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FILE NO OPA-PA: 14-013

PACIFIC DATA SYSTEMS
185 ILIPOG DRIVE
HBC BLDG SUITE 204A
TAMUNING, GUAM 96913
TELEPHONE: (671) 300-0200
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BEFORE THE
Office of Public Accountability

PETITION TO INTERVENE BY
PACIFIC DATA SYSTEMS, INC.

OPA-PA-14-013

PDS COMMENTS ON GPA AGENCY REPORT

Comes now Pacific Data System (PDS) to submit comments on the Agency Report provided by Guam Power Authority (GPA) in this matter on December 24, 2014 and received by PDS on December 26, 2014.

I. CORRECTIONS/CLARIFICATIONS TO GPA AGENCY REPORT AND PROCUREMENT RECORD

After review of the Procurement Record and Agency Report submitted by GPA in this Appeal, PDS believes the following clarifications and corrections need to be made by GPA for the record:

- A. Correction to page 2, last sentence of 2nd paragraph of the GPA Agency Report; it was PDS that filed an Appeal with the Office of Public Accountability on December 9, 2014, there should be no reference to IP&E in this matter and this reference in the GPA Agency Report should be replaced with PDS.
- B. Correction on the last line of Page 3 and first paragraph of page 4 of the GPA Agency Report that incorrectly states the service items that PDS has protested the award of are "A1 – A6". This is not true, PDS is not contesting the award of service items A-1, A-2, or A-6. PDS is contesting the award of service items A-3, A-4, A-5 to Docomo Pacific, Inc since these service items require GPUC authorization. It should be noted that GPA had issued a notice of potential award to Docomo Pacific, Inc. for A-1 through A-5, and PDS for A-6 to PDS (see Procurement Record at page 188), PDS has not protested the award of A-1 or A-2 to Docomo Pacific, Inc. since these services are unregulated services and do not require any GPUC or Federal authorizations to provide these types of services.

1 C. GPA has included in the Procurement Record a copy of an additional protest that PDS filed on
2 November 24, 2014. This protest was filed by PDS after receiving copies of bid documents from
3 GPA in this procurement. These documents were obtained by PDS via a Freedom of Information
4 Act request. GPA has not yet issued a decision regarding this second PDS Protest, yet GPA
5 makes a reference to the issues raised by PDS in this second Protest in its Agency Report
6 response (reference last paragraph of page 3 of the GPA Agency Report). Since no decision has
7 been made by GPA regarding the issues raised by the second PDS protest, GPA's comments in
8 the current Procurement Appeal related to the protest of 11/17/2014 are inappropriate and
9 misguided. That said, PDS does believe the second PDS Protest of 11/24/2014 raises related
10 issues to the subject Procurement Appeal and other new issues not before the OPA regarding
11 this procurement and the award evaluation and recommendations made by GPA in this
12 procurement. PDS believes that it would promote judicial economy to hear all of these issues
13 together in one consolidated Procurement Appeal. Given the comments of GPA in this Agency
14 Report, it seems that GPA will not sustain the second PDS Protest of 11/24/2014 and thus PDS
15 would likely be forced to Appeal the GPA decision regarding the second Protest to the OPA. We
16 believe GPA should be compelled to issue a decision in the second protest so that the issues
17 involved can be consolidated with this subject Procurement Appeal and the matters heard
18 together.

19 D. GPA has included with the Procurement Record (at Tab 43, page 97 and 98) one of two letters
20 written by PDS' attorney (the second letter is attached as Exhibit 1) regarding the notification
21 and status of the Automatic Stay required by 5 GCA §5425(g). PDS has not had a response from
22 GPA regarding the status of the mandated Stay of this procurement. Instead, GPA has
23 attempted to initiate new procurements for at least one of the services involved in the original
24 PDS Protest and this Appeal. The attached Exhibit 2 is a copy of a third PDS Protest that was
25 made on December 22, 2014 in response to GPA Request for Quote 27443. This RFQ is an
attempt by GPA to ignore the automatic stay that should be in effect for the procurement of
these services.

E. The Procurement Record submitted by GPA in this Procurement Appeal is incomplete and does
not include the following documents. GPA should be compelled by the OPA to produce these
documents as required by applicable procurement law and regulation.

1. No valid Certification of the Procurement Record has been provided by GPA. This
certification of the Procurement record must be made prior to any award and must itself be
part of the Procurement Record (reference 2 GAR §3130). A checklist is provided by GPA at
Tab 36 page 196 of the Procurement Record, but this document has not been signed or
certified by the Chief Procurement Officer under penalty of perjury as required by the
aforementioned Procurement Regulation. The document is also not correct regarding the
submission of confidential documents by the bidders since PDS believes at least two of the
three bidders submitted confidential documents with their bid submissions (see following
point for more details regarding bidders confidential submissions).

- 1 2. It appears that GPA has not provided to the OPA Confidential Information that was included
2 with each of the Bidder submissions (reference following pages of the Procurement Record;
3 Teleguam Holdings LLC bid at Tab 13 at pages 1543 and 1544 and see Exhibit 3 for copy of
4 Section II.D - Financial Information from PDS Technical Bid). In order to complete a *de novo*
5 review, the OPA requires all bid documents contained in bidder submissions (reference 2
6 GAR §12104(c)(6)) be provided as part of the Procurement Record.
- 7 3. No copy of contracts has been provided as part of the procurement record as required by 2
8 GAR §12104(e). PDS is aware that both PDS and Docomo Pacific, Inc. we provided contracts
9 by GPA under this procurement.
- 10 4. The Evaluation Committee memo of 11/25/14 (see Tab 41 page 100 of the Procurement
11 Record) references a detailed service pricing break down submitted by Docomo Pacific Inc.
12 with their Bid Price Proposal, however no such document is included with the Procurement
13 Record for the Docomo Pacific, Inc. Bid Price Proposal (see Tab 28 pages 226 to 240). If such
14 a document does exist, GPA should have been included this document as part of the
15 Procurement Record in this section.
- 16 5. The Procurement Record does not contain any notifications of Stay or Notice of the filing of
17 the PDS protest(s) to other Interested Parties in this Procurement. As the Procurement
18 Record shows, there were three bidders that participated in the procurement; PDS, Docomo
19 Pacific, Inc., and Teleguam Holdings, LLC.

16 **II. PDS COMMENTS ON THE GPA AGENCY REPORT:**

17 In the GPA answer to the PDS Appeal, GPA fails to answer the issue that PDS has clearly identified in its
18 original protest and this appeal; the simple fact that the bidder; Docomo Pacific, Inc. fails to meet the
19 Bidder Qualifications mandated by GPA in this bid since Docomo Pacific, Inc. does not have the required
20 regulatory authority to provide the services that are the subject of the PDS Protest and this Appeal;
21 Service Items A-3, A-4, and A-5. These service items are regulated services that require a Certificate of
22 Authority (COA) issued by the Guam Public Utilities Commission (GPUC)¹. Bidder Qualifications were a
23 significant requirement of the GPA IFB since GPA used a Multi-Step IFB process to qualify the bidders
24 and required the Bidder Technical Offers submitted in Phase I of the procurement to contain substantial
25 information related to Bidder Qualifications including; Financial Performance, Past Experience,
Corporate Documentation, Technical Expertise, Network Capabilities/Design, and Regulatory
Compliance, etc. All of these requirements were answered by the Bidder – Docomo Pacific, Inc. **EXCEPT**
for the requirement related to Regulatory Compliance. For this requirement, Docomo Pacific, Inc. did
not have the required COA, but instead submitted documentation for a separate legal entity, Guam
Telecom LLC (GTL), in an attempt to meet this requirement. This action by Docomo Pacific, Inc. should

¹ Reference Title 12 Chapter 12 GCA §12103(a)

1 have invalidated their bid for the regulated services, since GTL was not the Bidder in this procurement
2 and GTL is not the same legal entity as the Bidder; Docomo Pacific, Inc. Instead of GPA disqualifying
3 Docomo Pacific, Inc. from award of any regulated services requiring a COA², GPA allowed the Docomo
4 Pacific, Inc. bid to be considered for all services even though Docomo Pacific, Inc. did not meet the
5 Bidder Qualifications as required by the terms of the IFB and Guam Law.

6 In the Agency Report made by GPA, GPA has chosen to plead ignorance to the regulatory necessity of a
7 GPUC COA for the services being bid and also to turn a blind eye to the two different corporate
8 identities involved in the Docomo Pacific, Inc. bid; Docomo Pacific, Inc. and Guam Telecom LLC. This
9 may have been the case of an oversight by the evaluation committee, but the PDS Protest clearly
10 identified these issues and gave GPA the information required to make a determination to reject
11 consideration of the Docomo Pacific, Inc. bid for the regulated service items that required a GPUC issued
12 COA; specifically the services, A-3, A-4, A-5, for which PDS has protested the award to Docomo Pacific,
13 Inc.

14 GPA seems to have forgotten that the purpose of the Protest process is to identify issues in a
15 procurement and to allow these issues to be resolved prior to award. This was clearly the opportunity in
16 this case. As soon as PDS was aware of the planned award to Docomo Pacific, Inc. of regulated services
17 for which it did not possess a required COA, PDS protested making GPA fully aware of this issue. Though
18 GPA quickly issued a Protest Decision 4 days later, it chose instead to ignore the clear issue raised by the
19 PDS Protest and to proceed forward to make an award to Docomo Pacific, Inc. anyway; even
20 disregarding the automatic Stay that should have gone into place at the time of the original PDS protest
21 on November 17, 2014.

22 **III. GPA CLAIM FOR ATTORNEY FEES AND COSTS**

23 As the above PDS response and appeal has shown, PDS's original timely protest raised serious issues
24 related to how GPA performed the evaluation and award of this procurement. Further, GPA's refusal to
25 provide transparency in the procurement process and failure to provide a proper Procurement Record,
as required by law and regulation, has cast doubt over the integrity of the procurement process being
conducted by GPA and even whether GPA can make a fair and impartial decision in this matter
regardless of the clear facts that PDS has presented in this protest and appeal. The issues that PDS has
raised in this Appeal are not made fraudulently, frivolously, or solely to disrupt the procurement
process. These issues have been raised by PDS in effort to resolve serious problems regarding the
evaluation and award of this procurement to a bidder that has made a bid that is not responsive to the
bid requirements and who's bid offer violates Guam Law. PDS would not have had to take these steps
had GPA conducted a proper and fair evaluation of the Bids submitted or entered into negotiations with
PDS to resolve the protest as allowed by law and regulation. Therefore, no award of attorney fees or
expenses to GPA can be justified in this appeal.

² not all service items bid by GPA required a GPUC issued COA

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IV. CONCLUSION

PDS continues to request that the OPA undertake a *de novo* review of the IFB evaluation and GPA intent to award parts A-3, A-4, and A-5 of the bid to Docomo Pacific, Inc. We further request that the OPA provide orders as may be required to compel GPA to produce the missing documents to the Procurement Record and Agency Report as noted by PDS above and to enforce the Notice requirements and mandated Stay in this procurement.

For the record, PDS requests a hearing on this matter before the OPA.

RESPECTFULLY SUBMITTED this 5th day of January 2015.

PACIFIC DATA SYSTEMS



JOHN DAY
President

Copy to:
D. Graham Botha - Legal Counsel for Guam Power Authority (via fax to 648-3165)

- Attachments:
- Exhibit 1 Attorney Bill Mann letter dated December 5, 2014 regarding notification of automatic stay
 - Exhibit 2 Copy of PDS 3rd protest dated December 22, 2014
 - Exhibit 3 Section II.D - Financial Information from PDS Technical Bid

Exhibit 1:

Attorney Bill Mann letter dated December 5, 2014,
regarding notification of automatic stay

**BERMAN
O'CONNOR &
MANN**
Attorneys at Law

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December 5, 2014

VIA FACSIMILE [648-3165]

John M. Benavente, P.E.
Interim General Manager
Guam Power Authority
P.O. Box 2977
Hagatna, Guam 96932-2977

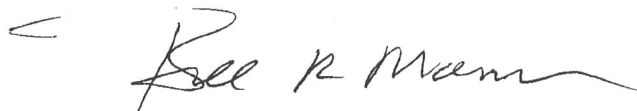
Re: Pacific Data Systems, Inc. Protest of GPA Invitation for Multi-Step Bid
GPA-072-14

Dear Mr. Benavente:

This is to follow-up on my letter to you dated December 1, 2014. I am advised by John Day, President of PDS, that Docomo Pacific has continued working on the project. PDS has not commenced work on the project due to its belief that the automatic stay is in effect as explained in my letter of December 1, 2014.

I again request that GPA immediately notify both Docomo Pacific and PDS of the existence of the automatic stay.

Sincerely,



Bill R. Mann

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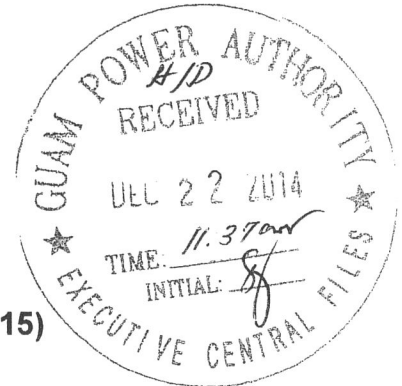
Exhibit 2:

Copy of PDS 3rd protest dated December 22, 2014

December 22, 2014

via hand delivery

Mr. John M. Benavente, P.E.
Interim General Manager
Guam Power Authority
P. O. Box 2977
Agana, GU 96932-2977



Subject: **PROTEST of GPA Request for Quote RFQ 27443(FY15)**

Dear Mr. Benavente:

PDS now files this procurement protest under G.C.A. 5 § 5425(a) regarding the above referenced procurement. PDS has filed this protest in order to call to GPA's attention the following issues related to this Request for Quote (copy attached as Exhibit 1).

1. The services requested to be bid under this Request for Quote (30Mb MetroEthernet services between GPA Macheche Substation and GPA Fadian Office), were previously bid by GPA in IFB GPA-072-14 and this procurement is currently under protest and procurement appeal. Thus, these services are subject to a Stay, reference 5 GCA §5425(g). This RFQ is a violation of the Stay provisions of the Guam Procurement law as noted and should not be allowed to proceed.

GPA is reminded that PDS has filed a timely protest of this procurement and no further action can be taken until this protest has been duly reviewed and an appropriate determination made (5 GCA §5425(g)).

Sincerely,

John Day
President

xc: Ms. Jaime L. C. Pangelinan - Supply Management Administrator

Exhibit 1: **GPA Request for Quote RFQ 27443(FY15)**



GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUAHAN
P.O. BOX 2977 • AGANA, GUAM U.S.A. 96932-2977

Stephanie Imasa/Dawn

Tel: (671) 648-3054/3055 Fax: (671) 648-3165
E-Mail Address: smtaijeron@gpagwa.com

Accountability	Impartiality	Competence	Openness	Value
Please respond as soon as possible, but no later than: 12:00 P.M., December 22, 2014		Request for Quotation (RFQ) No.: 27443(FY15)		Date: December 19, 2014
VENDOR: PACIFIC DATA SYSTEMS 300 - 0200 (F) 300 - 0745 (F)		Please furnish price quotation, delivery time and term based on CIF. Destination GPA for the items listed below. Please respond by the above date.		
Quoted by: (Please Print)		Quote Date:	Telephone:	
Delivery/Completion Date Required: <u>1 Week after Notice to Proceed (NTP)</u>		Offering recyclable and/or biodegradable products. () YES () NO		
Delivery Date Offered:		Please separate your offer of recyclable and/or biodegradable products from regular products		
Terms: <u>NET (30) THIRTY DAYS</u>				
Prices Good For: _____ days				

NOTICE: Restriction against Sex Offenders Employed by Service Providers to Government of Guam from Working on Government of Guam Property, 5GCA Section 5253, enacted by P.L. 28-24 and amended by P.L. 28-98:

If a contract for services is awarded to the bidder or offeror, then the service provider must warrant that no person in its employment who has been convicted of a sex offense under the provisions of Chapter 25 of Title 9 of the Guam Code Annotated or of an offense defined in Article 2 of Chapter 28 of Title 9 of the Guam Code Annotated, or who has been convicted in any other jurisdiction of an offense with the same elements as heretofore defined, or who is listed on the Sex Offender Registry, shall provide services on behalf of the service provider while on government of Guam property, with the exception of public highway. If any employee of a service provider is providing services on government property and is convicted subsequent to an award of a contract, then the service provider warrants that it will notify the Government of the conviction within twenty-four hours of the conviction, and will immediately remove such convicted person from providing services on government property. If the service provider is found to be in violation of any of the provisions of this paragraph, then the Government will give notice to the service provider to take corrective action. The service provider shall take corrective action within twenty-four hours of notice from the Government, and the service provider shall notify the Government when action has been taken. If the service provider fails to take corrective steps within twenty-four hours of notice from the Government, then the Government in its sole discretion may suspend temporarily any contract for services until corrective action has been taken.

THIS IS NOT AN ORDER

NO.	QTY.	DESCRIPTION	Unit Price	Extended Price
	LOT	<p>To provide the Guam Power Authority with 30Mbps Metro Ethernet WAN Connection between the following location:</p> <ul style="list-style-type: none"> - Macheche Substation to Fadian Facility (Server Room) <p>SCOPE OF WORK:</p> <ul style="list-style-type: none"> * Service Level Agreement (SLA): Provider must provide SLA that will address guaranteed response times, escalation procedures and the terms for any refunds/credits. The terms of this Service Level Objectives shall minimally address: <ul style="list-style-type: none"> - Network Availability of 99.99% - Packet delivery rate of 99.99% - Network latency of 10ms round trip - Mean Time to Repair (MTTR) 2 hours * Provider shall describe guaranteed level of bandwidth for the proposed data services * Provider shall provide a description of how the SLA is monitored, with statistic, charts and how these statistics are calculated * Provider must provide monthly bandwidth usage statistics and reports in .pdf format via email by COB 3rd work day of the following month <p>NOTE: All requests for Delivery Extensions will be Closely Scrutinized as all items/services are crucial to new Customer Installations, maintenance, and on-going projects. THANK YOU FOR YOUR RESPONSE Note: If you are unable to provide a price quote please annotate "NO QUOTE" and return this; Fax to: Dawn Fejeran</p>		

Exhibit 1

Exhibit 3:

Section II.D – Financial Information
from PDS Technical Bid

**Section II.D
FINANCIAL INFORMATION**

**SUBMITTED UNDER SEPARATE
SEALED ENVELOPE
CONFIDENTIAL SUBMISSION**

Company Confidential

PDS has labeled these sections of the PDS Bid Response as Confidential per 2 G.A.R. Section 3109(I)(2) and 2 G.A.R. Section 3109(I)(3). These sections have been separated from our main bid submission in order to comply with this Procurement Regulation regarding the treatment and handling of confidential information.