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

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Mon, Dec 2, 2024 at 4:47 PM

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Hafa Adai, Jerrick.

Please see enclosed Data Management Resource LLC's Reply to Opposition to Motion for filing in the above-referenced matter. If you have any questions, please contact our office at (671) 648-9001. Have a nice day.

Si Yu'os Ma'ase, **Tatiana Anderson** Office Manager

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| 7 | Attorney for Appellant, Data Management Resources, LLC | | |
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| 9 | PROCUREMENT APPEAL OF DENIAL OF PROCUREMENT PROTEST IN THE OFFICE OF THE PUBLIC ACCOUNTABILITY | | |
| 10 | IN THE APPEAL OF:) DOCKE | T NO. OPA-PA-24-004 | |
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| 12 | | TO OPPOSITION TO | |
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| 14 | 4 PORT AUTHORITY OF GUAM, DUCCUM Purchasing Agency. Purchasing Agency. | MENTS FROM PROCUMRENT D | |
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| 17 | 7 I. Introduction | | |
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| 20 | Resources, LLC (hereinafter "DMR" or "Appellant")'s identified in its motion are missing from the | | |
| 21 | Procurement Record. PAG also concedes these documents are material to the determination for relief | | |
| 22 | sought in this appeal. | | |
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| 26 | Reply to Opposition to Motion for Determination In the Appeal of: Data Management Resources, LLC and Port Authority of Guam OPA-PA-24-004 Page 1 of 6 | | |
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II. PORT AUTHORITY OF GUAM DOES NOT DENY THE IDENTIFIED DOCUMENTS ARE NOT IN THE PROCUREMENT RECORD NOR THAT THE DOCUMENTS ARE MATERIAL TO THE APPEAL

The following documents are indisputably missing in the Procurement Record: (1) documents that evidences Pacific Data Systems (hereinafter "PDS") responsiveness to the bid requirement that literature supporting the encryption and support software be included with their proposal (hereinafter collectively referred herein as "Required Literature"); (2) documents that evidences how PAG found PDS to be a responsive bidder despite not submitting the Required Literature; and (3) any contract, whether draft or final, labelled as Tab 19 in the Procurement Record. *See* Motion for Determination of Materiality of Missing Documents from Procurement Record, (Nov. 18, 2024). PAG, in opposition to Appellant's motion, does not deny that the Required Literature is absent from the Procurement Record, nor does it deny the documents are material to this instant appeal.

The central issue of this appeal is whether PDS's bid is nonresponsive, and the basis upon which PAG failed to reject the non-responsive bid. Appellant has consistently maintained PDS did not include all Required Literature in its bid to be a responsive bid. More importantly, PAG has not denied this fact in any of its pleadings or even in its denial of DMR's Protest. See Id., Motion to Dismiss (Nov. 18, 2024), and Decision on Protest (Sep. 10, 2024). Rather, PAG simply concludes that it has complied with its obligation to maintain a complete record, notwithstanding the absence of Required Literature, and asserts that that specific portion of the bid that did not comply with the procurement laws should be cancelled. See Opposition to Motion for Determination of Materiality of Missing Documents from Procurement Record, filed November 25, 2024.

Each of the documents identified by Appellant are material to this case. PDS did not submit the Required Literature with their proposal, and yet PAG upon evaluation of the bid packages,

> Reply to Opposition to Motion for Determination In the Appeal of: Data Management Resources, LLC and Port Authority of Guam OPA-PA-24-004 Page **2** of **6**

determined PDS to be a responsive bidder. The absence of the Required Literature in the procurement record is prima facie evidence of the failure of PAG to properly evaluate the submitted bids, and improperly granting PDS an exception, whereas Appellant was required to conform its bid to the specifications. The absence of documents in the Procurement Record to support PDS's responsiveness to procurement is the crux of the issue.

As conceded by PAG in its position that the Procurement Record is complete as submitted, these documents do not exist. Thus, the evaluation that PDS's bid was responsive and eligible to be considered along side the other bids is a violation of Guam's procurement laws. Therefore, the award to PDS should be stayed and ultimately cancelled.

As to the documents for any contract, whether draft or final, as labelled as Tab 19 in the Procurement Record, these missing documents are also material. PAG argues that it is in the interest of the People of Guam to continue with the procurement as awarded. See Motion to Dismiss (Nov. 18, 2024). However, PAG fails to show any reason why the contract in this procurement cannot be cancelled, if it exists. PAG, by its own concession that the Procurement Record is complete despite no contract with PDS, even in draft form, is contained within the Procurement Record, fails to show how the clear violation of Guam's procurement laws in this matter is in the best interest of the People of Guam. It is of great concern that the Purchase Order in this case is dated July 24, 2024, when it is irrefutable that Appellant filed its protest on July 12, 2024. See Second Supplement to Procurement Record (Nov. 18, 2024). This shows PAG continued with the procurement when it should have been stayed once the protest was filed. This further shows PAG continues to willingly act contrary to Guam procurement law and make exemptions for PDS.

Further, PAG argues Appellant has misconstrued the court's holding in Graphics Center, Inc. that a court cannot address whether documents not contained in the Procurement Record are material in a case if the issue of materiality is not fully addressed at the Office of Public Accountability (hereinafter "OPA") appeal level first. See Decision and Order, Graphics Center, Inc v. Office of the Public Accountability, Guam Power Authority, the Territory of Guam, and Infosend, Inc. (Oct. 29, 2024). In Graphics Center, Inc., the court ordered the case remanded back to the OPA for investigation and development of the record that the documents not contained in the Procurement Record are material. Id. Appellant's motion is to make the appeal record clear that the Required Literature, documents of any exemption granted to PDS only, and the contract with PDS are material in this case. It is unclear how this is a misapplication of Graphics Center, Inc.'s holding.

Lastly, PAG argues Appellant also misapprehends Telegram Holding, LLC. See Opposition to Motion for Determination of Materiality of Missing Documents from Procurement Record, (Nov. 25, 2024). The court in Telegram Holding, LLC held that missing documents in the Procurement Record are material when its absence prevents a judicial review of whether an appellant is entitled to the requested relief. See Telegram Holdings, LLC v. Territory of Guam, 2018 Guam 5. Once more, it is undisputed that Appellant's claims center on the fact PDS did not submit the Required Literature to be properly evaluated as a responsive bid for the procurement. The missing documents are material, because they are basis for the relief sought in this matter: (1) a finding that PAG failed to evaluate PDS's submission properly and granted PDS an exemption not afforded to Appellant; and (2) the procurement should be stayed and any contract cancelled.

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Reply to Opposition to Motion for Determination In the Appeal of: Data Management Resources, LLC and Port Authority of Guam OPA-PA-24-004 Page 4 of 6

III. CONCLUSION

Guam law requires a complete record of each procurement to be maintained, including "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. Any missing documents from the Procurement Record are material when its absence prevents judicial review to determine whether an appellant is entitled to the requested relief. See Telegram Holdings, LLC v. Territory of Guam, 2018 Guam 5. PAG confirms what has been submitted as the Procurement Record is its complete record.

The Procurement Record in this case lacks (1) documents that evinces PDS did submit the Required Literature with its proposal; (2) documents that evinces how PAG found PDS to be a responsive bidder despite not submitting the Required Literature; and (3) the contract. These documents are material as they are the heart of the appeal. They are essential to any fact finding in this case that the procurements laws were violated and the procurement should be stayed and any contract under the award cancelled as a result. Therefore, the OPA should determine the Required Literature and contract is material to the determine the procurement should be stayed and any contract cancelled.

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Reply to Opposition to Motion for Determination In the Appeal of: Data Management Resources, LLC and Port Authority of Guam OPA-PA-24-004

| 1 | Respectfully submitted this 2 nd day of December, 2024. | |
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| 4 | By: /s/ | |
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| 6 | JACQUELINE TAITANO TERLAJE Attorney for Appellant, <i>Data Management Resources</i> , <i>LLC</i> | |
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