

1 **GUAM DEPARTMENT OF EDUCATION**

2 James L.G. Stake, Legal Counsel
3 501 Mariner Avenue
4 Barrigada, Guam 96913
5 Telephone: (671) 300-1537
6 E-mail: legal-admin@gdoe.net
7 Attorney for Guam Department of Education

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: Sep 17, 2021

TIME: 4:18 PM BY: FOJ

FILE NO OPA-PA: 21-004 & 21-005

6 **OFFICE OF THE PUBLIC AUDITOR**
7 **PROCUREMENT APPEALS**

8 In the Appeal of

9 Pacific Data Systems, Inc. (PDS),

11 Appellant.

APPEAL CASE NOS.: OPA-PA-21-004 and
OPA-PA-21-005

**GDOE'S REPLY TO PDS'S OPPOSITION
TO MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION**

13 **I. INTRODUCTION**

14 On July 15, 2021, Appellant Pacific Data Systems, Inc. (Appellant or PDS) appealed the
15 denial of its protest for Invitation for Bid 027-2021 and 028-2021 for Telecommunication
16 Services (hereafter "IFB 027" and "IFB 028"), to the Office of Public Accountability (OPA). On
17 August 31, 2021, Appellee Guam Department of Education (GDOE) filed its Motion to Dismiss
18 for Lack of Subject Matter Jurisdiction. On September 8, 2021, PDS filed its Opposition to
19 GDOE's Motion. The following is GDOE's Reply to PDS's Opposition.

20 **II. PDS'S OPPOSITION IS INCORRECT BECAUSE PDS'S PROTEST DOES**
21 **REQUIRE THE OPA TO DETERMINE IF GTA IS IN COMPLIANCE WITH THE**
22 **GUAM TELECOMMUNICATIONS ACT AND THE OPA DOES NOT HAVE**
23 **JURISDICTION TO MAKE SUCH DETERMINATION.**

24 **1. PDS does not dispute that the OPA has no jurisdiction over alleged violations**
25 **of the Guam Telecommunications Act and now PDS is forced to "change" their argument;**
26 **but their "new" argument is still the same.**

1 PDS does not dispute that the OPA has no jurisdiction over alleged violations of the
2 Guam Telecommunications Act (the "Act"). Consequently, PDS has no choice but to now argue
3 that they are supposedly not asking the OPA to determine GTA's compliance with the Act, even
4 though their Notice of Appeal of IFB 027 and 028 clearly makes numerous and specific
5 references and citations to the Act. *See* Appellant's Opposition to Motion to Dismiss at 5; *see*
6 *also generally* Appellant's Notice of Appeal of IFB 027 & 028. PDS is now changing their tune.
7 But to be clear, PDS is still singing the same old song.

8 PDS's protest and subsequent appeal are absolutely based on their **allegations that**
9 **GTA's pricing violates the Guam Telecommunications Act.**¹ *See* Appellant's Notice of
10 Appeal of IFB 027 & 028 at 3-5; *see also* Appellant's Opposition to Motion to Dismiss at 5.
11 Specifically, PDS claims that because GTA's price supposedly violates the Act's mandates on
12 anti-competitive practices, GTA is supposedly non-responsible and non-responsive, and therefore
13 the award of the IFBs was supposedly incorrect because of such alleged violation of the Act; PDS
14 even specifically references the Act: 12 GCA §12205(d). *See* Appellant's Notice of Appeal of
15 IFB 027 & 028 at 5. PDS is feigning a "new" argument when it is exactly the same. *Id.* PDS
16 does not dispute that the OPA has no jurisdiction over alleged violations of the Act and therefore
17 this protest should be dismissed. *See* 2 GAR Div. 4 §12112.

18
19 **2. The OPA has already decided this issue in an analogous OPA case.**

20 This case is clearly analogous to *In the Appeal of JRN Air Conditioning & Refrigeration,*
21 *Inc.*, OPA-PA-10-008, despite PDS claiming otherwise. *See* Appellant's Opposition to Motion to
22 Dismiss at 4.

23
24
25 ¹ PDS is only able to reference the Attorney General's complaint filed in the Superior Court of
26 Guam. *See* Appellant's Notice of Appeal of IFB 027 & 028 Attachment H at 139 and 201. PDS
27 fails to provide any evidence of an actual violation of the Act.

1 *In the Appeal of JRN Air Conditioning & Refrigeration, Inc.*, the Appellant JRN alleged
2 that the bid award was defective because Appellee J&B failed to be a responsive bidder by not
3 complying with laws that were outside the jurisdiction of the OPA: 5 GCA § 5801 and § 5802.
4 *Id.* at 8. Does that sound familiar? In that case, the Public Auditor stated that to decide those
5 issues, they were required to determine whether J&B complied with 5 GCA §5801 and § 5802,
6 which was a determination held to be outside of the OPA's express authority and jurisdiction. *Id.*
7 at 8. Similarly, PDS makes allegations based on laws outside the jurisdiction of the OPA. *See*
8 Appellant's Notice of Appeal of IFB 027 & 028 at 3-4. It is clear that PDS's protest and
9 allegations against GTA are analogous to *In the Appeal of JRN Air Conditioning & Refrigeration,*
10 *Inc.*, and warrant applying the reasoning and ruling in that case: the OPA does not have
11 jurisdiction to make determinations based on laws outside its authority.

12 The Public Auditor held that jurisdiction rests with the Guam Department of Labor
13 (GDOL) on the issues regarding whether J&B failed to comply with 5 GCA §§ 5801 and 5802
14 and not with the Public Auditor in *In the Appeal of JRN Air Conditioning & Refrigeration, Inc.*
15 Here, the Guam Public Utilities Commission (GPUC) shall have the authority and jurisdiction to
16 implement and enforce the provisions of the Act through rulemakings or orders. *See* 12 GCA
17 §12204(b). GPUC is the proper forum for complaints of violations of the Act, and GPUC shall
18 investigate and issue final orders, not the OPA. *See* 12 GCA §§ 12207, 12311. Therefore, the
19 OPA should dismiss this case because jurisdiction over this matter involving alleged violations of
20 the Act rests with GPUC not the OPA.

21
22 **3. Guam Procurement law provides no authority for the OPA to determine**
23 **compliance with the Guam Telecommunications Act.**

24 The law is clear. The OPA was not bestowed with jurisdiction to determine compliance
25 with the Guam Telecommunications Act, by GTA or anyone else. *See* 2 GAR Div. 4 § 12112.
26 The Public Auditor shall determine whether a decision on a protest of method of selection,
27 solicitation or award of a contract, or entitlement to costs is in accordance with the statutes,
28

1 regulations, and the terms and conditions of the solicitation. *Id.* PDS's allegations that GTA
2 supposedly violated the Act are not a part of the selection, solicitation or award of a contract and
3 are not found anywhere in the terms and conditions of the solicitation. *Id.* The OPA is without
4 jurisdiction to entertain PDS's allegations and therefore this matter should be dismissed.

5 It is important to note that PDS does not deny that the OPA's jurisdiction is specific and
6 limited to procurement. PDS reiterates that the Public Auditor has the power to promote the
7 integrity of the procurement process and purposes of Guam's procurement laws. *See* Appellant's
8 Opposition to Motion to Dismiss at 4 (citing 5 GCA §5703 which states, the Public Auditor's
9 jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes
10 of 5 GCA Chapter 5, Guam Procurement Law). However, the Guam Procurement law sets forth
11 its specific purposes and its specific authority. Unfortunately for PDS, their allegations based on
12 the Guam Telecommunications Act are outside the express purpose and authority bestowed on the
13 OPA by the Guam Procurement law.

14 In conclusion, for the aforementioned reasons, GDOE respectfully requests that the OPA
15 dismiss this matter in its entirety.

16
17
18
19 Respectfully submitted this 17th day of September, 2021.

20
21 **GUAM DEPARTMENT OF EDUCATION**

22 By: 

23 **JAMES L.G. STAKE**
24 *Legal Counsel*