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 PROCUREMENT APPEALS

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Attorneys for the General Services Administration,
 Department of Administration, Government of Guam

BEFORE THE GUAM PUBLIC AUDITOR
Procurement Appeal

| | | |
|---------------------------------|---|--------------------------|
| IN THE APPEAL OF: |) | DOCKET NO. OPA-PA 12-007 |
| |) | |
| |) | |
| |) | |
| DATA MANAGEMENT RESOURCES, LLC. |) | <u>HEARING BRIEF</u> |
| |) | |
| Appellant. |) | |
| |) | |
| |) | |
| |) | |

The Department of Administration, Government of Guam, presents contested issues to be litigated at the hearing on the merits of this matter, set for 09:00 on Monday, 22 October 2012, before the Guam Public Auditor, together with argument summaries:

1. Contested Issue: Rejection of Appellant's best and final offer by General Services Administration on 28 February 2012 on the grounds of excessively expensive and non-existence of available funds was correct and proper.

Argument Summary: The Department asserts that not only was such rejection correct and proper but the lack of funds made it impossible to accept Appellant's best and final offer. Additionally, since Appellant's price was excessively

expensive and the Department had by this time largely developed its own Point of Sale software. (see: FY 2012 Budget Act, 5 GCA §22401; 2 GAR, Div. 4, §3115(d)(2)(A)(iv) Procurement Regulations and 5 GCA §5225 which authorize GSA to cancel a procurement). This cancellation authority is also reflected in ¶1.3.5 of Point of Sale System (POS) RFP/DOA-014-11.

2. Contested Issue: Government bad faith.

Argument Summary: There have been no specifics alleged by Appellant and the Department demands strict proof thereof. The Department considers this issue totally devoid of merit. At no time during this Procurement was the Government in bad faith.

3. Contested Issue: Appellant's 13 March 2012 Protest was based on only two grounds, i.e. (1) "Rejection is not warranted under 2 GARR §3114(l)" and (2) "GSA/DOA failed to act in good faith in the negotiations with DMR...". Yet in Appellant's 2 April 2012 Notice of Appeal, Appellant lists three additional grounds not raised in its Protest. These new grounds consist of: (a) failure to produce the entire procurement record; (b) a post-Protest arbitrary rejection of Appellant's best and final offer and (c) failure to convene the evaluation committee prior to rejection of Appellant's best and final offer.

Argument Summary: Grounds raised for the first time in a Notice of Appeal, not contained in Appellant's Protest are improper, inadmissible and stricken.

4. Additional Contested Issues: This appeal should be dismissed and the procurement vacated *ab initio* on the basis of: (a) the undisclosed unfair advantage

possessed by Appellant from the outset of this procurement, consisting of, without any demonstrated authority, fiber optic access by Appellant to the Government of Guam (“GovGuam”) central data center and data systems of, *inter alia*, the Departments of Administration, General Services Administration and Revenue and Taxation; (b) the duty of Appellant to disclose such access and the unethical failure of appellant to make such disclosure as of March 2012; (c) from the outset of this procurement, Appellant’s possession of a POS source code(s) and its wrongful failure to release the code(s) to potential bidder Bank of Guam at the April 2011 Mandatory Pre-bid Conference, which code(s) were lawfully owned by the Government of Guam; (d) the exclusive possession of a POS source code(s) by Appellant which gave it an unfair “insider” advantage over the other interested bidder, Bank of Guam and any other potential bidders, thereby rendering this Procurement impermissibly non-competitive.

Argument Summary: Possession of any “insider” unfair advantage by one potential bidder over another, renders this Procurement fatally defective in contravention of not only 5 GCA §§5001(b)(3-8) but also 5 GCA §5626 (a) and (b) as being uncompetitive. And since the unfair advantage was based upon wrongful failure of Appellant to disclose its fiber optic access to sensitive, confidential GSA, DOA and DRT data files, and wrongful assertion of source code ownership and non-release of same at the April 2011 Mandatory Pre-bid Conference, such unfairness can be said to be

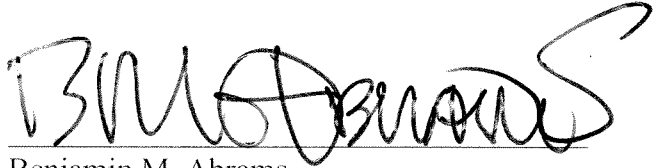
intentionally caused by Appellant.

Dated: 16 October 2012

OFFICE OF THE ATTORNEY GENERAL

Leonardo M. Rapadas, Attorney General

By:

A handwritten signature in black ink, appearing to read "B. M. Abrams", written over a horizontal line.

Benjamin M. Abrams
Assistant Attorney General

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