificially deflated pricing in violation of Guam law;

(4) That DOE must disqualify GTA from eligibility for Award under this IFB, as GTA's price proposal improperly conceals the costs of Guam's Gross Receipts Tax/Business Privilege Tax to customers "as an illegal surcharge over and above the price of goods represented to consumers" as similarly alleged in Superior Court of Guam action CV0217-21; and

(5) That DOE award GDOE 028-2021, to PDS as the lowest price responsive bidder to the IFB.

## C. SUPPORTING EXHIBITS, EVIDENCE OR DOCUMENTS

Submitted with this appeal are the following supporting exhibits, evidence, and documents:

(1) The original Invitation for Bid, and subsequent amendments are attached as **Attachment A**.

(2) The Bid Abstract is attached as **Attachment B**.

(3) The Bid Status form is attached as **Attachment C**.

(4) The Award Notification of June 4, 2021, is attached as **Attachment D**.

(5) PDS's Agency level protest is attached as **Attachment E**.

(6) The GDOE Protest Denial of June 29, 2021, is attached as **Attachment F.**

(7) The GTA Tariff for services provided under this procurement — Telecommunication Service Telecommunication Service — Digital Transmission Services — is attached as **Attachment G.**

(8) The complaint in CV0217-21 is attached as **Attachment H.**

PDS anticipates providing further documentation to substantiate its claims as GDOE submits the full contracting procurement record to the OPA, and allows PDS to review the procurement record in full.

## PART V: DECLARATION RE COURT ACTION AND RELATED PROCUREMENT APPEAL

Pursuant to 5 G.C.A. Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability 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, other than Superior Court of Guam action CV 0217-21 alleging deceptive pricing practices by GTA. The undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

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This Appeal has been filed with a contemporaneous appeal of GDOE IFB 027-2021, seeking telephone services. The grounds for PDS's agency protest of that IFB, the reasons for the agency's denial of that protest, and reasons for the appeal that followed are substantially similar.

**Respectfully submitted** this 14th day of July, 2021.

**RAZZANO WALSH & TORRES, P.C.**

By: _____
**JOSHUA D. WALSH**
*Attorneys for Appellant*
*Pacific Data Systems*

Gmail

**Jerrick Hernandez <jhernandez@guamopa.com>**

# OPA-PA-21-005 Notice of Receipt of Appeal

**Jerrick Hernandez** <jhernandez@guamopa.com> Thu, Jul 15, 2021 at 9:46 AM
To: ctcharfauros@gdoe.net, "Joshua D. Walsh" <jdwalsh@rwtguam.com>
Cc: "James L.G. Stake" <jlgstake@gdoe.net>

Hafa Adai,

Please see attached Notice of Receipt of Appeal for OPA-PA-21-005. This email will serve as an official notice in lieu of a transmittal via Fax.

Please confirm receipt of this email and the attached document. Thank you.

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Regards,

Jerrick J.J.G. Hernandez, MA, CGAP, CICA
Auditor
Office of Public Accountability – Guam
www.opaguam.org
Tel. (671) 475-0390 ext. 204
Fax (671) 472-7951



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