

OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE MATTER OF,)
)
DATA MANAGEMENT RESOURCES, LLC.) **APPEAL NO: OPA-PA-11-010**
) **ORDER DISMISSING APPEAL FOR**
) **LACK OF JURISDICTION AND**
) **VACATING HEARING DATE AND**
) **ASSOCIATED FILING SCHEDULE**
Appellant)

To: **Purchasing Agency:**
Bureau of Information Technology, Government of Guam
C/O Fred Nishihira, Esq.
Assistant Attorney General
Civil Division, Office of the Attorney General, Government of Guam
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Facsimile: (671) 472-2493

Appellant:
Data Management Resources, LLC
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PURSUANT TO 2 G.A.R. Div. 4, Chap. 12, §12104(9), the Public Auditor hereby invokes her authority to review the issue of her jurisdiction to proceed with this matter and after reviewing the pleadings and procurement record filed with this appeal, *Sua Sponte*, the Public Auditor hereby FINDS and ORDERS the following:

1. Appellant's June 28, 2011 Notice of Appeal in this matter is untimely. The Purchasing Agency issued its July 18, 2011 decision denying the Appellant's April 21, 2011 protest twenty (20) days after the Appellant's June 28, 2011 Notice of Appeal. Although the Appellant checked the box on the Notice of Appeal indicating it was appealing a Decision on the

1 Protest of the Method, Solicitation or Award, the Appellant stated that the decision being
2 appealed was Purchasing Agency's untimely failure to respond to the Appellant's April 21, 2011
3 protest.¹ Thus, the Appellant's Notice of Appeal in this matter was untimely because it was filed
4 prior to the Purchasing Agency's Decision on the April 21, 2011 protest.
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6 2. The provisions of 2 G.A.R., Div. 4, Chap. 9, §9103(d)(3) in inapplicable here and do
7 not justify the Appellant's untimely Notice of Appeal. The Appellant explains it could file this
8 matter prior to receiving a decision on its April 21, 2011 protest because June 20, 2011 was the
9 sixtieth (60th) day from the protest and, due to the Purchasing Agency's failure to issue a
10 decision by that date, it is automatically presumed that the Purchasing Agency's issued an
11 adverse decision against the Appellant. Such a presumption exists for procurement appeals
12 concerning Contract and Breach of Contract Controversies and under that procedure, if the Chief
13 Procurement Officer, the Director of Public Works, or the head of a purchasing agency, or the
14 designee of such officers, fail to issue a written decision concerning a contract or breach of
15 contract controversy within sixty (60) days after written request for a final decision, or within
16 such longer period as may be agreed upon by the parties, then the contractor may proceed as if
17 an adverse decision had been received. 5 G.C.A. §5427(f) and 2 G.A.R., Div. 4, Chap. 9,
18 §9103(d)(3). However, this procedure is only applicable to controversies between the
19 Government of Guam and a contractor which arise under, or by virtue of a contract between
20 them to include controversies based upon breach of contract, mistake, misrepresentation, or other
21 cause for contract modification or rescission. 5 G.C.A. §5427(a) and 2 G.A.R., Div. 4, Chap. 9,
22 §9103(b). Here, Appellant's April 21, 2011 protest concerned the Purchasing Agency's April
23 11, 2011 termination of negotiations with the Appellant, who had been selected as the best
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28 ¹ Line 1, page 2, Notice of Appeal filed on June 28, 2011.

1 qualified offeror in RFP-OOG-023-10 (Guam Enterprise Email System) (Hereafter Referred to
2 as “RFP”).² Further, both parties admit that no contract was awarded in the RFP.³ Thus, the
3 procedures set forth in 5 G.C.A. §5427(f) and 2 G.A.R., Div. 4, Chap. 9, §9103(d)(3) do not
4 apply to the Appellant’s April 21, 2011 protest because said protest is not for a contract
5 controversy between the Appellant and the Purchasing Agency.
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7 3. The Public Auditor lacks jurisdiction to hear this matter because it is not properly
8 before her. The Public Auditor has the power to review and determine *de novo* any matter
9 properly submitted to her. 5 G.C.A. §5703 and 2 G.A.R., Div. 4, Chap. 12, §12103(a). The
10 Public Auditor has the jurisdiction to hear an appeal of a purchasing agency’s decision on a
11 protest concerning the purchasing agency’s method of source selection, solicitation, or award of
12 a contract. 5 G.C.A. §5425(e), and 2 G.A.R., Div. 4, Chap. 12, §12201(a). As stated above, the
13 Appellant’s June 28, 2011 Notice of Appeal is untimely. Thus, this matter is not properly before
14 the Public Auditor and the Public Auditor does not have the jurisdiction to hear it.
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17 4. The Appellant’s explanation that it is appealing the Purchasing Agency’s failure to
18 respond to Appellant’s April 21, 2011 protest does not cure the untimely Notice of Appeal.⁴ The
19 Public Auditor’s jurisdiction, in relevant part, is limited to reviewing protest decisions set forth
20 in 5 G.C.A. §5425(c). 5 G.C.A. §5425(e). Such decisions are required if the protest is not
21 resolved by mutual agreement, are made in writing, state the reasons for the action taken, and
22 inform the protestant of its right to administrative and judicial relief. 5 G.C.A. §5425(c). Here,
23 the Purchasing Agency’s failure to decide Appellant’s protest in a timely manner is not the same
24 as the decision set forth in 5 G.C.A. §5425(c) as it is not in writing and does not contain the
25 reasons for the Purchasing Agencies actions. Thus, the Purchasing Agency’s failure to promptly
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27 ² Line 12, page 3, Id.

28 ³ Line 6, Page 4, Id., and Exhibit H, Agency Report filed on July 14, 2011.

⁴ Line 1, Page 2, Notice of Appeal filed on June 28, 2011.

1 issue the decision required by 5 G.C.A. §5425(c) is not a matter that the Public Auditor has the
2 jurisdiction to review.

3 5. The subsequent filing of the Purchasing Agency's decision denying Appellant's
4 protest does not cure the jurisdictional defect caused by Appellant untimely filing of its Notice of
5 Appeal. The facts here are similar to the facts in *TRC Environmental Corporation v. Office of*
6 *the Public Auditor*, SP160-07, Decision and Order on Petition for Writ of Mandate dated
7 November 24, 2008 (Superior Court of Guam). The appellant in that case, filed a document that
8 did not meet the standards of a Notice of Appeal required by Guam Procurement Law and
9 Regulations within the fifteen (15) day appeal period, and the appellant in that case filed an
10 amended appeal, correcting the procedural deficiency, after the fifteen (15) day appeal period
11 had expired. *Id.* at line 15, page 5. The *TRC* court interpreted 5 G.C.A. §5425(e) strictly, and
12 this statute states that a purchasing agency's decision denying a procurement protest may be
13 appealed by a protester to the Public Auditor within fifteen days after receipt by the protestant of
14 the notice of decision. *Id.* at line 2, page 6 and 5 G.C.A. §5425(e). The *TRC* court ruled that the
15 operative term of 5 G.C.A. §5703 and 2 G.A.R., Div. 4, Chap. 12, §12103, which states that
16 jurisdiction of the Public Auditor is limited to matters properly submitted to her, is the term
17 "properly submitted" and the court found that the untimely amended appeal was not properly
18 before the Public Auditor. *TRC* at line 9, page 7. Here, like the *TRC* appellant's amended
19 Notice of Appeal, the Appellant's June 28, 2011 Notice of Appeal is untimely. Thus, applying
20 of the rule in *TRC* here, the Appellant's June 28, 2011 Notice of Appeal is not properly before
21 the Public Auditor because it is untimely, and the Public Auditor does not have the jurisdiction to
22 hear it. Further, unlike the *TRC* appellant, the Appellant in this matter made no attempt to cure
23 the defect by filing an amended Notice of Appeal, or a new appeal, within fifteen (15) days after
24 it received the Purchasing Agency's Notice of Decision denying its April 21, 2011 protest.⁵

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27 ⁵ The Appellant could have done so as it was served with the Purchasing
28 Agency's Decision concerning the Appellant's Protest on July 19, 2011. Thus, the 15 day appeal period would have expired on August 3, 2011. See July 19, 2011 Stamped Receive Mark on Purchasing Agency's Response to DMR Protest of RFP, dated July 18, 2011, Exhibit 2, Purchasing Agency's Augmentation of Procurement Record filed on July 22, 2011.


1 Therefore, here, there was an untimely Notice of Appeal, and no attempt to cure it by the
2 Appellant.

3 6. Based on the foregoing, the Public Auditor hereby DISMISSES this matter without
4 prejudice for lack of jurisdiction.

5 7. The Hearing Re Appellant's Appeal scheduled for 9:00 a.m. on September 6, 2011
6 and the associated filing dates set forth in the August 12, 2011 Scheduling Order in this matter
7 are hereby VACATED.

8 8. This is a Final Administrative Decision. The Parties are hereby informed of their right
9 to appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance
10 with Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final
11 Administrative Decision. 5 G.C.A. §5481(a). A copy of this Decision shall be provided to the
12 parties and their respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made
13 available for review on the OPA Website www.guamopa.org.

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15 **SO ORDERED** this 29th day of August, 2011.

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21 _____
22 DORIS FLORES BROOKS, CPA, CGFM
23 PUBLIC AUDITOR
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FAX

To: **Mr. Fred Nishihira, Esq.**
Legal Counsel for Agency:
GSA – Bureau of Information Technology
(Appellee)

Ms. Jacqueline Taitano Terlaje, Esq.
Legal Counsel for Appellant:
Data Management Resources, LLC (DMR)

From: **Doris Flores Brooks, CPA, CGFM**
Public Auditor
OPA Procurement Appeals
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Hagatna, Guam 96910

Agency: _____ Pages 6 (Including cover)

CC: _____ Date: August 29, 2011

Fax: OAG: 472-2493 Point of Contact **Tel: 475-0390 x 211 (Anne Camacho)**
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Nos.

Re: **Appeal No. OPA-PA-11-010 Order Dismissing Appeal for Lack of Jurisdiction and Vacating Hearing Date and Associated Filing Schedule**

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Anne Camacho – acamacho@guamopa.org

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