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In the Procurement Appeal of Data Management Resources - OPA-PA-24-004

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Mon, Nov 18, 2024 at 4:43 PM

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Buenas Mr. Hernandez,

Please see the enclosed Motion for Determination of Materiality of Missing Documents from Procurement Record for filing in the matter in the above caption from Attorney Terlaje dated today, November 18, 2024. Should have any difficulty opening the attachments, please contact our office and our staff will resent it. Have a nice day.

Si Yu'os Ma'åse',

Christiana Q. Ralacios

Admin Assistant/Paralegal

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7	Attorney for Appellant, Data Management Resources, LLC
8	PROCUREMENT APPEAL OF DENIAL OF PROCUREMENT PROTEST
9 10	IN THE OFFICE OF THE PUBLIC ACCOUNTABILITY
10	IN THE APPEAL OF:) DOCKET NO. OPA-PA-24-004
12	DATA MANAGEMENT RESOURCES, LLC) Appellant, MOTION FOR DETERMINATION
13	AND) OF MATERIALITY OF MISSING) DOCUMENTS FROM PROCUMRENT
14	PORT AUTHORITY OF GUAM,) RECORD
15)
16	
17	I. INTRODUCTION
18	Appellant, DATA MANAGEMENT RESOURCES, LLC. (hereinafter "DMR" or
19	"Appellant") by and through its attorney, Jacqueline Taitano Terlaje of Law Office of Jacqueline
20	Taitano Terlaje, PC., hereby moves for determination that the missing documents in the procurement
21 22	record for Invitation for Bid No. IFB-PAG-008-024 Desktop Computer Systems with Accessories by
22	
23	the Port Authority of Guam (hereinafter "PAG") are material.
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II.

Relevant Procedural and Factual Background

The PAG announced the Invitation for Bid No. IFB-PAG-008-024 Desktop Computer Systems with Accessories (hereinafter "Invitation") in May 2024. Procurement Record ("PR"), Tab 1. The announcement stated submissions were due by June 12, 2024. *Id.* There were at least four (4) amendments made to the Invitation. PR, Tab 4. Four (4) bids were received by PAG in response to the Invitation, including Appellant's proposal and Pacific Data Systems's (hereinafter "PDS") proposal. PR, Tab, 12.

PAG held the bid opening on June 12, 2024, but did not evaluate the bids at that time. PAG determined PDS's bid complied with the requirements of the Invitation and its bid was responsive on June 19, 2024. PR, Tab 13. PAG determined PDS was the lowest responsive bidder on June 25, 2024. PR, Tab 16. DMR received notice of the Bid Status on June 28, 2024. PR, Tab 15. The Bid Status noted PDS was recommended for the award and DMR's proposal was rejected. *Id.* PAG issued the Notice of Award on June 28, 2024. PR, Tab 17. DMR acknowledged the Bid Status on July 17, 2024. PAG did not provide DMR with the Notice of Award. DMR timely filed its Protest on June 28, 2024, and raised the issue that PDS was a non-responsive bidder for not providing required literature with its proposal. PR, Tab 20.

DMR filed a Freedom of Information Act request with PAG the same day as it lodged its Protest. PAG provided DMR's counsel with a partial Procurement Record on October 02, 2024 via email. PAG then provided what it proports is the complete Procurement Record on October 04, 2024 via a USB thumb drive. Notably missing from the Procurement Record are (1) documents that evidence PDS did submit the required literature with their proposal and (2) documents that evidence how PAG found PDS to be a responsive bidder despite not submitting the required literature. Additionally, any

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contract, whether draft or final, (and the Purchase Order) as labelled as Tab 19 in the Procurement Record, with PDS has not been provided in the documents turned over by PAG.

III. A COMPLETE PROCUREMENT RECORD IS MATERIAL FOR DETERMINATION FOR RELIEF REQUESTED

Guam law requires that "each procurement officer shall maintain a complete record of each procurement." 5 GCA § 5249. Guam law states this includes "a log of communications between the government employees and any member of the public, potential bidder, vender or manufacturer which is in any way related to the procurement". *Id* at (b). It also includes "brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other material used in the development of specifications". *Id* at (d). Guam law also requires that no award can be made without the procurement officer's certification under the penalty of perjury the procurement record is maintained as required. 5 GCA § 5250.

In evaluating this section of Guam law, the Supreme Court of Guam has held missing documents in the procurement record are material when its absence thwarts judicial review in determining whether an appellant is entitled to the requested relief. *See* <u>Telegram Holdings, LLC v.</u> <u>Territory of Guam</u>, 2018 Guam 5. Further, in applying the holding in *Telegram Holding LLC*, the Court in <u>Graphics Center, Inc v. Office of the Public Accountability, Guam Power Authority, the Territory of Guam, and Infosend, Inc.</u>, determined that failure to "substantially engage" the issue of whether the missing documents in the procurement record were material or thwart judicial review at the OPA level prevents the court from addressing the matter when brought for judicial review. *See* Decision and Order, <u>Graphics Center, Inc v. Office of the Public Accountability, Guam Power Authority, the Territory of Guam, and Infosend the public Accountability, Guam Power Authority, the Territory of Guam, and Driftee of the Public Accountability, Guam Power Authority, the Territory of Guam, and Infosend the public Accountability, Guam Power Authority, the Territory of Guam, and In the Appeal of: Data Management Resources, LLC and Port Authority of Guam</u>

Infosend, Inc., filed October 29, 2024. In *Graphics Center, Inc*, the court, while it affirmed part of the OPA's decision, it remanded the matter back to the OPA "for further agency investigation and record development". *Id* at 7. The court stated there was no documentary support for Guam Power Authority's argument it had not provided Infosend, Inc an exemption and the OPA was ordered to further investigate and develop the record as to the materiality of the missing documents in the procurement record.

In this matter, as aforementioned, the Procurement Record is devoid of (1) documents that evidence PDS did submit the required literature with their proposal and (2) documents that evidence how PAG found PDS to be a responsive bidder despite not submitting the required literature (e.g. what exemption was given to PDS that was not given to all other bidders). The primary issue of the protest is that PDS was not a responsive bidder because it failed to provide the required Descriptive Literature. Specifically, the Invitation states:

Rejection of the Bid will be required if the descriptive literature(s) do not show that the product(s) offered conform(s) to the specifications and other requirements of this solicitation. Failure to furnish the descriptive literature(s) by the time specified in the Solicitation will require rejection of the bid.

PR, Tab 1. The Procurement Record shows that PDS's proposal failed to include the literature required. PAG does not contest this fact. However, PDS was still awarded the procurement. A fact PAG also does not contest. The Procurement Record does not contain what exemption PAG gave PDS to determine that PDS was a responsive bidder. A fact that PAG does not contest. Further, the Procurement Record as submitted by PAG, certified to be complete, also is devoid of even the draft of the contract and Purchase Order despite a Tab coversheet in the Procurement Record for contracts. These documents are material as they are relevant to the issues in this appeal. Therefore, there needs to be a determination that the missing documents are material under the *Telegram Holdings* standard.

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IV. CONCLUSION

Under Guam law, a complete record of each procurement must be maintained. 5 GCA § 5249. This includes "communications between the government employees and any member of the public, potential bidder, vender or manufacturer which is in any way related to the procurement" and "brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other material used in the development of specifications". 5 GCA § 5249 (b) and (d). Further, the procurement officer must certify under the penalty of perjury the procurement record was maintained as required by law before an award can be awarded. 5 GCA § 5250.

The Procurement Record in this case is devoid of (1) documents that evidence PDS did submit the required literature with their proposal and (2) documents that evidence how PAG found PDS to be a responsive bidder despite not submitting the required literature. Additionally, the Procurement Record as submitted does not contain even a draft contract and Purchase Order despite a Tab cover indicating such documents exist. Determination whether missing documents in a Procurement Record are material are required to determine whether an appellant is entitled to the relief sought. See Telegram Holdings, LLC v. Territory of Guam, 2018 Guam 5, and Decision and Order, Graphics Center, Inc v. Office of the Public Accountability, Guam Power Authority, the Territory of Guam, and Infosend, Inc., filed October 29, 2024.

The issues in this appeal center around PDS's non-responsiveness by its failure to submit the required literature and PAG's actions for not complying with Guam's procurement laws. Thus, the documents are material to the facts in this case. Therefore, the OPA should determine the missing documents are material to the determine DMR's entitled to the relief it seeks in its appeal.

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Respectfully submitted this 18 th day of November, 2024.
LAW OFFICE OF
JACQUELINE TAITANO TERLAJE, P.C.
By: /s/
JACQUELINE TAITANO TERLAJE Attorney for Appellant, Data Management Resources, LLC
Attorney for Appenant, Dura Management Resources, LEC
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