

1 BERMAN O'CONNOR & MANN
Suite 503, Bank of Guam Bldg.
2 111 Chalan Santo Papa
Hagåtña, Guam 96910
3 Telephone No.: (671) 477-2778
Facsimile No.: (671) 477-4366

4 Attorneys for Appellant:
5 PACIFIC DATA SYSTEMS, INC.

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7 **OFFICE OF PUBLIC ACCOUNTABILITY**

8 Docket No. OPA-PA 14-006

9 In the Appeal of
10 PACIFIC DATA SYSTEMS, INC.,
11 Appellant.

**OPPOSITION OF PACIFIC DATA
SYSTEMS, INC. TO MOTION TO
DECLINE**

12 The Appellant Pacific Data Systems, Inc. ("PDS") opposes the Motion to
13 Decline filed by the General Services Agency ("GSA").

14 GSA claims that this appeal may not proceed because of a pending
15 judicial proceeding. 2 GAR Div. 4 § 12103(b) provides:

16 (b) Effect of Judicial Proceedings. If an action
17 concerning the procurement under Appeal has
18 commenced in court, the Public Auditor shall not act
19 on the Appeal except to notify the parties and decline
the matter due to Judicial involvement. This Section
shall not apply where a court requests the decision of
the Public Auditor ...

20 The issue is thus whether there is any court action concerning the procurement under
21 appeal. There clearly is not.

22 The Public Auditor may recall the Consolidated Decision in three appeals,
23 OPA-PA-12-016, 017, and 018 that was entered on March 6, 2013. All three appeals
24 arose from IFB GSA-064-11. In OPA-PA-12-016, the Public Auditor concluded that GTA
25 had offered a phone that was not compliant with the IFB in that it did not have a digital
26 display, and affirmed the award of this part of the procurement to PDS. GTA appealed
27 the Public Auditor's Decision. *See Teleguam Holdings LLC and its Wholly Owned*
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2 *Subsidiaries v. Territory of Guam, et al.*, CV0333-13. The Hon. Anita A. Sukola upheld the
3 decision of the Public Auditor and ordered GTA's Complaint dismissed with prejudice.
4 Final Judgment was entered on March 17, 2014, and GTA appealed to the Guam
5 Supreme Court on April 21, 2014. However, GTA did not appeal the merits of Judge
6 Sukola's Decision. Its appeal is limited only to the issue of whether Judge Sukola erred
7 in requiring GTA to post a bond in order to obtain a Temporary Restraining Order.
8 GTA had been ordered to post a bond in the amount of \$44,661.00. GTA argued that
9 the automatic stay remained in effect and, as a result, it should not have been required
10 to post a bond. Judge Sukola, however, ordered that the \$44,661.00 be paid to the
11 Government of Guam and PDS.

12 PDS attached a copy of GTA's Opening Brief on Appeal in OPA-PA-14-
13 005. A review of that Brief reveals that the only relief requested by GTA is that the
14 bond it posted be returned to it and not paid to the Government and PDS. That request
15 is explicitly stated in the Conclusion. Whether or not the Government and PDS are
16 ordered to return the \$44,661.00 to GTA is entirely irrelevant to the present PDS appeal.
17 The disposition by the Supreme Court of GTA's appeal can have no effect whatsoever
18 on the outcome of the present appeal. It is therefore not "... an action concerning the
19 procurement under Appeal ..."

20 To the contrary, this appeal relates only by the attempt by PDS to comply
21 with its obligations under certain Purchase Orders issued to it for installation of
22 telecommunications equipment and service to the Department of Public Health and
23 Social Services ("DPHSS"), and the Guam Fire Department. As set out in the PDS
24 appeal, on May 30, 2014, GSA issued two 10 day Default Notices to PDS covering
25 telecommunication equipment and services to DPHSS and the Fire Department. By
26 letter dated June 10, 2014, GSA terminated these Purchase Orders on the grounds that
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2 PDS had not timely complied with the Purchase Orders. Although GSA's June 10 letter
3 did not contain the mandatory language informing the contractor of its rights to judicial
4 or administrative review, *see* 5 GCA § 5427, it did instruct PDS that it was not allowed
5 onto the premises of either DPHSS or the Fire Department to complete the Purchase
6 Orders. PDS got the message, and has appealed pursuant to 5 GCA § 5706 and 2 GAR
7 Div. § 12301.

8 At the hearing, PDS will present evidence that on December 13, 2013, GTA
9 filed a Motion for Contempt, seeking to hold GSA in contempt for issuing certain
10 Purchase Orders under this procurement, and PDS in contempt for working on those
11 Purchase Orders. There were hearings on GTA's Motion on December 24, 2013 and
12 January 9, 2014. GSA and PDS reached a mutual agreement not to proceed further with
13 the Purchase Orders regarding this part of the procurement pending the resolution by
14 the Court of GTA's Motion for Contempt. Judge Sukola denied the Motion for
15 Contempt 87 days later on March 10, 2014, at which time PDS was once again free to
16 commence work on the Purchase Orders. However, GSA has refused to take these 87
17 days into account as an excusable delay.

18 In addition, the evidence at the hearing will show that PDS had in fact
19 completed all work required for the Fire Department, and that the Notice of
20 Termination regarding the Fire Department was improper. As to DPHSS, the evidence
21 at the hearing will show that GSA sent a 10 day notice of default on June 2, 2014. It had
22 previously sent a notice of default regarding this work on May 30, 2014, but PDS
23 reasonably believed the 10 day cure period would run from the latest notice on June 2.
24 That meant PDS had until June 12 to cure the alleged default. GSA basically tricked
25 PDS by terminating its services 2 days early on June 10. The evidence at the hearing
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will show that if PDS had been allowed until June 12 to cure the alleged default at DPHSS, it would have done so.

It may thus be seen that there is no overlap between the limited issue raised by GTA in its appeal to the Guam Supreme Court, and the limited issue in the present appeal. In fact, it is most unfortunate that GSA has taken the position it has. It may be predicted that it will take around a year or so from now for the resolution of GTA's appeal to the Supreme Court. In the meanwhile, both GSA and PDS will be denied the benefit of the lowest and best bidder providing equipment and service to the DPHSS and Fire Department.

PDS also notes that at the time it received the Notice of Default regarding DPHSS, it had already installed 686 out of the 709 required telephone lines, all of which it was required to disconnect. To the knowledge of PDS, neither DPHSS nor the Fire Department wanted a change of vendors. This is purely the doing of GSA, and PDS respectfully submits that the Public Auditor should look closely into the circumstances prompting GSA's action.

The other pending court case that GSA refers to is a complete red herring. The Public Auditor may recall that in OPA-PA-12-018, the Public Auditor concluded that it was appropriate for GSA to provide that only one bidder would be awarded the contract for the GGWAN system. That is an entirely different part of IFB GSA-064-11, and has nothing whatsoever to do with the present PDS appeal. GTA did appeal the Public Auditor's Decision in the GGWAN matter in CV0334-13, and trial is set for August 18, 2014. However, the result of the trial in that case will relate only to the GGWAN issue, and can have no effect on the present appeal.

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No further delay should be tolerated regarding the implementation of this procurement. GSA's Motion to Decline should be rejected, and this appeal processed as expeditiously as possible.

DATED this 17th day of July, 2014.

Respectfully submitted,

BERMAN O'CONNOR & MANN
Attorneys for Appellant
PACIFIC DATA SYSTEMS, INC.

By: 
BILL R. MANN