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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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FILE NO 12-011

IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT PETITION

IN THE PETITION OF
PACIFIC DATA SYSTEMS, INC.,
Appellant.

Docket No. OPA-PA-12-011

**TELEGUAM HOLDINGS, LLC'S
REPLY MEMORANDUM IN SUPPORT
OF ITS MOTION TO DISMISS**

I. INTRODUCTION

Pacific Data Systems, Inc.'s ("PDS") Opposition to Teleguam Holdings, LLC's ("GTA") Motion to Dismiss lacks legal and factual substance. GTA's Motion demonstrates that PDS failed to submit its protest to GSA within 14 days from when it knew or should have known of the facts underlying its protest that GSA could not properly evaluate the bidders for the local procurement preference. Instead, PDS waited about ten months to protest. In response to GTA's Motion to Dismiss, PDS claims the OPA should not consider whether it filed a timely protest because GTA did not raise the issue in its Comments. As discussed below, the issue of a timely protest is elemental to the OPA's exercise of jurisdiction. Because PDS did not file a timely protest, the OPA simply cannot proceed regardless of when or whether an interested party raises the issue of timeliness.

Moreover, in an attempt to cloud and confuse the OPA, PDS makes a number of misstatements demonstrating its complete inability to grasp the basics of GTA's motion arguments. The OPA should disregard PDS' arguments and rule that PDS' underlying protest was untimely.

II. THE MOTION IS NOT UNTIMELY

The OPA has jurisdiction to review only matters properly submitted, meaning, matters that have been timely protested and appealed. 2 GAR Div. 4 § 12103(a). PDS claims that the OPA should ignore its untimely protest on the basis that GTA, an Interested Party, did not argue PDS' untimeliness in its Comments. However, the purpose of the Comments is to allow an Appellant or an Interested Party to respond to an *agency report*. 2 GAR Div. 4 § 12104(c)(4). The regulations do not prohibit an Interested Party from moving to dismiss after Comments to the agency report have been filed, and thus, the regulations allowed GTA to file the Motion to Dismiss at any point during the proceedings.

Moreover, in other matters the OPA has considered motions to dismiss after the parties have submitted Comments. *See, e.g., In the Appeal of Town House Department Stores, Inc. dba Island Business Systems & Supplies*, OPA-OA-10-010 (Mar. 7, 2011 Decision at 12) (considering a motion to dismiss brought by appellant more than a month after Comments were due). The OPA is not restrained to only consider matters of timeliness at the Comments phase. In fact, section 12103(a) makes it incumbent upon the OPA to determine, without restriction, if a matter has timely protested and appealed, and therefore properly submitted to the OPA for consideration. The OPA's jurisdiction depends on a matter having been timely protested. Therefore, the OPA must consider whether PDS filed a timely protest either upon GTA's Motion or on its own accord.

III. PDS DOES NOT ADDRESS THE MERITS OF THE MOTION TO DISMISS

PDS' Opposition makes two misstatements demonstrating its fundamental (and potentially intentional) misunderstanding of GTA's motion. First, PDS asserts that GTA argues that PDS should have known what bidders submitted "beforehand." Second, PDS claims that GTA argues that PDS should assume responsibility for notifying other bidders to submit the Local Procurement Preference Application. A review of GTA's clearly laid out arguments shows that PDS completely misconstrues the basis for the Motion to Dismiss.

GTA does not contend that PDS should engage in any advance discovery of what other bidders submitted, and does not contend that PDS should notify other bidders to submit the Local Procurement Preference Application. Instead, GTA contends that PDS was ten months untimely because when the solicitation was issued, PDS then gained knowledge of its claim that GSA could not evaluate the bidders for a local procurement preference. As PDS claims, GSA's failure to include the Application as part of the bid prejudiced its ability to determine if the bidders qualified for a local preference. Once PDS saw that GSA did not require submission of the Local Procurement Preference Application, the 14-day clock started ticking for PDS to protest GSA's alleged inability to properly evaluate the bids for a local preference.

PDS' understanding of GTA's arguments strays so far from what GTA actually argues that PDS' misrepresentations appear to be intentional, in order to confuse the OPA.

IV. CONCLUSION

PDS has not provided a single sustainable basis to defeat GTA's Motion to Dismiss. The Motion should be granted, and this matter must be dismissed.

DATED: Hagåtña, Guam, 21 August 2012.

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