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7
8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
9 **GOVERNMENT OF GUAM**

10 IN THE APPEAL OF :

11 PACIFIC DATA SYSTEMS, INC.

12 Appellant.

CASE NO: OPA-PA 14-003

**GUAM VISITORS BUREAU
PREHEARING BRIEF, WITNESS &
EXHIBIT LIST**

13 **PRE-HEARING BRIEF**

14 Guam Visitors Bureau ("GVB") submits its Agency Statement, filed as part of its Agency
15 Report on May 1, 2014, as setting forth its position in this matter. A copy of said Agency Statement is
16 attached hereto in lieu of a repeating the same arguments under title of a Pre-Hearing Brief. In
17 particular, the GVB maintains that PDS' protest was untimely and awaits the OPA's decision on its
18 Motion to Dismiss.

19
20 **WITNESS LIST**

21 GVB submits its witness list as follows:

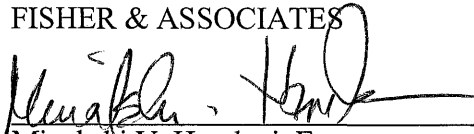
- 22 1. Karl A. Pangelinan, GVB General Manager
23 2. Jon Nathan P. Denight, GVB Deputy General Manager
24 3. Antonio "Tony" Muña, Jr., GVB Computer Specialist
25 4. GVB reserves the right to call witnesses listed on Appellant's Witness List.
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1 **EXHIBIT LIST**

2 GVB submits its exhibit list as the documents filed on April 23, 2014 as part of the Agency
3 Procurement Record, and on May 1, 2014 as part of the Agency Report.

4 Submitted this 1st day of June, 2014.

6 FISHER & ASSOCIATES

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8 Minakshi V. Hemlani, Esq.
9 Counsel for GVB

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9 **GOVERNMENT OF GUAM**

10 IN THE APPEAL OF :

CASE NO: OPA-PA 14-003

11 PACIFIC DATA SYSTEMS, INC.

AGENCY STATEMENT

12 Appellant.

13 **COMES NOW** Guam Visitors Bureau (“GVB”), by and through undersigned counsel of
14 record, and submits its Agency Statement in response to Appellant Pacific Data System, Inc.’s
15 procurement appeal filed April 16, 2014. This Agency Statement is submitted pursuant to 2 Guam
16 Admin. R. & Reg. 12105(g).

17 **I.**

18 **STATEMENT OF FACTS**

19 On January 31, 2014, the GVB issued an invitation for interested parties to submit bids for the
20 assessment of existing CCTV surveillance systems and design-build-upgrade new additional CCTV
21 infrastructure in the Tumon area, including maintenance services and 24/7 system monitoring (Multi-
22 Step Bid No. GVB-2014-002MS). *See Agency Procurement Record at Tab E.* Two offerors, Pacific
23 Data Systems, Inc. (“PDS”) and G4S Security Systems, Inc. (“G4S”) submitted bids that were opened
24 on February 17, 2014. The sealed bid costs were opened publicly on February 26, 2014. *See Agency*
25 *Procurement Record at Tab A.*

26 On February 27, 2014, the GVB sent a Notice of Award to G4S as the lowest responsive and
27 responsible offeror. *See Agency Procurement Record at Tab B.* On the same date, a Notice of Non-
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1 Selection was sent to PDS along with the Abstract for review. *See Agency Procurement Record at Tab*
2 *B.*

3 On March 4, 2014, PDS made a written request under the Freedom of Information Act
4 (“FOIA”). *See Agency Procurement Record at Tab B.* On March 6, 2014, the GVB sent a letter to PDS
5 documenting their meeting of March 5, 2014, wherein the parties discussed PDS’ concerns regarding
6 the disparity of prices of items offered to the GVB. *See Agency Report at Tab H; Agency Procurement*
7 *Record at Tab B.* The GVB responded to the FOIA request in accordance with law on March 10, 2014.
8 *See Agency Procurement Record at Tab B.* On the following date, PDS repeated their FOIA request for
9 a copy of the bid package submitted by G4S. *See Agency Procurement Record at Tab B.* The GVB
10 responded on March 13, 2014, explaining that pursuant to 2 GAR § 3109(v)(2)(c), the technical offer of
11 a successful bidder may only be disclosed after an award. *See Agency Procurement Record at Tab B.*
12 PDS admits that “[t]o the best of PDS’ knowledge no formal award has been issued by GVB in this
13 procurement.” *See Part IV, PDS Procurement Appeal, filed April 16, 2014.*

14
15 On March 24, 2014, PDS submitted a bid protest alleging that the GVB did not undertake a
16 proper evaluation of the PDS and G4S bids, and failed to provide PDS with copies of G4S bid
17 documents. *See Agency Report at Tab A; Agency Procurement Record at Tab B.* The protest was
18 rejected on April 1, 2014, as without merit and out of time. *See Agency Report at Tab H; Agency*
19 *Procurement Record at Tab B.*

20 II.

21 MEMORANDUM OF POINTS & AUTHORITIES

22 A. PDS’ PROTEST IS UNTIMELY AND SHOULD BE DISMISSED.

23 Title 5 GCA § 5425(a) Right to Protest states in part, “[a]ny actual or prospective bidder,
24 offeror, or contractor who may be aggrieved in connection with the method of source selection,
25 solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of
26 Public Works or the head of a purchasing agency. The protest shall be submitted in writing within
27 fourteen (14) days after such aggrieved person knows or should know of the facts giving rise
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1 thereto.” See also 26 GAR §§ 16901(c)(1); *Guam Imaging Consultants, Inc. v. GMHA*, 2004 Guam
2 15. Pursuant to 26 GAR §§ 16901(c)(1), protests filed after the fourteen (14) day period after the
3 protestor knows of should have known of the facts giving rise to the protest shall not be considered.

4 PDS received a Notice of Non-Selection on February 27, 2014, and was aware of the facts
5 alleged to support its protest no later than March 5, 2014; after the meeting held between the GVB
6 and PDS wherein the parties discussed PDS’ concerns regarding the disparity of prices of items offered
7 to the GVB. Therefore, any written protest should have been submitted to the GVB within 14 days of
8 said meeting, or by March 19, 2014. However, PDS did not submit its bid protest until March 24,
9 2014 – approximately 19 days after it knew of the facts giving rise to its protest. PDS’ protest is
10 therefore untimely and should be dismissed.

11 **B. GVB PROPERLY EVALUATED BOTH PDS AND G4S BIDS.**

12 Title 5 GCA § 5211 Competitive Sealed Bidding, Subsection (g) Award states in part, “[t]he
13 contract shall be awarded with reasonable promptness by written notice to the lowest responsible
14 bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids and whose
15 bid amount is sufficient to comply with Article 13 of this Chapter, if applicable.” 5 GCA § 5211(g)
16 Subsection (e) Bid Acceptance and Bid Evaluation states in relevant part, “[b]ids shall be evaluated
17 based on the requirements set forth in the Invitation for Bids, which may include criteria to
18 determine acceptability such as inspection, testing, quality, workmanship, delivery and suitability for
19 a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for
20 award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle
21 costs. The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be
22 used in bid evaluations that are not set forth in the Invitation for Bids.” 5 GCA § 5211(e)
23

24 The General Terms and Conditions of Multi-Step Bid No. GVB-2014-002MS, under provision
25 16, sets forth the standard for determination of most fair, reasonable, responsive and responsible bidder.
26 Specifically, “[i]n determining the MOST FAIR, REASONBALE, RESPONSIVE, AND
27 RESPONSIBLE BIDDER, the GVB GM&CPO shall be guided by the following:
28

- 1 a) TOTAL Price of items offered in Bid Cost and SUBMITTED RESPONSIVELY AND
- 2 RESPONSIBLY TO THIS BID'S INSTRUCTION TO ENSURE A LEVEL
- 3 COMPETITIVE FIELD.
- 4 b) The ability, capacity and skill of the Bidder to perform.
- 5 c) Whether the Bidder can perform promptly or within the specified time.
- 6 d) The quality of past performance of the Bidder with regards to awards previously made to
- 7 him.
- 8 e) The previous and existing compliance by the Bidder with laws and regulations relative to
- 9 procurement.
- 10 f) The sufficiency of financial resources and ability of the Bidder to perform.
- 11 g) The ability of the Bidder to provide future maintenance and services for the subject of the
- 12 award.
- 13 h) The compliance with all of the conditions to the Multi-Step Bid No. GVB-2014-002MS.”

14 *See page 8 of Multi-Step Bid No. GVB-2014-002MS, Agency Procurement Record at Tab E.*

15 Provision 22 of the General Terms and Conditions states in part, “[a]ward shall be made to the

16 lowest responsible and responsive bidder, whose **bid is determined to be the most advantageous to**

17 **the Government**, taking into consideration the evaluation factors set forth in this solicitation. *See page*

18 *9 of Multi-Step Bid No. GVB-2014-002MS, Agency Procurement Record at Tab E.*

19 The GVB evaluated and scored the technical bids submitted by PDS and G4S in accordance

20 with criteria set forth under A-2. Phase I: Maximum Score Points for Technical Bid Criteria. *See page*

21 *33 of Multi-Step Bid No. GVB-2014-002MS, Agency Procurement Record at Tab E.* Under Phase I,

22 G4S scored 92.5 out of 100 total points and was deemed “acceptable” to continue to Phase II. PDS

23 scored 69.5 out of 100 total points, falling in the “potentially acceptable” range. *See Technical Bid*

24 *Evaluation Score Summary – Certified, Agency Report at Tab F.* Pursuant to 2 GAR §3109(t)(5), a

25 determination was made to meet with PDS and discuss their unpriced “potentially acceptable” technical

26 proposal. PDS’ proposal was ultimately determined acceptable to continue to Phase II. *See Agency*

27 *Report at Tab G.*

28 Under Phase II, the GVB evaluated and scored bid costs submitted by PDS and G4S in

accordance with criteria set forth under B-13: Bid Cost: Evaluation and Selection of Award. *See page*

50 of Multi-Step Bid No. GVB-2014-002MS, Agency Procurement Record at Tab E. G4S was

determined as the bidder whose submission met bid specifications at the most competitive price. *See*

1 *Multi-Step Bid No. GVB-2014-002MS CCTV Surveillance System Phase II: Bid Cost Evaluation*
2 *Summary, Agency Report at Tab F.*

3 PDS cites to 2 GAR § 3109(m)(3) in support of its contention that the disparity of prices of
4 items offered should have alerted the GVB to a possible mistake in bid costs. According to PDS, “[a]n
5 ‘apples to apples’ comparison of the G4S and PDS bids should have called into question whether the
6 bidders were actually bidding on the same scope of work and GVB should have undertaken a
7 confirmation or clarification from the bidders of the exact work that was to be provided or included in
8 the bids submitted.” *See Part IV(A), PDS Procurement Appeal, filed April 16, 2014.*

9 In this case, the GVB had already evaluated and scored the technical bids submitted by G4S and
10 PDS under Phase I. There was no reason for the GVB to question the scope of work for which G4S
11 submitted its bid cost under Phase II. Moreover, 2 GAR § 3109(m)(3) states that “[i]f the bidder alleges
12 mistake, the bid may be corrected or withdrawn if the conditions set forth in Subsections 3109(m)(4)
13 through 3109(m)(6) of this Section are met.” 2 GAR § 3109(m)(3) On February 27, 2014, the GVB
14 sent the Notice of Award to G4S and Notice of Non-Selection to PDS. Both bidders received a copy of
15 the Abstract with Bid Cost form. On February 28, 2014, the GVB sent an email to G4S requesting
16 reply and confirmation. *See Agency Procurement Record at Tab B.* At no time has G4S alleged a
17 mistake in bid cost.

18 Based on the foregoing, the GVB properly evaluated both PDS and G4S bids pursuant to 5
19 GCA § 5211, in accordance with the criteria set forth in the multi-step bid, and determined that G4S
20 was the most responsive and responsible bidder who submitted an offer that met both the Technical and
21 Bid Cost specifications.

22 **C. GVB RESPONDED TO PDS’ FOIA REQUEST IN ACCORDANCE WITH LAW.**

23 The GVB responded to PDS’ Freedom of Information request in accordance with law. A copy
24 of the bid package submitted by G4S was not provided because 5 GCA § 101018(i) Limitation on Right
25 of Inspection states that “[a]ll existing privileges or confidential records or other information
26 expressly protected under the law shall not be abrogated by this Act” and, pursuant to 2 GAR §
27 3109(v)(2)(c), an unpriced technical offer of a successful bidder may only be disclosed after an
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1 award has been made. 5 GCA § 101018(i); 2 GAR § 3109(v)(2)(c) The GVB has not issued formal
2 award for this multi-step bid. In fact, PDS admits that “[t]o the best of PDS’ knowledge no formal
3 award has been issued by GVB in this procurement.” *See Part IV, PDS Procurement Appeal, filed*
4 *April 16, 2014.*

5 If PDS contends that a violation of the Freedom of Information Act has occurred, this
6 procurement appeal is not the proper forum in which to bring such contention. The Act itself provides
7 the manner in which a person may enforce their right to inspect or receive copies of public records. *See*
8 *5 GCA §10111.*

9 **D. GVB SHOULD BE AWARDED ATTORNEY’S FEES AND COSTS.**

10 The Public Auditor has “the power to assess reasonable costs including reasonable attorney
11 fees incurred by the government, including its autonomous agencies and public corporations, against
12 a protestant upon its finding that the protest was made fraudulently, frivolously or solely to disrupt
13 the procurement process.” 5 GCA § 5424(h)(2)

14 The history of procurement appeals filed by PDS includes the following cases: OPA-PA-12-
15 017, OPA-PA-12-014, OPA-PA-12-012, OPA-PA-12-011, OPA-PA-12-009, OPA-PA-12-006,
16 OPA-PA-12-005, OPA-PA-12-004, OPA-PA-12-0003, OPA-PA-12-002, OPA-PA-11-011, and
17 OPA-PA-10-005. Of the twelve (12) cases listed, at least half were dismissed. The GVB submits
18 that this pattern of filing procurement appeals, half of which result in dismissal, suggests a frivolous
19 intent on the part of the PDS to disrupt the procurement process. Therefore, the GVB should be
20 awarded attorney’s fees and costs against PDS for the instant appeal.

21 **III.**

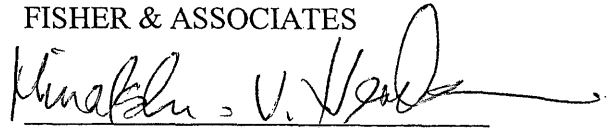
22 **CONCLUSION**

23 The protest filed by PDS was untimely and this procurement appeal should be dismissed.
24 Even if said protest was timely, the GVB properly evaluated both PDS and G4S bids pursuant to 5
25 GCA § 5211, in accordance with the criteria set forth in the multi-step bid, and determined that G4S
26 was the most responsive and responsible bidder who submitted an offer that met both the Technical and
27 Bid Cost specifications. In addition, the GVB responded to PDS’ Freedom of Information request in
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1 accordance with law and, considering PDS' pattern of filing procurement appeals, half of which result
2 in dismissal, the GVB should be awarded attorney's fees and costs for the instant appeal.

3 Submitted this 1st day of May, 2014.
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5 FISHER & ASSOCIATES

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7 Minakshi V. Hemlani, Esq.
8 Counsel for GVB
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