

1 Jacqueline Taitano Terlaje, Esq.
2 **LAW OFFICE OF JACQUELINE TAITANO TERLAJE, P.C.**
3 250 Route 4
4 Suite 204, Nanbo Guahan 250 Building
5 Hagåtña, Guam 96910
6 Telephone 671.648.9001
7 Facsimile 671.648.9002
8 Email: info@terlajelaw.com

9 Attorneys for Petitioner
10 *Data Management Resources, LLC.*

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11 **THE OFFICE OF PUBLIC ACCOUNTABILITY – GUAM**
12 **HAGÁTÑA, GUAM**

13 In the Appeal of) DOCKET NUMBER. **OPA-PA-12-007**
14)
15)
16 DATA MANAGEMENT RESOURCES, LLC.,) **APPELLANT’S MEMORANDUM IN**
17) **REPLY TO GOVERNMENT’S**
18) **MEMORANDUM OF POINTS AND**
19) **AUTHORITIES IN SUPPORT OF**
20) **JURISDICTION**
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COMES NOW Appellant, DATA MANAGEMENT RESOURCES, LLC. (“DMR”), through undersigned counsel, in reply to the issue of jurisdiction, as set forth at hearing on July 3, 2012. On July 3, 2012, the Hearings Officer granted Appellant’s Motion for Discovery due to the lack of certification by the Government of Guam of a complete procurement record, and to ensure that the Appellant has a fair opportunity to address the merits of the procurement appeal with a complete record.

Appellant subsequently requested that the Public Auditor determine its jurisdiction to determine the Government’s Motion to Dismiss; specifically, ¶¶1(b) and 2 of the Government’s unsupported allegations of “improperly restricting maximum competition, manipulating access to bid documentation and Appellant’s direct and continuous access to confidential and sensitive GovGuam data”. Government’s Motion to Dismiss, p. 2 (Jun. 14, 2012). Appellant sought an order determining

ORIGINAL

1 jurisdiction pursuant to Title 5 of the Guam Code Annotated (GCA), §§5425(e) and 5703, prior to
2 commencement of discovery for the purpose of limiting the scope of discovery to those issues in which
3 the Public Auditor has jurisdiction. The Appellant now submits this Memorandum in support of its
4 request for a determination of jurisdiction of the Public Auditor over the issues raised for the first time
5 on appeal by the Government in its Motion to Dismiss.

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8 **MEMORANDUM OF POINTS AND AUTHORITIES**

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10 **I. THE GOVERNMENT FAILED TO PROPERLY SUBMIT**
11 **THE ISSUES IN ¶¶1(b) and 2 OF ITS MOTION TO DISMISS**
12 **FOR REVIEW BEFORE THE PUBLIC AUDITOR, AND AN**
13 **ORDER DETERMINING LACK OF JURISDICTION OVER**
14 **ISSUES RAISED FOR THE FIRST TIME ON APPEAL IS**
15 **WARRANTED.**

16 The Public Auditor has jurisdiction “to review and determine de novo any matter properly
17 submitted to her or him.” 5 GCA §5703; 2 Guam Administrative Rules and Regulations (GAR)
18 §12103. Those matters “properly submitted” to the Public Auditor are limited to the issues raised in the
19 decision and protest appealed from. 5 GCA §5425(e); In Re Appeal Allied Pacific Builders, Inc., OPA-
20 PA-12-10 Decision (Jun. 14, 2012); In the Appeal of Peter Alexis Ada, OPA-PA-11-016 Decision (Jan
21 6, 2012); In Re Appeal Allied Pacific Builders, Inc., OPA-PA-12-10 Decision (Jun. 14, 2012); In Re
22 Captain. Hutapea & Assoc., OPA-PA-08-009, Findings and Recommendations of the Hearing Officer
23 (Oct. 23, 2008); and In Re Appeal of Guam Publications, Inc., OPA-PA-007 Decision (Aug. 8, 2008).
24 Thus, issues raised for the first time on appeal, and which were not addressed in either the protest or
25 decision of the agency, are not properly submitted to the Public Auditor. Id.

26 The Public Auditor consistent with her mandates as set forth in Guam law has held that issues
27 raised for the first time on appeal are not within her jurisdiction. In In Re Appeal Allied Pacific

1 Builders, Inc., the appellant raised new allegations in the appeal to which the Department of Education
2 (DOE) objected. In Re Appeal Allied Pacific Builders, Inc., OPA-PA-12-10 Decision (Jun. 14, 2012).
3 In granting, in part, DOE's motion to dismiss, the Public Auditor held that reviews of procurement
4 under 5 GCA §5425(e) are limited to the issues presented by the appellant on protest, and the decision
5 rendered by the agency. Id., See In Re Appeal of Peter Alexis Ada, OPA-PA-11-016 Decision (Jan 6,
6 2012)(finding Public Auditor jurisdiction limited by §5425(e)).
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8 Similarly, in In Re Captain. Hutapea & Assoc., the appellant on appeal for the first time made
9 allegations that the procurement specifications and requirement were flawed, and requested that the
10 Public Auditor review this issue. The Public Auditor held that issues raised for the first time on appeal,
11 and which are not addressed by either the Protest or the Decision on the protest, are "not properly before
12 her". In Re Captain. Hutapea & Assoc., OPA-PA-08-009, Findings and Recommendations of the
13 Hearing Officer (Oct. 23, 2008).
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15 Importantly, in In Re Appeal of Guam Publications, Inc., the General Services Agency (GSA) by
16 the Office of the Attorney General advanced the same argument as Appellant in this case. In Re Appeal
17 of Guam Publications, Inc., OPA-PA-007 Decision (Aug. 8, 2008). GSA asserted that the Public
18 Auditor did not have jurisdiction to hear the protestant's appeal on whether the Marianas Variety was a
19 newspaper of general circulation since it was neither raised in its decision, nor in the protest lodged.
20 GSA objected to the jurisdiction of the Public Auditor because the issue of whether the Marianas
21 Variety was a paper of general circulation was raised for the first on appeal. The Public Auditor agreed
22 with GSA, and held that since the agency did not address the issue in its Decision and it was not raised
23 in the protest, there was no decision on the issue on which the Public Auditor may review. In Re Appeal
24 of Guam Publications, Inc., OPA-PA-007 Decision (Aug. 8, 2008).
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26 In this case, the General Services Agency/Department of Administration (collectively
27 "Government"), have requested the Public Auditor to dismiss, to cancel, and to vacate the procurement
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1 in this matter. Specifically, the Government has raised for the first time on appeal that the procurement
2 was flawed based on allegations of “improperly restricting maximum competition, manipulating access
3 to bid documentation and Appellant’s direct and continuous access to confidential and sensitive
4 GovGuam data”. Government’s Motion to Dismiss, p. 2 (Jun. 14, 2012). Notably, the Government fails
5 to submit any factual allegations as to the truth of these spurious claims.

6 Contrary to the Government’s position in this case, the Public Auditor’s jurisdiction is limited by
7 law, and Guam law requires that all issues submitted to the Public Auditor for review be “properly
8 submitted to her.” 5 GCA §5425(e). There is no evidence in the procurement record that the
9 Government raised these issues in its decision from which Appellant appeals; neither is there any
10 evidence that this issue was raised in the protest. Therefore, a determination that the Public Auditor
11 lacks jurisdiction to review the issue raised for the first time on appeal at ¶¶1(b) and 2 of the
12 Government’s Motion to Dismiss is necessary prior to commencement of Appellant’s deposition
13 schedule.
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15 Additionally, while the Government proffers 5 GCA §5703 in support of its assertions of proper
16 jurisdiction, §5703 provides, in part, “The Public Auditor’s jurisdiction shall be utilized to promote the
17 integrity of the procurement process and the purposes of 5 GCA Chapter 5” (emphasis added.) 5 GCA
18 §5703, however, only furthers and supports Appellant’s argument that in order to promote the integrity
19 of the procurement process, the Public Auditor must properly assert jurisdiction; an improper assertion
20 of jurisdiction defeats the very purpose for which the Public Auditor was created. Therefore, Appellant
21 requests that the Public Auditor issue an order denying jurisdiction over the issues raised for the first
22 time on appeal by the Government.
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1 **II. FAIRNESS AND INTEGRITY OF THE PROCUREMENT**
2 **PROCESS REQUIRES THE PUBLIC AUDITOR TO ABIDE**
3 **BY HER STATUTORY MANDATE TO REVIEW ONLY**
4 **THOSE ISSUES PROPERLY SUBMITTED TO HER**

5 Appellant submits that in order to satisfy the requirements and stated purpose of Guam
6 Procurement law, the Public Auditor under the circumstances herein must find that she lacks jurisdiction
7 over the issues raised for the first time on appeal by the Government. When seeking to cancel or vacate
8 a procurement for the first time on appeal, at the bare minimum, the Government must be required to
9 provide notice of the precise misconduct with which the appellant is charged to have committed
10 warranting a cancellation or vacation of the procurement; more importantly, to safeguard against
11 spurious and speculative charges of immoral and fraudulent behavior, as done in this particular case, to
12 avoid the obligations of the procurement process.

13 The Government incorrectly posits that “the ultimate question to be answered by the Public
14 Auditor is whether to uphold the cancellation of this solicitation.” Motion to Dismiss, p. 6 (Jun. 14,
15 2012). The first question in this case, and in every case, is whether the Public Auditor has jurisdiction to
16 review the issues raised for the first time on appeal by the Government. The Government correctly sets
17 forth 5 GCA §5001, which provides that Guam procurement laws are intended “to ensure fair and
18 equitable treatment of all persons” and “to provide safeguards for . . . the integrity” of the procurement
19 process. 5 GCA §5001(b)(4), (b)(7). However, the Government improperly seeks a dismissal of this
20 procurement appeal on a basis that is neither fair, equitable, and lacks integrity.

21 In this case, the Government's Motion to Dismiss speculates that there is potential for
22 wrongdoing or misconduct in this procurement. GSA has gone to great lengths to submit numerous
23 declarations stating that the Appellant is a vendor for the Government of Guam and that there exists a
24 fiber optic cable connecting the Appellant to the Government of Guam. These facts are not contested;
25 nor is the Government’s authorization of the connection contested.

26 The Motion to Dismiss and the declarations of Bryan Cruz, Ed Cruz, Tom Ashe, and Roberto
27 Castro all fail to set forth cognizable facts of any purported wrongdoing by Appellant; nothing in which
28 Appellant may be given a fair opportunity in which to defend, as required by Guam law, the Organic Act
of Guam, and the Constitution of the United States. The Office of the Attorney General who purports to

1 be the defender of Due Process now seeks from the Public Auditor an order, which would clearly deny
2 the Appellant notice of the misconduct the Attorney General of Guam so desperately is attempting to
3 allege without any factual support. In fact, at hearing in this matter, when questioned directly by the
4 Hearings Officer on whether the Government was accusing Appellant of any wrongdoing, the
5 Government stated without any authority of law that it was not required to put forth any evidence of
6 wrongdoing. The conduct of the Office of the Attorney General of Guam clearly flies in the face of its
7 obligation to advance the integrity of the procurement process in Guam.

8 CONCLUSION

9 Appellant does not contest that the Government has the obligation to comply with Guam
10 Procurement Law, or the Attorney General of Guam's obligation to act as a legal advisor during the
11 solicitation or procurement process. However, Appellant does contest that any authority granted to the
12 Government under Guam Procurement Law obviates the Government's compliance with the process of
13 review and appeal set forth in 5 GCA, Chapter 5. Any leeway the Government is permitted by the
14 Public Auditor must be consistent with the Public Auditor's jurisdiction. Thus, Appellant respectfully
15 requests that the Public Auditor find that the issues raised by the Government in ¶¶1(b) and 2 of its
16 Motion to Dismiss were not properly submitted to her in compliance with 5 GCA §5425(e) and §5703.
17 Additionally, Appellant respectfully requests that an order of the Public Auditor issue limiting the scope
18 of discovery to those issues raised in the protest and decision on review before the Public Auditor.

19 RESPECTFULLY SUBMITTED on this 6th day of July, 2012.

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21 **LAW OFFICE OF**
22 **JACQUELINE TAITANO TERLAJE, P.C.**

23
24 By: 
25 **JACQUELINE TAITANO TERLAJE**
26 Attorney for Appellant