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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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

10 IN THE APPEAL OF

11 TELEGUAM HOLDINGS, LLC AND
12 ITS WHOLLY OWNED
13 SUBSIDIARIES, GTA TELEGUAM,
14 LLC; GTA SERVICES, LLC; AND
15 PULSE MOBILE LLC,

16 Appellant.

17 APPEAL NO. OPA-PA-13-016

18 **MOTION TO DISMISS FOR LACK OF**
19 **JURISDICTION**

20 Comes now the Guam Department of Education (“GDOE”), the Purchasing Agency in
21 this matter, and pursuant to 2 GAR Div §12104(c)(9) files this Motion to Dismiss this appeal for
22 lack of jurisdiction.

23 **BACKGROUND**

24 On November 19, 2013 Teleguam Holdings, LLC and its wholly owned subsidiaries,
25 GTA Telecom, LLC; GTA Services, LLC; and Pulse Mobile LLC (hereafter referred to as
26 “GTA”) filed the above-referenced appeal with the Office of Public Accountability (“OPA”).
27 The appeal arises from Guam Department of Education’s (“GDOE”) Invitation for Bid (“IFB”)
28 020-2011 for GDOE’s E-Rate Network. GTA bid on Part 6 of the IFB but was not successful in
its bid. Instead, Pacific Data Systems (“PDS”) was awarded Part 6 of the IFB. The award for
Part 6 was completed with the issuance by GDOE to PDS of a Purchase Order on March 23,

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In the Appeal of TeleGuam Holdings, LLC and its Wholly Owned Subsidiaries, GTA TeleGuam, LLC; GTA Services, LLC; and Pulse Mobile LLC, Appellant

OPA-PA-13-016

Motion to Dismiss for Lack of Jurisdiction

ORIGINAL

1 2011. On August 30, 2013, GTA filed a protest with GDOE alleging that PDS' performance
2 under Part 6 failed to comply with the requirements of the IFB. GDOE denied the protest on
3 November 5, 2013 on the bases that the protest was outside the statutory time limit for filing the
4 protest, and that the allegations contained therein were outside the scope of a protest under
5 applicable procurement law. GTA thereafter made its present appeal to the OPA.
6

7 **MOTION TO DISMISS FOR LACK OF JURISDICTION**

8 **I. The grounds for GTA's protests are outside the authority granted to the Office of** 9 **Public Accountability for review of procurement actions.**

10
11 5 GCA §5703 states that the OPA "shall have the power to review and determine de novo any
12 matter properly submitted to her or him." The matters that may be properly submitted to the OPA
13 are described in specific sections of Guam's procurement law and as discussed below, none of the
14 grounds of GTA's protest and appeal fit therein.

15 16 **A. GTA's protest and appeal do not meet the requirements for an appeal relating to** 17 **source selection, solicitation or award of a contract.**

18 5 GCA §5425(a) provides that a protest may be made by an actual or prospective bidder,
19 offeror or contractor who is "aggrieved in connection with the method of source selection,
20 solicitation or award of a contract." 5 GCA §5425(e) allows appeals from decisions made on
21 such protests to be taken to the OPA. Each of GTA's concerns regarding the IFB relate to PDS's
22 performance *after* the solicitation, selection, and award of the contract under the IFB. This is
23 evident by GTA's own statement that it "is not protesting the award of Part 6 [of the IFB] to PDS,
24 rather GTA is protesting the performance, or the lack thereof, of PDS to fulfill its obligations
25 under the bid specification within the requisite date..." (GTA Procurement Appeal, p. 4).
26

1 GTA's appeal concerns only actions or omissions that occurred after PDS was awarded a contract
2 under Part 6 of the IFB; therefore GTA's appeal does not conform to the limitations contained in
3 §5425(a).

4 As GTA's protest and appeal do not meet the requirements of §5425(a), the OPA does not
5 have jurisdiction to hear an appeal under §5425(e).

6
7 **B. GTA's protest and appeal do not meet the requirements for an appeal relating to the**
8 **debarment or suspension of a contractor.**

9
10 In its appeal, GTA requests that PDS should be debarred from future participation in GDOE
11 bids. The jurisdiction of the OPA for matters relating to debarment or suspension is described in
12 5 GCA §5426 and §5705. Section 5426(a) and (c) allow a purchasing agency to debar or suspend
13 an entity from consideration for contract awards. Section 5426(f) allows any member of the
14 public to petition a purchasing agency to take action regarding debarment or suspension. Section
15 5426(e) allows appeals to the OPA for decisions under either Section 5426 (c) or (f), if the appeal
16 is "taken to the Public Auditor in accordance with §5706" of the same chapter.

17 The reference to Section 5706 appears to be a typographical error. The title to Section 5426 is
18 "Authority to Debar or Suspend". The title to Section 5706 is "Contract and Breach of Contract
19 Controversies". However, the title to Section 5705 is "Suspension and Department Proceedings".
20 Section 5705(a) even states that it applies to a review by the OPA of a "decision under §5426 of
21 this Chapter." It is apparent that the reference to Section 5706 in §5426(e) was intended to mean
22 Section 5705. The remainder of this motion therefore refers to Section 5705 when discussing the
23 OPA's authority to hear appeals regarding debarment or suspension of contractors.

24 §5705(c) states that the OPA "shall decide whether, or the extent to which, the debarment or
25 suspension was in accordance with the statutes, regulations and the best interests of the
26 government or any autonomous agency or public corporation, and was fair." The OPA has

1 authority to review whether a debarment or suspension was proper or fair; this power does not
2 extend, expressly or by implication, to allow review when a debarment or suspension *did not*
3 *occur*. It also does not allow the OPA to issue a debarment or suspension on its own; that
4 authority, pursuant to 5 GCA §5426(a) is reserved to the Chief Procurement Officer, the Director
5 of Public Works, or the head of a purchasing agency after consult with the Attorney General.
6 GTA's request for debarment of PDS does not constitute a debarment or suspension as described
7 under 5 GCA §5705(c).

8 As GTA's protest and appeal do not meet the requirements of §5426 or §5705, the OPA does
9 not have jurisdiction to hear an appeal under those sections of the law.
10

11 **C. GTA's protest and appeal do not meet the requirements for an appeal relating to**
12 **contract controversies.**

13
14 The OPA is also authorized to hear appeals relating to contracts or breach of contracts. 5 GCA
15 §5427(a) states that the section applies to "controversies between the Territory and a contractor
16 and which arise under or by virtue of a contract between them." §5427(e) allows for an appeal to
17 the OPA "in accordance with §5706 of this Chapter." As stated above, GTA did not receive an
18 award for Part 6 of the IFB and is therefore not a contractor with GDOE for the services
19 thereunder. Instead, PDS is the contractor for Part 6 of the IFB. §5427(a) clearly limits its
20 application to controversies between a purchasing agency and a contractor, for matters relating to
21 a contract between those parties. As GTA is not a contractor in this matter, GTA's protest and
22 appeal do not meet the requirements of §5427 or §5706 and the OPA does not have jurisdiction to
23 hear an appeal under those sections of the law.
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CONCLUSION

For the reasons above, GTA’s protest and appeal do not meet the requirements that would grant the OPA authority to hear the appeal. GDOE therefore respectfully requests that the OPA dismiss this matter for lack of jurisdiction.

Dated this 26th day of November, 2013.

Respectfully submitted,

GUAM DEPARTMENT OF EDUCATION

By: 
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Legal Counsel