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GUAM DEPARTMENT OF EDUCATION

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**OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS**

In the Appeal of

APPEAL CASE NO. OPA-PA-21-004

Pacific Data Systems, Inc. (PDS),

**REBUTTAL TO COMMENTS ON AGENCY
REPORT**

Appellant.

COMES NOW the Guam Department of Education (GDOE), by and through its Legal Counsel James L.G. Stake, and files its Rebuttal to Comments on Agency Report, pursuant to 2 GAR Div. 4 §12104(c)(4), in response to the appeal of Pacific Data Systems, Inc. of GDOE Invitation for Bid (IFB) 027-2021, for Telecommunication Service – Plain Old Telephone Services (POTS).

I. RELEVANT BACKGROUND

On April 28, 2021, GDOE issued its IFB 027-2021 for Telecommunication Service – Plain Old Telephone Services (hereinafter referred to as the “IFB”). On May 27, 2021, GDOE received bids for the IFB from Pacific Data Systems, Inc. (PDS) and Teleguam Holdings LLC (GTA). On June 4, 2021, GDOE awarded to GTA as the lowest, most responsible and responsive bid for the IFB. On June 10, 2021, PDS protested the award for GTA. On June 29, 2021, GDOE issued its denial of PDS’s protest. On July 15, 2021, GDOE received the notice of receipt of appeal from the Office of Public Accountability (OPA). On July 23, 2021, GDOE filed the Procurement Record regarding the appeal, and on July 30, 2021 its Agency Report. On August 9, 2021, GDOE received PDS’s

1 Comments on the Agency Report and Agency Statement. The following is GDOE's Rebuttal to
2 Comments on the Agency Report.

3 **II. GDOE PROPERLY EVALUATED AND AWARDED TO GTA, AS THE LOWEST,**
4 **MOST RESPONSIVE AND RESPONSIBLE BIDDER IN ACCORDANCE WITH THE IFB**
5 **AND LAW.**

6 As previously argued, section 3.2.1 of the IFB states, the IFB shall be awarded to the lowest,
7 most responsive and responsible bid. See GDOE Procurement Record Bate Stamp (hereafter cited as
8 "GDOE") at 98. A responsible bidder is one with the capability in all respects to perform fully the
9 contract requirements, and the integrity and reliability which will assure good faith performance, and
10 a responsive bidder is one who has submitted a bid which conforms in all material respects to the
11 Invitation for Bids. See 5 GCA §§ 5201(f), 5201(g). GDOE evaluated GTA's bid and has
12 determined that they have the capability in all respects to perform fully the contract requirements, and
13 submitted a bid that conforms in all material respects to the IFB. See Procurement Record at 510.
14 GTA is also the lowest bidder. *Id.* at 509. Pursuant to Guam Procurement Law and the IFB, GDOE
15 properly awarded to GTA as the lowest, most responsible and responsive bid. *Id.* at 515.

16 As stated above, on April 28, 2021, GDOE issued the IFB. On May 17, 2021, GTA signed
17 Amendment 2 Acknowledgment Form, and on May 26, 2021, GTA signed its bid form that states, by
18 submission of this bid the company is making an offer to provide the services and products described
19 in GDOE IFB 027-2021. See GTA signed Bid Form and Amendment 2 Acknowledgment Form,
20 GDOE at 350 and 355. On June 4, 2021, GDOE analyzed the bids according to the IFB and the law.
21 See Analysis and Recommendation, GDOE at 509. Lastly, on June 4, 2021, GDOE awarded to GTA
22 in accordance to their bid, the IFB, and the law. See Notice of Award, GDOE at 515. Therefore,
23 GDOE properly evaluated and awarded the IFB.
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1 PDS's arguments¹ do not devalue or undermine GDOE's evaluation and award during the
2 procurement process, because GDOE properly evaluated and awarded pursuant to the IFB, GTA's
3 bid, and the law throughout the process. *See* GDOE at 350, 355, 509, & 515.

4 **III. GDOE PROPERLY EVALUATED THE IFB, AND THE OPA IS NOT THE PROPER**
5 **FORUM TO INVESTIGATE ALLEGATIONS REGARDING A SEPARATE PENDING**
6 **LAWSUIT.**

7 Guam Procurement law states that no criteria may be used in bid evaluation that are not set
8 forth in the IFB, and as previously mentioned GDOE evaluated and awarded in accordance to the
9 terms of the IFB and the law. *See* 5 GCA §§ 5211(e), 5211(g). In addition, the OPA is not the proper
10 forum for an investigation and enforcement of alleged violations² of the Telecommunications Act.
11 *See* 2 GAR Div. 4 §12112. PDS again alleges possible violations of law and GDOE should evaluate
12 and award the IFB pursuant to their allegations. This is incorrect and without legal support. As stated
13 above, GDOE shall evaluate and award according to the terms and conditions of the IFB. *See* 5 GCA
14 §§ 5211(e), 5211(g). Regarding jurisdiction, as previously argued, the OPA has decided on a directly
15 analogous case, and GDOE respectfully requests that the OPA also dismiss this appeal because the
16 enforcement and investigation of this subject matter rests with the Guam Public Utilities Commission
17 (GPUC). *See In the Appeal of JRN Air Conditioning & Refrigeration, Inc.*, OPA-PA-10-008 at 9-10;
18 *see also* 12 GCA §12207. Therefore, GDOE properly evaluated and awarded the IFB, and this matter
19 should be dismissed.
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22 ¹ PDS's arguments do not affect the evaluation and award process because GDOE properly evaluated
23 using the contents of the bids and the IFB. PDS now argues rigid enforcement issues, which GDOE has
24 the authority to address in numerous ways; however, it does not negatively affect the evaluation and award
25 during the IFB process because GDOE properly evaluated and awarded the bids to the terms of the IFB.
26 *See* 5 GCA §5237(a) (regarding a purchasing agency's authority to extend a contract).

27 ² To be clear, PDS has not provided authority to evaluate bids outside the terms of the IFB. In addition,
28 PDS has only provided allegations at this point, pursuant to a pending litigation between GTA and the
Office of the Attorney General of Guam. GDOE at 519.

1 **IV. PDS'S ARGUMENT REGARDING AN ALLEGED AUTOMATIC STAY IS**
2 **UNTIMELY AND PROHIBITED BY LAW.**

3 On June 4, 2021, GDOE awarded to GTA as the lowest, most responsible and responsive bid
4 for the IFB. *See* Notice of Award, GDOE at 515. On August 9, 2021, PDS now brings a brand new
5 issue regarding the Automatic Stay straight to the OPA.³ *See* PDS Comments on Agency Report at 5.
6 Under Guam Procurement Law, a protest shall be submitted in writing within fourteen (14) days after
7 such aggrieved person knows or should know of the facts giving rise thereto. *See* 5 GCA § 5425(a).
8 Procurement law strictly forbids PDS's brand new allegation regarding the automatic stay following
9 GDOE's award, more than sixty (60) days after the fact. *Id.* Therefore, GDOE respectfully requests
10 the OPA dismiss this additional claim as untimely along with the appeal. *Id.*

11 **V. GDOE PROVIDED THE PROCUREMENT RECORD IN ACCORDANCE WITH**
12 **THE PROCUREMENT RULES AND REGULATIONS.**

13 On July 23, 2021, GDOE filed the Procurement Record as required by this appeal, to the OPA
14 and PDS. Guam Procurement rules and regulations state, the head of a Purchasing Agency shall
15 submit to the OPA a complete copy of the procurement record relevant to the appeal within five (5)
16 working days of receiving notice of an Appeal, in chronological order where practicable, numbered
17 sequentially, tabbed, and indexed to identify the contents. *See* 2 GAR Div. 4 §§ 12104(c)(3), 12105.
18 GDOE submitted timely and in accordance with the requirements set forth in the procurement rules &
19 regulations.⁴ *See generally* GDOE Procurement Record. As stated above, GDOE filed the
20 Procurement Record to the tribunal OPA and to opposing counsel PDS. Regarding PDS's bid, GDOE
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25 ³ Guam Law mandates protesters first exhaust their administrative remedies prior to appealing to the OPA.
26 *See* 5 GCA §5425(a). Here, PDS has failed to exhaust their administrative remedies regarding this brand
27 new allegation because it was not raised as an issue in their June 10, 2021 protest.

1 included a supplemental confidentiality notice to the OPA, on August 9, 2021 regarding PDS's own
2 documents.⁵ Therefore, GDOE filed the Procurement Record as provided in the relevant rules and
3 regulations.

4 In conclusion and based on the aforementioned reasons, GDOE hereby requests that the OPA
5 dismiss this appeal in its entirety.

7 Dated: August 16, 2021

8 Respectfully submitted,

9 **GUAM DEPARTMENT OF EDUCATION**

10
11 By: 
12 **JAMES L.G. STAKE**
13 *Legal Counsel*

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16 (Footnote continued from previous page)

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18 ⁴ PDS did not provide legal authority for the requirement of a certified record. *See* PDS Comments on
19 Agency Report at 7. Without legal authority, GDOE is not aware of a requirement that it is statutorily
20 mandated to satisfy.

21 ⁵ GDOE provided PDS's bid in a limited capacity pursuant to this appeal. The procurement record was
22 filed to the OPA as the hearing tribunal of this protest, as well to opposing counsel and owner of the bid,
23 PDS. The OPA also did not post the entire procurement record on their website, only the table of
24 contents. Relevant procurement case law addresses inadvertent disclosures only where the protester
25 demonstrates that the recipient of the information received an unfair advantage, or that the protester was
26 otherwise competitively prejudiced by the disclosure. *See In the Matter of Inmarasat Government, Inc.*,
27 B- 419583 (2021) WL 2476481 at 7; *see also In Matter of: S & K Aerospace, LLC.*, B- 411648 (2015) WL
28 7348967 at 6 (The Comptroller General decided it will sustain a protest based on improper disclosure only
where the protester demonstrates that it was in some way competitively prejudiced by the disclosure).
This case is distinguishable, in that the IFB 027-2021 evaluation and award occurred more than one (1)
month before the submission of the procurement record for this appeal. To be clear, the submission of the
procurement record as required by this appeal, did not affect the evaluation and award process, and was
only provided to the OPA and the owner of the bid, PDS. There is no evidence of an unfair competitive
advantage or prejudice, because the procurement record was only provided to the OPA and PDS.