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RECEIVED
 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS

DATE: 07/14/14

TIME: 3:43 AM PM BY: JB

FILE NO OPA-PA: 14-005

THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Procurement Appeal of)
)
 Pacific Data Systems, Inc. (PDS),)
)
 Appellant.)

DOCKET NO. **OPA-PA-14-005**

MOTION TO DECLINE

Pursuant to 5 GCA §5703 and 2 GAR Div. 4 § 12103(b) the Guam Services Agency “GSA”, Government of Guam, by and through the undersigned counsel moves the Office of the Public Auditor to decline this Appeal due to Judicial involvement. There are two active court cases involving IFB GSA-064-11, the procurement for the Government of Guam Telecommunication Services.

Attached is a copy of the Notice of Appeal filed in CVA2014-012 brought by Teleguam Holdings LLC “GTA”. At issue in this Supreme Court Appeal is OPA-PA-12-016. A proceeding which the OPA is listed as an Interested Party.

Attached is a copy of the Complaint file in CV0334-13 filed by GTA and scheduled to go to a full hearing on August 18, 2014.

Appellant in our case wishes to distinguish the current appeal by from the aforementioned two cases. The law as set forth in 5 GCA §5703 and 2 GAR Div. 4 § 12103(b) does not give the OPA the prerogative to act on an appeal that has commenced in court.

5 GCA §5703 states: “The Public Auditor shall have the power to review and determine de novo any matter properly submitted to her or him.”

2 GAR Div. 4 § 12103(b) “Effect of Judicial Proceeding. If an **action** concerning the procurement under Appeal has commenced in court, the Public Auditor **shall not act** on the Appeal except to notify the parties and decline due to the Judicial involvement. This section shall not apply where the court requests the decision of the Public Auditor...”

The IFB GSA-064-11 has two matters pending before the Courts of Guam. Neither the Superior nor the Supreme Court has requested that the OPA render a decision regarding the Appeals OPA-PA-14-005 or OPA-PA-14-006.

This matter is not properly before the OPA and GSA respectfully request the OPA to notify the parties that the OPA has declined to take action in this appeal due to judicial involvement.

Respectively submitted this 14th day of July, 2014.

OFFICE OF THE ATTORNEY GENERAL
Leonardo Rapadas, Attorney General

By: 

FRED NISHIHIRA
Assistant Attorney General
Counsel for Purchasing Agency, GSA

Apr 23, 14 Lm.

IN THE SUPERIOR COURT OF GUAM
FILED
SUPERIOR COURT
OF GUAM

HAGÁTÑA, GUAM

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TELEGUAM HOLDINGS LLC AND ITS)
WHOLLY OWNED SUBSIDIARIES,)

SUPERIOR COURT CASE NO. CV0333-13
SUPREME COURT CASE NO. CVA14-012

Plaintiff-Appellant,)

vs.)

NOTICE

TERRITORY OF GUAM; DEPARTMENT)
OF ADMINISTRATION, GENERAL)
SERVICES AGENCY; THE OFFICE OF)
PUBLIC ACCOUNTABILITY; PACIFIC)
DATA SYSTEMS, INC.,)

Defendants-Appellees.)

**TO: OFFICE OF THE ATTORNEY GENERAL
BERMAN O'CONNOR & MANN**

Please be advised that a **NOTICE OF APPEAL** in the above-entitled case has been filed on **April 21, 2014**, in the Superior Court of Guam to the Appellate Division of the Supreme Court of Guam by **Attorney Elyze McDonald Iriarte** from the Final Judgment and the Order re: Disposition of Bond entered on March 20, 2014.

*Attached is a copy of the Notice of Appeal and the draft Docket Sheet.

Dated: April 21, 2014

DANIELLE T. ROSETE
CLERK OF COURT
SUPERIOR COURT OF GUAM
Evelyn R. Borja

By: _____
Deputy Clerk

12.0576 A FN



May 21, 14 Im.

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IN THE SUPREME COURT OF GUAM SUPREME COURT OF GUAM

| | | | |
|----|----------------------------------|---|------------------------------------|
| 1 | | | |
| 2 | | | |
| 3 | TELEGUAM HOLDINGS, LLC, |) | Supreme Court Case No. CVA2014-012 |
| 4 | |) | Superior Court Case No. CV0333-13 |
| 5 | Plaintiff-Appellant(s) |) | |
| 6 | |) | |
| 7 | vs. |) | CLERKS NOTICE RE: |
| 8 | |) | BRIEFING SCHEDULE |
| 9 | OFFICE OF PUBLIC ACCOUNTABILITY, |) | |
| 10 | PACIFIC DATA SYSTEMS, THE |) | |
| 11 | GOVERNMENT OF THE TERRITORY OF |) | |
| 12 | GUAM, DEPARTMENT OF |) | |
| 13 | ADMINISTRATION GOV'T OF GUAM |) | |
| 14 | |) | |
| 15 | Defendant - Appellee(s) |) | |


The record in the above-captioned matter was filed on the 20th day of May, 2014. The Appellant's opening brief shall be served and filed within forty (40) days after the date of the filing of the record. See Guam R. App. P. 17(a).

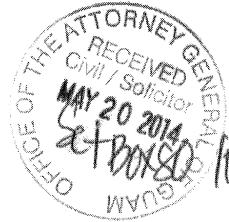
The Appellee's opening brief shall be served and filed within thirty (30) days after service of the Appellant's brief. See GRAP 17(a).

The Appellant may serve and file a reply brief within fourteen (14) days after service of the brief of the Appellee, but, except for good cause shown, a reply brief must be filed at least fourteen (14) days before argument. See GRAP 17(a).

Dated this 20th day of May 2014.


Charlene T. Santos


Hannah M.G. Arroyo
Clerk of Court



12.0576A FN

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FILED
SUPERIOR COURT
OF GUAM

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CLERK OF COURT

BY: _____

Attorneys for Appellant
Teleguam Holdings, LLC and its wholly owned subsidiaries

IN THE SUPERIOR COURT OF GUAM

TELEGUAM HOLDINGS LLC AND ITS
WHOLLY OWNED SUBSIDIARIES,

Plaintiff,

vs.

TERRITORY OF GUAM; DEPARTMENT
OF ADMINISTRATION, GENERAL
SERVICES AGENCY; THE OFFICE OF
PUBLIC ACCOUNTABILITY; PACIFIC
DATA SYSTEMS, INC.,

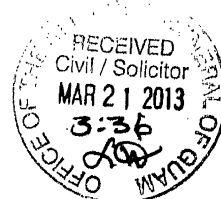
Defendants.

CIVIL CASE NO. **CV 0334-13**

**VERIFIED COMPLAINT;
VERIFICATION; EXHIBITS 1-2**

Teleguam Holdings LLC and its wholly owned subsidiaries GTA Telecom LLC; GTA Services, LLC; and Pulse Mobile LLC (collectively "GTA") hereby allege the following:

1. This is a civil action requesting ordinary relief pursuant to 5 G.C.A. §§ 5425(f) and 5480.
2. Jurisdiction is vested in the Superior Court of Guam pursuant to 5 G.C.A. § 5480(a).
3. GTA is licensed to conduct business in the Territory of Guam, is a



contractor with several government of Guam ("GovGuam") agencies, and is a person receiving an adverse decision from the Office of Public Accountability ("OPA").

4. The Territory of Guam is a proper party and has waived sovereign immunity pursuant to 5 G.C.A. § 5480(a).

5. The General Services Agency ("GSA") issued Invitation for Bid No. GSA 064-11 ("IFB GSA 064-11"). GSA is a proper party and has waived sovereign immunity pursuant to § 5480(a).

6. The OPA is an instrumentality of GovGuam, has exercised jurisdiction over procurement protests denied by GSA, including the procurement at issue here, and is a proper party.

7. Pacific Data Systems, Inc. ("PDS") is licensed to conduct business in Guam and with respect to the 1 Gbps Network in Bid Form 11 of IFB GSA 064-11, submitted a bid price higher than the lowest most responsible bidder, GTA.

IFB GSA 064-11 (Part E) Bid Form 11

8. On June 22, 2011, GSA issued IFB GSA 064-11 to solicit Telecommunications Services; Mobile Telephone Services; Integrated Services Digital Networking (ISDN), Primary Rate Interface (PRI), Basic Rate Interface (BRI), and Session Initiation Protocol (SIP) Trunks; GGWAN Data Communication Services; Broadband Internet Access; DSL/Cable or Wireless Internet Services; Television Services; Routers; Managed Services; and Network Equipment and Direct Inward Dialing (DID) Numbers. IFB GSA 064-11 is attached as Exhibit 1.

9. The purpose of IFB GSA 064-11 was to enable GovGuam to establish a Price List for Telecommunication Services. The Price List was intended for a comprehensive set

of voice, data, and television services that are routinely used by GovGuam.

10. IFB GSA 064-11 consists of ten Parts. Part E pertains to the Dedicated GovGuam Wide Area Network ("GGWAN").

11. Each Part of IFB GSA 064-11 shall be treated separately for bid submission and shall not affect the other "Parts" of the bid. Bidders may respond to one Part or to all Parts of the IFB GSA 064-11.

12. Awards made in accordance with IFB GSA 064-11 will be for five (5) years upon availability of funding. GovGuam may elect to extend the awards for no more than two consecutive one-year terms upon availability of funds.

13. IFB GSA 064-11 provided sixteen Bid Forms on which bidders would submit its bid for the different parts of the IFB.

14. For Part E regarding the GGWAN, bidders were required to complete and submit Bid Form 11.

15. In the Bid Specifications for Part E, GSA sought network services to support connection speeds in two separate capacities: (1) 1,000 Mbps (or 1 Gbps); or (2) 10,000 Mbps (or 10 Gbps).

16. GovGuam agencies electing to participate in the GGWAN must select either the 1 Gbps or the 10 Gbps dependent on the agency's needs and budgetary constraints.

17. The original bid specifications did not preclude an award to multiple contractors. For instance one contractor could provide the 1 Gbps capacity and another contractor could provide the 10 Gbps capacity.

18. Bid Form 11 required bidders to provide bid prices for both the 1 Gbps and 10 Gbps Dedicated GovGuam services based on (a) Installation price per Node, and (b)

Monthly Recurring Cost per Node (including all Surcharges).

19. GTA and PDS were the only bidders to submit Bid Form 11 for Part E - GGWAN.

20. For the 1 Gbps, GTA bid \$750.00 per month per node, and PDS bid \$870.00 per month per node. Both bidders waived installation charges.

21. For the 10 Gbps, GTA bid \$9,400 per month per node, and PDS bid \$1,500.00 per month per node. GTA bid \$48,832.00 installation charge per node.

22. On April 27, 2012, GSA issued a Bid Status recommending an award of both the 1 Gbps and the 10 Gbps to PDS.

23. GSA based its recommendation for award on the aggregate price for both the 1 Gbps and 10 Gbps instead of awarding each separate capacity to the lowest bidder.

24. GSA's method of awarding based on aggregate price violates the terms of the IFB 064-11.

25. GSA's method of awarding based on aggregate price violates Guam Procurement Law and/or regulations.

26. Because the intent of GSA IFB 064-11 is to provide a Price List for which GovGuam agencies would be able to select its required telecommunication services, and because GTA submitted a lower bid price for the 1 Gbps, GTA should be awarded for the 1 Gbps service.

27. Under the proposed award to PDS, GovGuam agencies seeking the 1 Gbps capacity will pay a higher price although the lower priced capacity was offered.

28. Under the proposed award to PDS, the GovGuam will needlessly expend additional sums on the 1 Gbps capacity.

29. GSA's decision not to award the 1 Gbps capacity to GTA will force

GovGuam to obtain a network capacity at a higher price, contrary to the procurement code.

GTA Protest of GSA's April 27, 2012 Bid Status IFB 064-11 (Part E) Bid Form 11

30. On May 11, 2012, GTA timely filed a Protest with GSA protesting GSA's recommendation to award Part E to PDS. GTA asserted:

- a. GSA failed to determine that GTA was the lowest responsible bidder for the 1 Gbps even though GTA's bid was \$120.00 per month lower than PDS's bid.
- b. GSA failed to conduct further review of the bidder's technical specifications to determine if the price variance for the 10 Gbps service was warranted.

31. On October 19, 2012, GSA denied GTA's protest.

Procurement Appeal before the Office of Public Accountability

32. On November 5, 2012, GTA appealed GSA's denial of its protest to the OPA on the following grounds, among others:

- a. GSA should have awarded GTA the 1 Gbps network for the GGWAN because GTA's bid was the lowest price to the Territory in accordance with the bid specifications set forth in IFB GSA 064-11.
- b. GSA failed to objectively evaluate the bids based on the technical submissions; instead GSA relied solely on price notwithstanding a huge price variance between the two bidders for the 10 Gbps network.

33. The OPA exercised jurisdiction over GTA's appeal, and designated the appeal as Procurement Appeal No. OPA-PA-12-018.

34. PDS participated in the OPA Proceedings as an Interested Party.

35. The OPA conducted a two day hearing on the merits of GTA's appeal

beginning on January 29 and 30, 2012.¹

36. During the hearing, the evidence showed:

a. Bid Form 11 contained two sections: 1,000 Mbps (1 Gbps) and 10,000 Mbps (10 Gbps). Each section required the bidder to provide a price for installation (per node) and a monthly recurring charge (per node) including all surcharges.

b. Ed Cruz from the Bureau of Information Technology testified that GovGuam can issue two separate awards, one for the 1 Gbps and another for the 10 Gbps.

c. GSA admitted that the two networks (1 Gbps and 10 Gbps) could be provided by multiple vendors but did not provide any evidence that multiple providers would be less efficient or too burdensome for the GovGuam.

d. GSA's decision not to issue separate awards for the 1 Gbps and 10 Gbps was not based on price but on convenience, which is not a criteria for evaluation of a procurement or an award of a contract.

e. Although Bid Form 11 contained two separate and distinct sections, GSA treated the 1 Gbps and the 10 Gbps as one award.

f. GTA's bid was responsive to Part E bid specifications in IFB GSA 064-11.

g. GTA submitted Bid Form 11 and offered the following:

(1) 1 Gbps - No installation charge, \$750.00 per month per node for a total cost over 60 months equal to \$810,000.00.

(2) 10 Gbps - \$48,832 per node installation charge, \$9,400.00 per month per node for a total cost over 60 months equal to \$11,030,976.00.

¹ The two (2) day hearing was a consolidated hearing for three separate appeals (OPA-PA-12-016; OPA-PA-12-017; and OPA-PA-12-018) arising from the same Invitation for Bid IFB GSA 064-11.

h. PDS submitted Bid Form 11 and offered the following:

(1) 1 Gbps - No installation charge, \$870.00 per month per node for a total cost over 60 months equal to \$969,600.

(2) 10 Gbps - No installation charge, \$1,500.00 per month per node for a total cost over 60 months equal to \$1,620,000.

i. GTA's bid was the lowest responsive bid for the 1 Gbps network.

The OPA's Decision

37. On March 6, 2013, the OPA rendered its decision and affirmed GSA's denial of GTA's protest. The OPA's Decision is attached as Exhibit 2.

38. The OPA's March 6, 2013 decision was a final administrative decision.

39. The OPA concluded the following:

a. Only one bidder should be awarded a contract for Bid Form 11.

b. While GTA had a lower price for the 1 Gbps, PDS had the lower aggregate price and as such should be awarded Bid Form 11 in its entirety.

c. GSA's award to PDS on April 27, 2012 and May 3, 2012 was proper.

Count I: OPA's Finding that Only One Contract Should be Awarded for Bid Form 11 is Arbitrary, Capricious, Clearly Erroneous, or Contrary to Law.

40. GTA incorporates the allegations in paragraphs 1 through 39.

41. Under the proposed award the GovGuam will needlessly expend sums on the 1 Gbps capacity which is contrary to Guam Procurement Law and/or regulations.

42. The OPA's decision that only one contract will be awarded for each Part is arbitrary, capricious, clearly erroneous, or contrary to law.

43. The OPA's decision that GSA's recommendation to award Bid Form 11 based on the aggregate price bid and GSA's explanation as to why multiple bidders could not be awarded the network service is arbitrary, capricious, clearly erroneous, or contrary to law.

Count II: OPA's Finding that GSA's Award of Bid Form 11 to PDS was proper is Arbitrary, Capricious, Clearly Erroneous, or Contrary to Law.

44. GTA incorporates the allegations in paragraphs 1 through 43.

45. Because under the OPA's decision the GovGuam agencies will pay more without legal justification for the 1 Gbps network, the OPA's determination is arbitrary, capricious, clearly erroneous, and contrary to law.

Count III: GSA Erred in Aggregating Prices for Bid Form 11

46. GTA incorporates the allegations in paragraphs 1 through 45.

47. GSA's method of awarding based on aggregate price violates the terms of IFB GSA 064-11, as it forces GovGuam agencies to pay a higher price for the 1 Gbps capacity.

48. GSA's method of awarding based on aggregate price violates Guam Procurement Law and/or regulations because GovGuam will expend more funds for the 1 Gbps capacity than it could have expended if it awarded the 1 Gbps at the lower cost offered by GTA.

WHEREFORE, GTA prays for:

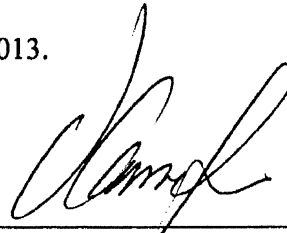
1. A stay in the award of IFB GSA 064-11 Part E (GGWAN).
2. An Order finding that the OPA's decision was arbitrary, capricious, clearly erroneous, or contrary to law.
3. An order vacating Part E of GSA's April 27, 2012 and May 3, 2012 Bid Status.
4. An order awarding IFB 064-011 Part E 1 Gbps network to GTA.

5. For attorney's fees and costs.
6. For such other and further relief as may be deemed appropriate by the

Court.

DATED: Hagåtña, Guam, March 20, 2013.

CARLSMITH BALL LLP



VINCENT C. CAMACHO
ELYZE MCDONALD IRIARTE
Attorneys for Plaintiffs
TELEGUAM HOLDINGS LLC AND ITS
WHOLLY OWNED SUBSIDIARIES

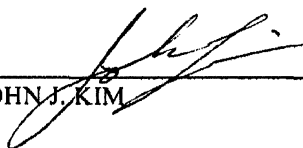
VERIFICATION

GUAM U.S.A,)
)
Municipality of Hagåtña,)

I, John J. Kim, as Controller and Contracting Officer of TeleGuam Holdings LLC, and its wholly owned subsidiaries GTA Telecom, LLC; GTA Services, LLC; and Pulse Mobile, LLC am authorized to make this verification.

I have read the foregoing Verified Complaint and, to the best of my knowledge, the information stated therein is true and correct.

I declare under penalty of perjury that the foregoing is true and correct and this verification was executed on this 20th day of March, 2013.



JOHN J. KIM

SUBSCRIBED AND SWORN to before me, a Notary Public, in and for Guam U.S.A., by JOHN J. KIM, as Controller/Contracting Officer of Teleguam Holdings LLC, this 20th day of March, 2013.



NOTARY PUBLIC

MARIA TISHA M. MAKIO
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: Dec. 21, 2015
624 North Marine Corps Dr., Tamuning 96913