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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

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9 **OFFICE OF PUBLIC ACCOUNTABILITY**

10 Docket No. OPA-PA-11-011

11 In the Appeal of  
12 **PACIFIC DATA SYSTEMS, INC.,**  
13 Appellant.

14 **APPELLANT PACIFIC DATA SYSTEMS,**  
15 **INC. COMMENTS ON AGENCY**  
16 **REPORT**

17 **I. INTRODUCTION**

18 Guam Community College (GCC) states in its Agency Report three reasons that  
19 it claims justifies the rejection of all bids in this procurement, referencing the  
20 procurement regulations at 2 G.A.R. Div 4 § 3115(d)(2). The original PDS Procurement  
21 Protest and current Appeal are based on PDS' disagreement with GCC's application of  
22 these regulations to this procurement. The following summarizes PDS' position  
23 regarding each of the reasons for rejection provided by GCC.

24 **II. PDS' BID DOES NOT EXCEED AVAILABLE FUNDS**

25 The first reason provided by GCC claims that the amount of the bids exceed  
26 available funds, referring to 2 G.A.R. Div. 4 § 3115(d)(2)(A)(iv).

27 A careful review of the IFB shows that GCC's assertions relative to this rejection  
28 reason are unsubstantiated by the facts. GCC structured IFB GCC-FB-015 to include the  
procurement of a new VOIP telephone system and telephone services for one year.  
\$285,000 of ARRA funds were available to pay for the new VOIP telephone system.

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2 GCC also provided documentation with Amendment #2 of IFB GCC-FB-015 that  
3 revealed the amount of local funds that GCC had budgeted and was paying to the  
4 existing provider GTA was estimated at \$132,000 per year for telephone services.

5 It was the high annual telephone costs of the existing GTA telephone service that  
6 motivated GCC to seek procurement of a new telephone system in order to reduce its  
7 continuing operational costs.<sup>1</sup> GCC has stated in its ARRA application and at the  
8 bottom of page 2 of its April 7, 2011 Notice of Rejection that:

9 *"The entire purpose of this bid was to save GCC money on*  
10 *phone services"*

11 It is clear that GCC fully understood that the savings it sought would be derived  
12 from the reduction in annual recurring costs for telephone services that would be made  
13 possible through the procurement of a new telephone system. Hence, GCC sought to  
14 procure **both** the new telephone system and telephone services under the single IFB  
15 GCC-FB-015 procurement, understanding that the two things (new telephone system  
16 and lower cost telephone services) were inexorably linked and that the total funding  
17 available for this project was not limited to the amount of ARRA Grant Funding  
18 available, but also included the funding used by GCC for its existing telephone services.

19 Contrary to GCC's assertion in its Agency Report, PDS' Bid submission was  
20 within total funding available from ARRA funds when combined with GCC funds for  
21 telephone services, and the PDS Bid does indeed enable GCC to meet its stated objective  
22 of saving money on its future telephone services. The following is a summary of the  
23 total amount of the PDS Bid summarized by the amounts for the new Telephone System  
24 and the amount for the new telephone services. The amount of funds that GCC has  
25 available for the new Telephone System and Telephone Services are also shown.

26 <sup>1</sup> This results from the fact that the new VOIP telephone systems would perform various  
27 functions that GCC had been (and still is) paying GTA to perform with its existing Centrex system from  
28 GTA.

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<u>Bid Items</u>	<u>Available Funds</u>	
New Telephone System	\$285,000.00	(ARRA Funding)
Existing Telephone Services	\$132,000.00	(GCC Funding)
Total Funding Available	<u>\$417,000.00</u>	
PDS Bid	\$307,880.50	
Excess Funding	<u>\$109,119.50</u>	

As the above analysis plainly shows, the PDS Bid is well within funding available to GCC for this procurement. The PDS Bid includes Telephone Services with an annual cost of \$30,000 per year, a reduction of \$102,000 or 77% per year compared to GCC's current expense of \$132,000 per year. Clearly these are the very sort of operational savings that GCC was looking for when GCC prepared this procurement and made its ARRA grant request to fund this project.

### III. IT IS APPROPRIATE TO ADJUST QUANTITIES

GCC next states in its Agency Report that it made a determination that it would have been inappropriate to adjust quantities to come within available funds. Though PDS believes that the PDS Bid is well within available funding, PDS structured its bid to comply with GCC requirements to allow for flexibility to adjust the bid configuration to meet available funding. Page 1 of GCC Amendment #3 specifically states that vendors were to provide bid configurations that GCC could adjust to come within available funding. The PDS Bid submission provides just this capability and allows for adjustments in quantities of various system components or services to meet GCC's available funding.

Contrary to GCC's assertion that it made a determination that it would be inappropriate to modify quantities to come within available funds, PDS is unaware of GCC ever undertaking any revisions to the PDS Bid configuration in order to analyze this possibility. The procurement record submitted by GCC does not contain any

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record of the sort of calculations or analysis that would be necessary for GCC in good faith to make this determination.

Even though GCC took the position that the PDS Bid was over the amount of funding available, GCC never communicated to PDS any request to adjust the PDS Bid configuration to reduce or reconfigure system components or services to meet available funds. Though PDS did not receive any request from GCC, PDS did undertake its own review and believes the existing telephone system and telephone services quantities could be reduced without significantly affecting the performance of the proposed telephone system or telephone services:

<u>Bid For</u>	<u>PDS Bid</u>	<u>Adjustments</u>	<u>Revised PDS Bid</u>
New Telephone System	\$307,880.50	\$25,209.50	\$282,671.10

The revised Bid Form and Worksheet were contained in Exhibit F of the PDS Protest of April 21, 2011. That protest letter is Exhibit 3 to the PDS Appeal. This worksheet shows the quantity changes that were made to the original configuration to arrive at the figures above.

The assertion by GCC that it would not be appropriate to make quantity adjustments, as allowed by the GCC Bid specifications and G.A.R. Div 4 § 3115(d)(2)(A)(iv), to come within available funding is not true. Adjustments, if required, can indeed be made and are completely acceptable and lawful. It appears that GCC has not even made a good faith effort to do so, which constitutes a violation of the Public Auditor's Order of January 12, 2011, requiring GCC to "... consider the IFB's remaining bidders in accordance with Guam Procurement Law and Regulations."

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2 **IV. GCC'S REFERENCE TO A PENDING GSA IFB IS A PRETEXT**

3 GCC claims in its Agency Report that the supplies and services are no longer  
4 required due to a new GovGuam General Services Agency (GSA) IFB. GCC claims that  
5 this IFB renders this procurement redundant. It is true that on June 22, 2011, GSA did  
6 issue an IFB for Telecommunications Services. However, GCC ignores the fact that this  
7 IFB only covers telephone services and not a new Telephone System. The new GSA IFB  
8 cannot in any way take the place of IFB GCC-FB-015. The two procurements are  
9 definitely not redundant. In addition, the Telephone Services award that will come out  
10 of this GSA procurement will not be compatible with the older Centrex telephone  
11 equipment in use today by GCC, and would require a substantial additional  
12 expenditure by GCC for new telephones to support the new service.

13 Moreover, actual adoption by GCC of any GSA award in the current GSA  
14 procurement is far from certain since an adoptable award is yet to exist, and given the  
15 past history with these types of GSA procurements, may not exist for some time if at all.  
16 This is due to the fact that GSA has been unable to create a viable procurement for these  
17 services. The most recent IFB issued by GSA (GSA-064-11) is not the first procurement  
18 that has ever been issued by GSA for telephone services. GSA issued OOG-BIT-027 on  
19 October 1, 2009 and cancelled the procurement before opening on December 28, 2009.  
20 Another procurement, GSA-058-10, was issued on March 18, 2010 and was again  
21 cancelled before opening on August 19, 2010.

22 Finally, it should be noted that at the time that GCC issued IFB GCC-FB-015,  
23 there was a GSA procurement pending for Telephone Services (the aforementioned  
24 GSA-058-10). However, GCC took no action to be part of that procurement. Quite to  
25 the contrary, GCC decided instead to request ARRA funds and initiated its own  
26 procurement. PDS finds it very strange and curious that GCC would now refer to a  
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2 GSA procurement as a reason for rejecting valid bids for this procurement, particularly  
3 when PDS' bid meets all requirements and provides the saving on telephone services  
4 costs that GCC states was the basis for the procurement. PDS believes GCC's reference  
5 to the pending GSA IFB is only a pretext for the rejection of bids on GCC's own  
6 procurement.

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8 **V. THE PDS BID IS REASONABLE**

9 PDS notes that in its denial of the PDS protest, GCC took the position that the  
10 remaining proposals were at unreasonable prices. PDS responded to this claim in its  
11 Appeal at pp. 7-8. It is noteworthy that GCC did not make this argument in its Agency  
12 Report, and thus no longer contests PDS' position that its bid was reasonably priced.

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14 **VI. GCC ACTIONS ARE IN VIOLATION OF G.A.R. DIV. 4 § 3115(b)**

15 In summary, it is the position of PDS that its bid is within the available funds for  
16 the project, or alternatively can be adjusted to come within available funding. The PDS  
17 bid will deliver the operational savings in telephone service costs that are the  
18 fundamental reason why GCC initiated this procurement. GCC seems to believe that  
19 rejection of all bids can be done with little justification. Quite to the contrary, G.A.R.  
20 Div 4 § 3115(b) states:

21 (b) Policy. Solicitations should only be issued when there is a  
22 valid procurement need unless the solicitation states that it is  
23 for informational purposes only. The solicitation shall give  
the status of funding for the procurement.

24 Preparing and distributing a solicitation requires the  
25 expenditure of government time and funds. Businesses  
26 likewise incur expense in examining and responding to  
27 solicitations. Therefore, although issuance of a solicitation  
28 does not compel award of a contract, a solicitation is to be  
cancelled only when there are cogent and compelling

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2 reasons to believe that the cancellation of the solicitation is in  
3 the territory's best interest.

4 PDS believes that GCC's rejection of all bids is in effect an effort to cancel the  
5 procurement, and that the reasons provided by GCC for taking this action do not meet  
6 this standard and therefore can not be allowed.

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8 **VII. RELIEF REQUESTED**

9 This procurement has been pending a valid award by GCC for over a year and  
10 given that the primary funding source for the purchase are ARRA funds, PDS cannot  
11 understand why GCC has dragged these proceeding out as long as possible even when  
12 under order by the OPA to take action. GCC's delays have put GCC's primary funding  
13 source, ARRA, in jeopardy. In addition these delays have forced GCC to expend at  
14 least an additional \$100,000 dollars in local funds in order to pay for its existing high  
15 cost telephone services from GTA since GTA's bid was ruled to be non-responsive.

16 A review of the record since the OPA Decision in the prior Appeal in this  
17 procurement (OPA-PA-10-005) is revealing regarding the lack of good faith shown by  
18 GCC in this procurement:

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- 20 • On January 12, 2011 GCC was ordered by the OPA to consider the  
21 remaining bidders.
  - 22 • GCC took no action on the OPA's Order. Due to GCC's inaction,  
23 on April 5, 2011, PDS filed a Motion with the OPA to enforce the  
24 OPA's January 12, 2011 Order.
  - 25 • On April 7, 2011, GCC took action to reject all bids by sending out a  
26 notice to the bidders.
  - 27 • On April 21, 2011, PDS filed a protest of GCC's decision to reject all  
28 bids.

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- GCC took no action on the PDS Protest until PDS made a demand for resolution in a letter from Bill Mann to Sarah Strock on June 7, 2011. See GCC's First Supplemental Procurement Record.
- Finally, on June 15, 2011, GCC denied the PDS Protest.

GCC lack of action and good faith compliance with procurement law and regulations have resulted in this procurement now being before the OPA for a second time. Worse yet, the primary ARRA funding source for this project will soon expire and the matter now requires urgent attention on the part of the OPA.

Therefore, in addition to other remedies that the OPA may deem are warranted, PDS requests that the OPA order the following actions of GCC:

1. Order GCC to award this bid to PDS as the most responsive bidder.
2. Order GCC to use local and/or ARRA funds for this award. If GCC should provide evidence to the OPA within 10 days of the OPA's decision showing that it lacks funds to award the full amount of the PDS bid, then the OPA at that time can order GCC and PDS to meet and within 10 days settle on an amended system configuration by modifying quantities that meets GCC bid requirements and available funding.
3. Order GCC to issue PDS a Purchase Order for the award not later than September 30, 2011. This will allow GCC to preserve its ARRA funding, become compliant with Guam Law, and insure that GCC can begin to realize the savings that were the genesis of this procurement.
4. Award PDS its costs in its protest and appeal.

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**VIII. REQUEST FOR HEARING**

For the reasons noted above, PDS does not believe that sufficient time exists for the matter to go through a formal hearing process, and thus requests that the matter be decided based on the filings of the parties.

DATED this 29<sup>th</sup> day of July, 2011.

Respectfully submitted,

**BERMAN O'CONNOR & MANN**  
Attorneys for *PACIFIC DATA SYSTEMS, INC.*

By: 

**BILL R. MANN**