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 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS
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Attorneys for the General Services Agency

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

IN THE APPEAL OF)
)
 DATA MANAGEMENT RESOURCES, LLC.)
)
 Appellant.)
)
)

DOCKET NO. OPA-PA-12-007
**MEMORANDUM OF POINTS
 AND AUTHORITIES IN SUPPORT
 OF THE JURISDICTION
 OF THE OFFICE OF PUBLIC
 ACCOUNTABILITY**

This is an appeal brought by Data Management Resources, LLC (“DMR”), in response to the denial by the General Services Agency, Department of Administration (“GSA”) of its protest of the cancellation of RFP/DOA-014-11, a solicitation for Point of Sale software development and maintenance, and required hardware. This solicitation was initiated by the Department of Administration (“DOA”). DOA had tasked GSA with the management of this solicitation. The cancellation of the solicitation had occurred after negotiations between DMR and GSA had commenced. DMR was the sole offeror, and was found to be the best qualified and responsive offeror prior to the initiation of negotiations. DMR has appealed the denial of its protest to the Public Auditor.

ORIGINAL

At the pre-hearing conference held in this matter on May 17, 2012, DOA, through legal counsel, advised the Hearing Officer that a Motion to Dismiss in this matter would be filed. In response, the Hearing Officer advised the Appellant, DMR, and the Appellee, Government of Guam, of a cutoff date for all pre-hearing motions either party decided to file. Appellee filed its Notice of Motion and Motion to Dismiss Appeal in a timely manner, and Appellant filed its Opposition and Motion to Strike in a timely manner.

As well, Appellant has filed a Motion for Discovery and Appellee has not opposed the Motion for Discovery.

Hearings have been held before the Hearing Officer on Appellee's Motion to Dismiss and Appellant's Motion for Discovery on July 1, 2012 and July 3, 2012. At the July 3, 2012 hearing, Appellant made an oral motion to challenge the jurisdiction of the Public Auditor to hear, in this matter, a portion of the Appellee's Motion to Dismiss. Specifically, it was asserted that the Public Auditor lacked jurisdiction to consider the claim that there existed a fiber optic cable between DMR and DOA computer systems, affording DMR with unrestricted access to DOA and GSA computer data banks, and that this, among other factors denominated in the motion, created an unnecessary competitive disadvantage to all other potential offerors, and is grounds to vacate the procurement *ab initio*. This matter is, according to Appellant, outside the scope of the claim made by Appellant in its protest and the decision it has appealed here, and therefore, outside the jurisdiction of the Public Auditor in this appeal.¹ We disagree.

The parties have been accorded an opportunity to file memoranda of points and authorities concerning the jurisdiction of the Public Auditor by July 5, 2012.

¹ Because the motion that challenges the jurisdiction of the Public Auditor was made verbally at a hearing originally designated for other purposes, counsel for the Appellee may be inadvertently misstating Appellant's motion. I apologize if that is the case. Nonetheless, the question of jurisdiction should be resolved in favor of Appellee no matter whether the motion is stated properly by Appellant here or not.

I. THE PUBLIC AUDITOR IS GRANTED BROAD JURISDICTION TO PROMOTE THE INTEGRITY OF THE PROCUREMENT PROCESS.

The integrity of the procurement process is a primary value and a primary purpose of the procurement law that underwrites and guides the government of Guam in its acquisition of supplies, services and construction. The procurement law states, in relevant part:

“§ 5001. Purposes, Rules of Construction.

- (a) Interpretation. This Chapter shall be construed and applied to promote its underlying purposes and policies.
- (b) Purposes and Policies. The underlying purposes and policies of this Chapter are:
 - (1) ...
 - (2) to permit the continued development of procurement policies and practices;
 - (3) to provide for increased public confidence in the procedures followed in public procurement;
 - (4) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory;
 - (5) ...
 - (7) to provide safeguards for the maintenance of a procurement system of quality and integrity; and
 - (8) ...”

5 GCA §5001. Consistent with these purposes denominated in Guam procurement law, the Public Auditor was designated as the individual and office responsible for hearing and determining procurement appeals. 5 GCA §5425(e). Further, the Public Auditor has been granted broad enough jurisdiction in order to protect the integrity of the procurement process.

“§ 5703. Jurisdiction of the Public Auditor.

The Public Auditor shall have the power to review and determine de novo any matter properly submitted to her or him. The Public Auditor shall not have jurisdiction over disputes having to do with money owed to or by the government of Guam. Notwithstanding § 5245 of this Chapter, no prior determination shall be final or conclusive on the Public Auditor or upon any appeal from the Public Auditor. The Public Auditor shall have the power to compel attendance and testimony of, and production of documents by any employee of the government of Guam, including any employee of any autonomous agency or public corporation. The Public Auditor may consider testimony and evidence submitted by any competing bidder, offeror or contractor of the protestant. **The Public Auditor’s jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.”** (Emphasis added.)

5 GCA §5703. See also, 2 GAR, Div. 4 §12103(a).

II. THE ATTORNEY GENERAL HAS AUTHORITY AND RESPONSIBILITY TO ASSURE INTEGRITY IN THE PROCUREMENT PROCESS.

In the course of this appeal, the Office of the Attorney General, as legal counsel for DOA, and its sub-division, GSA, has reviewed the procurement record and all of the circumstances surrounding this solicitation. It has a legal responsibility to do so.

“§ 5150. Duties of the Attorney General.

... Whenever the Chief Procurement Officer, the Director of Public Works, or the head of any executive branch agency, ... conducts any solicitation or procurement which is estimated to result in an award of Five Hundred Thousand Dollars (\$500,000) or more, the Attorney General or his designees, ... *shall* act as legal advisor during all phases of the solicitation or procurement process. The Attorney General, or his designee, ... when he approves contracts, determine not only the correctness of their form, but their legality. In making such a determination of legality, he may require any or all agencies involved in the contract to supply him with evidence that the required procedures precedent to executing the contract were carried out. ...”²

5 GCA §5151. In Public Law 30-072:1, the Legislature amended §5150 by expanded the role of the Attorney General in the procurement process, and requiring the Attorney General or his designated Assistant Attorney General to be involved in the procurement process at its initiation if the procurement is expected to exceed Five Hundred Thousand Dollars, the Legislature stated its findings and intent as follows:

“Section 1. Legislative Findings and Intent. *I Liheslaturan Guahan* finds that there exists a need for greater scrutiny in the preparation of bid documents and in the awarding of bids for major purchases and contracts for services. *I Liheslatura* finds that such involvement of the Office of the Attorney General in the procurement process would ensure proper and expeditious procurement of goods and services and would minimize protests of bid awards and allow for a more expeditious procurement process. *I*

² The Chief Procurement Officer originally referred this matter to the Office of the Attorney General on December 2, 2011. By law this referral likely should have been made at an earlier date.

Liheslatura further finds that Guam stands to lose considerable amounts of federal funding due to questionable procurement practices. It is the intent of *I Liheslatura*, therefore, to ensure the fair and equitable treatment of all who are involved in the procurement process and to preserve the integrity of the procurement system.”

P.L. 30-072:1. In addition, the Attorney General has been given specific authority to access procurement records. It is apparent that this grant of access to any and all procurement records is consistent the role of the Attorney General to assure that the purposes of the procurement law, found at §5001 and cited above, are fulfilled, and the integrity of the process is maintained. 5 GCA §5250.

Therefore, not only has the Public Auditor been given the jurisdiction to promote and preserve the integrity of the procurement process in the conduct of procurement appeals, the Attorney General has been specifically granted significant responsibilities in the process as well, in order to preserve the integrity of the process. It is not unreasonable to conclude that in this very solicitation the Attorney General is obligated to investigate and determine the integrity of the process undertaken here, and take such reasonable steps as are necessary in this regard.

III. THE ATTORNEY GENERAL SHOULD BE GIVEN LEEWAY TO BRING SIGNIFICANT MATTERS TO THE ATTENTION OF THE PUBLIC AUDITOR.

In this case, the ultimate question to be answered by the Public Auditor is whether to uphold the cancellation of this solicitation.

In this case, the Attorney General, in the process of investigating this procurement process, came across information and circumstances that affect the integrity of the solicitation and procurement process itself. In this case, the discovery of a very real connection between an

offeror and the government, the existence of a fiber optic cable connecting government computers and an offeror's computer, calls into question the underlying integrity of the process. In the process of defending the government action which would cancel the solicitation, is not the existence of the fiber optic cable connection relevant to the question before the Public Auditor? Is not the existence of the fiber optic cable relevant to whether the solicitation should be cancelled? Is not the existence of the fiber optic cable relevant to the question of the integrity of the procurement process?

The process of bringing an appeal to the Public Auditor is always initiated by a bidder or offeror. In this process, the government, represented by the Attorney General, is always responding to the matter which has been framed by the aggrieved non-government party. In some circumstances, this being one of them, there are no other interested parties who are going to be able to raise questions about the integrity of the process if the government is prohibited from doing so. It is the Attorney General who is likely in this circumstance to identify issues that must be raised which are not or would not be raised by an appellant.

This is such a case. As well, this case is distinguishable from the decision alluded to by Appellant in her oral motion. She cited to the procurement appeal known as *In the Appeal of Allied Pacific Builder, Inc.* OPA-PA-12-010. In *Allied Pacific Builder*, supra, the Public Auditor granted the government's motion to dismiss two grounds for appeal raised by the Appellant for the first time on appeal. The Public Auditor was correct in holding that, because the Appellant did not raise the specific grounds for setting aside the solicitation in its Protest, filed with the government as the first step in the process, it would not be permitted to raise those new issues in its appeal, filed after the protest was denied.

The circumstances in *Allied Pacific Builder*, supra, are 180 degrees opposite from the situation found here. The Attorney General, who has specific responsibility to preserve the

integrity of the process in this case, raised the issue as soon as it became known to him. It required the investigative resources of the Office of the Attorney General to discern the true significance of the fiber optic cable, as it applies to the facts of this case. *Allied Pacific Builder, supra*, does not stand for the proposition that the government is confined to the parameters of the case brought by the appellant. Such a proposition is contrary to the clear grant of jurisdiction given the Public Auditor at 5 GCA §5703. It stands only for the proposition that the Appellant is confined to the parameters of its original protest. To so confine the Attorney General or the Public Auditor is contrary to the clear intent of the law and regulations.

IV. CONCLUSION

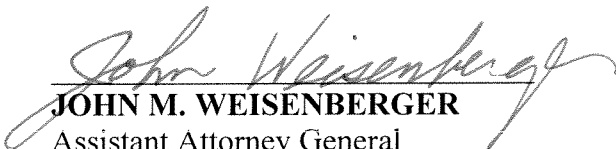
Data Management Resources, LLC., has invoked the jurisdiction of the Public Auditor. It has placed the question of whether the underlying solicitation should be cancelled squarely before the Public Auditor. Appellee's motion to have the underlying procurement ruled invalid *ab initio* based upon factors that were present during the procurement, in effect, factors that are a part and parcel of the procurement record, is wholly consistent with the appeal process invoked by DMR. This is the case because these factors go directly to the question of the integrity of the procurement process itself.

Having been brought within the jurisdiction of the Public Auditor by DMR's appeal, the government, through its Attorney General, should be permitted the latitude granted by law to raise serious questions about the underlying process that is on review. This is especially the case, as here, when the questions raised by the Attorney General are focused on the government and its processes as much as, if not more so, than on the Appellant. It is time to fix what is

broken. This procurement is broken. The Public Auditor has the jurisdiction to do so.

Respectfully submitted this July 5, 2012.

OFFICE OF THE ATTORNEY GENERAL
Leonardo M. Rapadas, Attorney General

By: 
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