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**THE OFFICE OF PUBLIC ACCOUNTABILITY – GUAM**  
**HAGATNA, GUAM**

In the Appeal of ) DOCKET NUMBER OPA-PA-11-004  
)  
)  
) **MOTION and COMMENTS IN SUPPORT**  
DATA MANAGEMENT RESOURCES, ) **OF MOTION FOR AN ORDER ON THE**  
13 LLC, Appellant. ) **PLEADINGS**  
)  
)

COMES NOW the Appellant Data Management Resources, LLC (hereinafter “Appellant”) through undersigned counsel and moves the Public Auditor to issue an order on the pleadings in the above-captioned appeal based on Guam Rule Civ. Pro. Rule 12 (c) and the admissions of Department of Education (hereinafter “GDOE”) to allegations in the petition filed herein.

**MEMORANDUM**

This Appeal arises out of the decision on Protest of the Method, Solicitation and Award of IFB025-2010 to Micros-Fidelio for Item Nos. 1 and 2 of IFB025-2010 related to the specification that the vendor must be a “Manufacturer-Authorized Reseller” (hereinafter

**COPY**

1 “Reseller Specification”). Specifically, GDOE failed to ensure that bidder Micros-Fidelio has  
2 met the Reseller Specification, as required by p.23 of IFB025-2010.

3 October 15, 2010, Appellant lodged its protest to the award, which was subsequently  
4 denied by GDOE on February 10, 2011 (hereinafter “Determination”). The Determination  
5 failed to provide explanation as to how Micros-Fidelio was deemed a “Manufacturer-  
6 Authorized Reseller” other than a conclusory statement that it was. On February 25, 2011,  
7 Appellant filed its appeal to the GDOE award of GDOE IFB025-2010 to Micros-Fidelio  
8 alleging that the awarded bidder was not a “Manufacturer-Authorized Reseller” and failed to  
9 submit documentation establishing otherwise. On March 14, 2011, GDOE filed its Agency  
10 Report admitting to the allegations contained in the petition.  
11

12 The Public Auditor has the authority to issue a determination on the pleadings as to  
13 GDOE’s response in its entirety and to each response to the allegations contained in the  
14 petition. Guam Rules Civ. Pro. Rule 12 (c) allows for a determination on the pleadings in  
15 instances in which allegations have been admitted to by a responding party. *See* G.R.C.P. 12  
16 (c). Prior to granting a Rule 12(c) motion, a movant must clearly establish that no material  
17 issue of fact exists and that he is entitled to judgment as a matter of law. McGlinch v. Shell  
18 Chem. Co., 845 F.2d 802,810 (9th Cir. 1988). When deciding if judgment on the pleadings is  
19 proper, the facts asserted in the pleadings, including all its inferences, must be viewed in the  
20 light most favorable to the non-moving part. Madonna v. U.S., 878, F .2d 631 (2nd Cir. 1989).  
21  
22

23 Here, Appellant alleges that GDOE improperly awarded the bid to Micros-Fidelio  
24 because the bidder failed to meet the Reseller Specification. Petition, p. 3. DOE procurement  
25 regulations allow the department to waive informalities of a bid pursuant to DOEPR 3.9.13.4.  
26 However, it also requires that the GDOE Superintendent waive any informality.  
27

1 In response to the protest, GDOE failed to provide explanation as to how it determined  
2 that that the bidder was a Manufacturer-Authorized Reseller. Petition, p. 3. On February 25,  
3 2011, GDOE made available all documents related to the determination following Appellant's  
4 Freedom of Information Request under the Guam Sunshine Reform Act (hereinafter "FOIA").  
5 GDOE's FOIA disclosure reveals that Micros-Fidelio's relationship to the manufacturer is that  
6 of an authorized agent, and not that of an authorized seller. Petition, p. 3-4. Further validating  
7 Appellant's allegations, GDOE filed its Agency Report admitting to the allegations of  
8 Petitioner's Appeal on March 14, 2011.  
9

10 GDOE does not assert that the Reseller Specification is an informality of the bid.  
11 However, even if the specification was somehow considered to be an informality, GDOE's  
12 disclosed documents and Agency Report clearly establish that DOEPR 3.9.13.4 was not  
13 complied with because the Superintendant made no waiver of the Manufacturer-Authorized  
14 Reseller Specification of IFB025-2010. Having reviewed the petition and the responses to  
15 allegations contained therein in the GDOE agency report, there is no genuine issue of material  
16 fact for the Auditor's determination. Therefore, the appeal may be properly decided based on  
17 the record and a hearing on the petition is unnecessary.  
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**CONCLUSION**

Based on the above, Appellant requests that the Public Auditor grants the motion and issues the proposed order attached herewith granting the prayer of relief requested in the petition. Specifically, that the Public Auditor ratifies and affirms the Appeal of its Protest to IFB025-2010, and that IFB025-2010 be allowed to proceed with the determination that Micros-Fidelio has failed to meet the specifications of IFB025-2010.

Submitted this 1<sup>st</sup> day of April 2011.

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**OFFICE OF THE PUBLIC AUDITOR**  
**HAGATNA, GUAM**

In the Appeal of	)	DOCKET NUMBER OPA-PA-11-004
	)	
DATA MANAGEMENT RESOURCES, LLC	)	
	)	<b>PROPOSED ORDER AND FINDINGS</b>
Appellant	)	
_____	)	

**I. INTRODUCTION**

THIS MATTER came before the Public Auditor pursuant to an appeal filed on February 25, 2011 by Appellant DATA MANAGEMENT RESOURCES, LLC (hereinafter "DMR") regarding Government of Guam, Department of Education's (hereinafter "GDOE") award of GDOE IFB025-2010 to Micros-Fidelio Micronesia, Inc. (hereinafter "Micros-Fidelio"). Specifically, DMR protested GDOE's award and waiver of the "Manufacturer-Authorized Reseller" specification, as required by p. 23 of GDOE IFB025-2010.

On March 14, 2011, Respondent GDOE filed its Agency Report admitting to the allegations of Petitioner's Appeal. On April 1, 2011, DMR filed its Comments and Motion to the GDOE Agency Report. The Public Auditor holds that GDOE erroneously deemed Interested Party Micros-Fidelio's bid to be non-responsive to IFB025-2010 after it failed to provide adequate documentation supporting the requirement that it is a "Manufacturer-Authorized Reseller." Accordingly, DMR's appeal is GRANTED.

1 The Public Auditor in reaching this Decision has considered and incorporates herein the  
2 procurement record and all documents submitted by the parties. Specifically, DMR's Notice of  
3 Appeal, Respondent GDOE's Agency Report and admissions, and DMR's comments to the GDOE  
4 Agency Report, the Public Auditor hereby FINDS and ORDERS the following:

5 **II. FINDINGS OF FACT**

6 (1) On August 26, 2010 GDOE issued GDOE IFB 025-2010 Outright Purchase of  
7 Computer Systems Items #1 through 4; seven (7) prospective bidders picked up bid packages.  
8

9 (2) On September 17, 2010 the bid closed and 3 bid submittals were received from Micros-  
10 Fidelio Micronesia, Inc., ComPacific, and DMR. GDOE prepared Abstract of the Bids of the same  
11 date which indicated that the following bidders were the lowest responsive responsible bidders for the  
12 Items #1 thru # 4.

13  
14 Items # 1 and 2 Micros-Fidelio Micronesia, Inc.

15 Items # 3 and 4 ComPacific  
16

17 For reference, Items 1 and 2 are computer systems (hardware, software), and Items 3 and 4 are  
18 switches (accessories).  
19

20 (3) On September 23, 2010 GDOE completed its Bid Analysis & Recommendation.

21 (4) On October 1, 2010 GDOE sent notice to the Bidders of its Intent to Issue Awards as  
22 listed in No. 2 above.

23 (5) On October 15, 2010, DMR filed a protest with regard to GDOE's intent to award  
24 Items #1 and 2 to Micros-Fidelio Micronesia, Inc. and also as to GDOE's intent to award Items # 3  
25 and 4 to Comp Pacific.  
26

27 (6) On February 25, 2011, Petitioner DMR filed its timely appeal to the GDOE award of  
28 GDOE IFB025-2010 to Micros-Fidelio.

1 (7) On March 14, 2011, Respondent GDOE filed its Agency Report admitting to the  
2 allegations of Petitioner's Appeal.

3 (8) On April 1, 2011, DMR filed its Comments and Motion to the GDOE Agency Report.

4 (9) Micros-Fidelio Micronesia, Inc. is not a Manufacturer Authorized Reseller of the  
5 products bid to IFB025-2010, Items #1 and 2.

6 (10) ComPacific is not a Manufacturer Authorized Reseller of the products bid to IFB025-  
7 2010, Items #1 and 2.

8 (11) DMR is a Manufacturer Authorized Reseller of the products bid to IFB025-2010,  
9 Items #1 and 2.

### 11 III. ANALYSIS

#### 12 A. MICRO FIDELIO MICRONESIA, INC. WAS NON-RESPONSIVE.

13 As a preliminary matter, the Public Auditor must determine whether Micros-Fidelio was a  
14 "Manufacturer Authorized Reseller" as required by GDOE IFB025-2010. IFB025-2010, p.23.  
15 Generally, a "Manufacturer-Authorized Reseller" is an entity or individual who has an agreement with  
16 a manufacturer to sell the manufacturers' products, and a reseller is granted a license and/or  
17 authorization from the manufacturer. Thus, in order for a bidder to satisfy the Minimum Specification  
18 of a "Manufacturer-Authorized Reseller," the bidder must submit documentation from the  
19 manufacturer authorizing the sale of the manufacturer's product; absent this documentation, a bidder is  
20 not qualified.  
21

22 In support of its bid on IFB025-2010, Micros-Fidelio offered "Acer" brand products in  
23 response to Items #1 and 2. Upon inquiry of Micros-Fidelio' status as a Manufacturer Authorized  
24 Reseller, Micros-Fidelio submitted documentation from Computerland and Nor-Tech. No  
25 documentation from Acer America Corporation, the owner of the mark "Acer" was submitted  
26 acknowledging a direct authorization to Micros-Fidelio to sale its products. Thus, the Public Auditor  
27 finds that Micros-Fidelio bid was non-responsive to IFB025-2010 to Items #1 and 2.  
28

1 **B. THE MINIMUM SPECIFICATION REQUIRING A BIDDER TO BE A**  
2 **“MANUFACTURER AUTHORIZED RESELLER” IS NOT A MINIMUM**  
3 **SPECIFICATION THAT MAY BE WAIVED.**

4 On March 14, 2011, GDOE admitted in its Agency Report that the bid requirement that all  
5 bidders be Manufacturer’s Authorized Reseller is material to the bid and not a minor informality.  
6 GDOE admits that the minimum specification may affect warranty services being provided as to the  
7 equipment being procured. Despite Micros-Fidelio’s failure to submit documentation supporting its  
8 status as a Manufacturer-Authorized Reseller, as required by GDOE IFB025-2010, GDOE awarded  
9 GDOE IFB025-2010 to Micros-Fidelio. GDOE later advised that it had waived the Minimum  
10 Specification of “Manufacturer-Authorized Reseller” pursuant to Department of Education  
11 Procurement Regulations (DOEPR) 3.9.13.4, which provides:

12  
13 Minor informalities are matters of form, rather than substance evident from the bid  
14 document, or insignificant mistakes that can be waived or corrected without prejudice  
15 to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual  
16 conditions is negligible. The Director of Education shall waive such informalities . . .

17 The waiver of this specification by GDOE was not a minor informality. Clearly, whether the bidder is  
18 in fact authorized by the manufacturer to resale its products will affect price and contractual condition;  
19 specifically, it will also affect GDOE to ensure that the products it purchases are covered by  
20 warranties, as requested in IFB025-2010. Therefore, the Public Auditor finds that whether a bidder is  
21 a Manufacturer Authorized Reseller is not an informality that may be waived.

22 The Public Auditor finds that the next lowest bidder for Items #1 and 2 is ComPacific.  
23 However, upon a review of the procurement record, it is evident that GDOE further erroneously  
24 qualified the bid of ComPacific without proper documentation as a Manufacturer Authorized Reseller.  
25 Therefore, the Public Auditor finds that the only qualified bidder submitting proper documentation of  
26 its status as a Manufacturer Authorized Reseller, as required by IFB025-2010 is DMR. Furthermore,  
27 DMR being the lowest qualified bidder in response to IFB025-2010 Items #1 and 2, GDOE shall  
28



1 proceed with the award of IFB025-2010 to DMR in accordance with Guam Procurement Law and  
2 Regulations.

3 **C. GDOE ERRONEOUSLY FAILED TO OBTAIN A WRITTEN DETERMINATION**  
4 **OF THE WAIVER OF INFORMALITY FROM THE SUPERINTENDENT.**

5 Notwithstanding the finding that the minimum specification of Manufacturer Authorized  
6 Reseller cannot be waived by DOEPR 3.9.14.4, GDOE failed to obtain a proper waiver, and thus,  
7 DMR's appeal is further sustained on this basis. DOEPR 3.9.14.6 provides:

8  
9 When a bid is corrected or withdrawn, or correction or withdrawal is denied, under  
10 Subsections 3.9.13.4 (Mistakes Discovered After Opening but Before Award) and  
11 3.9.14.5 (Mistakes Discovered After Award) of this Section, the Director of Education  
shall prepare a written determination showing that the relief was granted or denied in  
accordance with these Regulations.

12 The Director of Education is the GDOE Superintendent, as provided by DOEPR 1.9, ¶17. No written  
13 determination by the Superintendent under of DOEPR 3.9.13.6 was produced with the procurement  
14 record, and thus, it is assumed that no written determination was made pursuant to procurement  
15 regulations. Therefore, DMR's protest is further sustained and granted in that GDOE erroneously  
16 waived the minimum specifications without a proper waiver and written determination by the  
17 Superintendent.  
18

19 **IV. CONCLUSION**

20 **BASED ON THE FOREGOING, the Public Auditor hereby determines the following:**

21 1. GDOE erroneously awarded GDOE IFB025-2010 to Micros-Fidelio Micronesia, Inc.  
22 because Micros-Fidelio Micronesia, Inc.'s bid was non-responsive for failing to meet the minimum  
23 specification of "Manufacturer Authorized Reseller."  
24

25 2. GDOE's award of the contract to Micronesia, Inc. is void, and Micros-Fidelio  
26 Micronesia, Inc. should have been disqualified and rejected at the time of bid opening.

27 3. DMR's Appeal is GRANTED.

28 4. The award of IFB025-2010 Items #1 and 2 to Micros-Fidelio is hereby declared void.

