



Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

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

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Claire Pollard <cpollard@rwtguam.com>  
To: Jerrick Hernandez <jhernandez@guamopa.com>  
Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>

Tue, Aug 31, 2021 at 3:38 PM

Dear Mr. Hernandez:

Please see the following attached documents to be filed in the above-referenced matter.

- *Motion to Enforce Confidentiality of Appellant's Submissions; Motion to Release GTA's Bid Documents*
- *Motion for Injunctive Relief and Stay of Procurement Pending Final Resolution of Appeal*

Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,  
Claire Pollard

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**2 attachments****8.31.21 Motion to Enforce Confidentiality of Appellants Submissions.pdf**

154K

**8.31.21 Motion for Injunctive Relief and Stay of Procurement.pdf**

354K

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**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.

**CONSOLIDATED APPEAL NOS:  
OPA-PA-21-004  
OPA-PA-21-005**

**MOTION FOR INJUNCTIVE RELIEF  
AND STAY OF PROCUREMENT  
PENDING FINAL RESOLUTION OF  
APPEAL**

Appellant Pacific Daily Systems, Inc. (“PDS” or “Appellant”), by Appellant’s undersigned attorney, respectfully moves the Office of Public Accountability (“OPA”) for an immediate order determining that the statutory stay mandated by 5 GCA § 5425(g) has remained in place since the initiation of PDS’s protests of Guam Department of Education’s (“GDOE” or “Procuring Agency” or “Agency”) intended awards of IFB 027-2021 and IFB 028-2021 (the “IFBS”). PDS further moves the OPA for an order compelling GDOE, its agents, employees, successors, attorneys, and all persons in active concert and participation with them, from progressing forward with contract performance or acceptance of performance of the IFBS until final resolution of PDS’s consolidated protest, including any appeals.

Unless this motion is granted, PDS will suffer immediate and irreparable injury, loss, and damage if the Procuring Agency is permitted to accept performance under the IFBS prior to final resolution of PDS's protest, as more fully set forth in PDS's Notice of Appeal and papers filed in this action.<sup>1</sup> This motion is supported by the record currently before the OPA, the appended Memorandum in Support of Motion, and any argument that the OPA may entertain on this matter.

### **MEMORANDUM IN SUPPORT OF MOTION.**

#### **I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND.**

GDOE issued the IFBS for Telecommunication Service – Plain Old Telephone Services (“POTS”) and Telecommunication Service – Digital Transmission Services (“DTS”) on April 28, 2021. See Procurement Record (“PR”), Tab 13. PDS is the incumbent vendor who has provided, and continues to provide, these services. On May 27, 2021, two bidders, PDS and GTA, submitted bids in response to the GDOE bid invitation. *Id.* On June 4, 2021, GDOE sent PDS a Bid Status and Award Notification, notifying PDS that GTA was the intended awardee of both contracts. *Id.* On June 9 and 10, 2021, PDS timely submitted, and GDOE received, written, agency-level protests to GDOE of the intended awards to GTA. *Id.* On June 30, 2021, PDS received GDOE's denial of PDS's protests. PR, Tab 14. In response, PDS timely filed Notice of Appeals of GDOE's denial of PDS's protest before the OPA on July 14, 2021.

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<sup>1</sup> The protest appeals of IFB 027-2021 and IFB 028-2021 were consolidated by order of the OPA on August 30, 2021. Though PDS is here moving for injunctive relief, this motion should not be construed as altering PDS's legal position that, because of its timely protest, the statutory stay mandated by 5 GCA § 5425(g) has been in place since the inception its protests.

The Procurement Record and accompanying Agency Report were eventually provided, and PDS provided its Comments on those submissions on August 9, 2021. The provided record shows that since receiving PDS's protests on June 9 and 10, 2021, GDOE has proceeded further with the award of the contracts through contract negotiations, and that GDOE's actions constitute a further violation of law. *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, Guam, 2020 Guam 20, ¶ 148. ("once a party brings a timely protest, an automatic stay of procurement until final resolution of that protest is required.") (internal quotations, citations, and edits omitted). This appeal has not yet been resolved before the OPA.

## II. LEGAL ARGUMENT.

The OPA should provide PDS injunctive relief and confirm the stay of procurement. Enforcing a stay of procurement pursuant to 5 GCA § 5425(g) is within the powers of the OPA. *See In the Appeal of Morrico Equipment, LLC*, OPA-PA-15-014, OPA-PA-15-017, OPA-PA-16-001, p. 11 (finding that appellant had submitted timely protests under 5 GCA § 5425(a) and granting appellant's emergency motion to enforce stay of procurement required by 5 GCA § 5425(g)). GDOE has violated and continues to violate the automatic stay required by 5 GCA § 5425(g). Unless this motion is granted, PDS will suffer immediate and irreparable injury, loss, and damage if GDOE is permitted to accept performance under GDOE IFB 027-2021 prior to final resolution of PDS's protest.

PDS filed a timely, pre-award protest pursuant to 5 GCA § 5425(a). This timely protest automatically triggered the stay provision of 5 GCA § 5425(g). This provision

prohibits GDOE, the purchasing agency of the Territory of Guam in this matter, from proceeding further with the award of the contract prior to final resolution of PDS's protest and voids any such further action. *See* 5 GCA § 5425(g). The automatic stay provision remains in place from the date of the protest until the protest's final resolution. PDS's protest has not reached final resolution and the stay remains in place. Yet, GDOE has proceeded further with the award of the contract by continuing with contract negotiations of the award and acquiring signatures for the contract. Therefore, we ask that the OPA enforce the stay by providing injunctive relief.

**A. PDS has the right to protest under 5 GCA § 5425(a), and filed a timely protest.**

PDS's has the right to protest the Award under 5 GCA § 5425(a). Any actual bidder who may be aggrieved in connection with the award of a contract may protest to the head of a purchasing agency. *See* 5 GCA § 5425(a). PDS is an actual bidder for the IFBS. A party becomes "aggrieved" when they become aware of a violation of one of the procurement law's substantive provisions or the terms of the IFB. *See DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 84. On June 4, 2021, PDS became aware that DOE had selected for award an offeror — GTA — that both submitted prices that were in violation of law and that could not meet the performance dates specified by the agency in the IFBS. Pursuant to 5 GCA § 5425(a), PDS made their protest to the head of GDOE, the purchasing agency within fourteen (14) days after PDS learned of the facts giving rise to the protest. 5 GCA § 5425(a); *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, Amended

Opinion ¶ 77 citing *Guam Imaging*, 2004 Guam 14 ¶ 25. Therefore, PDS has brought proper and timely protests.

**B. PDS's timely protest automatically triggered a stay under 5425(g).**

PDS's protests triggered stays of procurement. The stay provision states, "...the Territory shall not proceed further with the solicitation or with the award of the contract prior to final resolution of such protest, and any such further action is void...." 5 GCA § 5425(g). To trigger this provision, the protest must first be a timely protest under either 5 GCA § 5425(a) or § 5480(a). 5 GCA § 5425(g). PDS's protest meets the statutory requirements of a timely protest under 5 GCA § 5425(a), as it was brought within 14 days of the event that triggered PDS's aggrievement, i.e., the selection of GTA for award despite that offeror's illegal price submissions and inability to perform as specified in the IFBS. Thus, PDS's protests triggered the stay provision of 5 GCA § 5425(g) on June 9 and 10, 2021, when they were filed.

PDS's protest triggered the stay *automatically*. Guam courts have "consistently held that the stay following a timely, pre-award procurement protest applies 'automatically.'" *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 148. Once a party brings a timely protest, an automatic stay of procurement until final resolution of that protest is required. *Id.* No court order is necessary for the automatic stay to become effective. *Id.* The automatic stay is a legal entitlement that vests upon a timely, pre-award protest. *Id.* Thus, PDS's timely protest automatically triggered a stay, which has been in place upon protest on June 10, 2021.

**C. The automatic stay remains in place throughout the appeal process.**

The automatic stay in this matter is still in place. The OPA has held that “final resolution” of an appeal would include the time period of an appeal after protest. *In the Appeal of [IBSS]*, OPA-PA-08-012, at pp 9-10. The automatic stay set forth in 5 GCA § 5425(g) remains in effect from the date of the protest and continues until final resolution of the action by the Superior Court. *DFS Guam L.P. v. A.B. Won Pat Int’l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 148. Because the automatic stay is in place from the date of the protest at least through a decision by the Superior Court, the automatic stay must necessarily remain in place from the date of the protest to the final decision regarding the protest by the OPA. The automatic stay in this matter came into effect upon date of PDS’s protest. PDS timely filed a notice of appeal to GDOE’s protest decision before the OPA on July 14, 2021. The OPA has not yet decided PDS’s appeal. Thus, as this protest has not yet reached final resolution, the automatic stay, triggered on June 10, 2021, has and will remain in place throughout the appeal process.

**D. GDOE is in violation of the stay required by 5 GCA § 5425(g).**

GDOE is in violation of the automatic stay required by 5 GCA § 5425(g). The statute provides, in the event of a timely protest such as this, the government agency “shall not proceed further with the solicitation or with the award of the contract prior to final resolution of such protest, and any such further action is void....” 5 GCA § 5425(g). GDOE has proceeded forward with the award of the contract through continued contract negotiations with GTA for the contested award and by acquiring

signatures for said contract. The Procurement Record shows that, shortly after receiving PDS's protests, GDOE has proceeded further with the award of the contract for this and its parallel telecommunication procurement through contract negotiations and attempted contract execution. *See*, Procurement Record OPA-PA-004, 15; 183-184; Procurement Record of OPA-PA-005, 15; 240-248. GDOE's actions violated the automatic stay provision of 5 GCA § 5425(g). Pursuant to the statute, all GDOE's actions in furtherance of this award, from receipt of PDS's protest on June 10, 2021, are void.

**E. PDS will suffer immediate and irreparable injury, loss, and damage if GDOE is allowed to continue to violate the automatic stay prior to final resolution of PDS's protest.**

Guam law provides that if Appellant PDS is successful in its protest, PDS "shall be entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, excluding attorney's fees...." 5 GCA §5425(h). GDOE's pushing forward with the procurement award to GTA hampers any eventual remedy PDS may have to become an awardee of the solicitation, since the Territory may be able to merely ratify and affirm GTA's contract regardless of the outcome of the instant appeal. 5 GCA § 5425(a)(1); (2).

Since PDS may only be able to recover the costs of its bid if the stay is not honored and its protest appeal is sustained by the OPA, PDS will be irreparably injured. Irreparable injury is defined as injury for which there is no adequate remedy at law. *Shin v. Fujita Kanko Guam, Inc.*, CVA 07-002, 2007 WL 4348300 (Guam Dec. 6, 2007); *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 716-17 (Fed. Cl.




2006). The Federal Claims court has held that where an aggrieved offeror can only gain the costs of bid preparation in a suit for damages, and not anticipated profits, such a bid protester is irreparably harmed. *See Bannum, Inc. v. United States*, 60 Fed. Cl. 718, 730 (Fed. Cl. 2004) *citing Essex Electro Eng'rs, Inc. v. United States*, 3 Cl.Ct. 277, 287 (1983), *aff'd*, 757 F.2d 247 (Fed.Cir.1985). This is the exact situation faced by PDS, and necessitates the action requested by PDS.

### III. CONCLUSION.

PDS respectfully requests that the OPA enforce the stay of procurement by issuing an order confirming that the automatic stay under 5 GCA §5425(g) was triggered upon the filing of PDS's protests, and that the stay continues to be in force until final resolution of these protests including any appeals. The OPA should grant injunctive relief on these issues, and declare that all actions taken by DOE since the protests in furtherance of the IFBS are void.

**Respectfully submitted** this 31<sup>st</sup> day of August 2021.

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

By:   
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