

Jacqueline Taitano Terlaje, Esq.  
Rachel Taimanao-Ayuyu, Esq.  
**LAW OFFICE OF JACQUELINE TAITANO TERLAJE, P.C.**  
888 North Marine Corps Drive, Suite 215  
Tamuning, Guam 96913  
Telephone 671.648.9001  
Facsimile 671.648.9002  
Email: [info@terlajelaw.com](mailto:info@terlajelaw.com)

Attorneys for *Data Management Resources, LLC*

RECEIVED  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS  
AUG 22 2011  
TYPE: 4/15 BY: MMU  
FILE NO: 16-015

**THE OFFICE OF PUBLIC ACCOUNTABILITY – GUAM**

**HAGATNA, GUAM**

In the Appeal of ) DOCKET NUMBER OPA-PA-11-015  
)  
DATA MANAGEMENT RESOURCES, LLC. ) **APPELLANT DMR COMMENTS TO**  
Appellant ) **AGENCY REPORT**  
)  
)

COMES NOW, Appellant DATA MANAGEMENT RESOURCES, LLC (hereinafter “DMR”) through undersigned counsel pursuant to §12104(c)(4) of the Guam Administrative Rules and Regulations (hereinafter “GAR”) and comments to the Agency Report filed by the Guam Community College (hereinafter “GCC”).

**FACTUAL BACKGROUND**

On April 1, 2011, GCC issued GCC-FB-11-007 for Information Technology Equipment. DMR, ComPacific and Sanford Technology Group (hereinafter “Sanford”) retrieved the invitation for bid.

As a condition of bidding, GCC-FB-11-007 required certain bidder qualifications and representations, specifically the Assurance of Compliance with the Buy American Act (hereinafter “Assurance of Compliance”), to be made part of the bid package. All complete bids were required to be submitted no later than April 15, 2011.

**COPY**

1 GCC issued a "Special Reminder to Prospective Bidders" (hereinafter "Special Reminder")  
2 once again detailing the terms and conditions of the invitation for bid. Importantly, on April 14, 2011,  
3 Sanford acknowledged by its representative that the Compliance Certification was a Specification  
4 required to be submitted with its bid. Sanford acknowledged that "**Failure to comply with the above**  
5 **requirements will mean a disqualification and rejection of the bid.**" See Exhibit 4 to DMR Appeal.

6 All three bidders submitted bids which were opened by GCC on April 15, 2011. However,  
7 Sanford failed to submit a complete bid as required for bidding because it failed to include the  
8 Assurance of Compliance with the Buy American Act. More than two weeks after bid opening, GCC  
9 erroneously allowed Sanford to correct its bid by permitting the late submission of the Compliance  
10 Certification by Sanford on May 3, 2011.

11 On May 19, 2011, DMR lodged a protest with GCC.

12 GCC failed to timely respond within sixty (60) days to the protest.

13 On July 18, 2011, DMR timely appealed to the Public Auditor.

## 14 ANALYSIS

### 15 A. **GCC DENIAL OF PROTEST IS UNTIMELY UNDER APPLICABLE** 16 **PROCUREMENT RULES AND REGULATIONS**

17 GCC incorrectly cites Rule 6 of the Guam Rules of Civil Procedure regarding time computation  
18 as it does not apply in procurement protests and appeals. The applicable authority for procurement  
19 proceedings such as this is found within Chapter 12 of the GAR. 2 GAR § 12101 states "[t]hese rules  
20 shall be construed and applied to provide for the expeditious resolution of controversies in accordance  
21 with the requirements of 5 GCA Chapter 5 (Guam Procurement Law) and the Guam Procurement  
22 Regulations contained in 2 GAR Division 4." Regarding time computation, GAR provides "[i]n  
23  
24  
25  
26  
27  
28

1 computing any period of time prescribed by these rules, the day of the act, event, or default from which  
2 the designated period of time begins to run shall not be included.” 2 GAR § 12102 (g).

3 Notwithstanding, GCC untimely issued its Denial of Protest on July 19, 2011—sixty-one days  
4 from the DMR’s protest. By GCC’s computation, the day of protest *and* the sixtieth day from protest  
5 should not be included. This is simply incorrect as a plain meaning of the rule contemplates a single  
6 day, or a single event. Whether GCC chooses to exclude the day of DMR’s protest in its computation,  
7 or in the alternative, the sixtieth day from May 19, 2011 with that date being day one; the sixtieth day  
8 would have been July 18, 2011.  
9

10 **B. THE PUBLIC AUDITOR HAS DETERMINED THAT COMPLIANCE WITH**  
11 **BIDDER CERTIFICATION EXPRESSLY REQUIRED IN AN INVITATION**  
12 **FOR BID IS A MATTER OF RESPONSIVENESS**

13 Our procurement laws define a "responsive bidder" as a person who has submitted a bid which  
14 conforms in all material respects to the Invitation for Bids. 5 G.C.A. § 5201(g) and 2 G.A.R. Div. 4.  
15 Chap. 1, 1106(28). GCC-FB-11-007 expressly and specifically required that the Assurance of  
16 Compliance, along with other statutorily mandatory certifications and representations by bidders be  
17 included with submitted bids and failure to do so would have resulted in disqualification and rejection  
18 of those bids. Additionally, because GCC-FB-11-007 involved the use of federal funds, a bidder’s  
19 assurance of compliance of those applicable federal requirements was a condition of bidding. 5 G.C.A.  
20 § 5501.  
21

22 GCC asserts that the Assurance of Compliance involves bidder qualification, and therefore, is a  
23 matter of bidder responsibility, not responsiveness. GCC Report, Exhibit C, at p. 3. However, the  
24 Public Auditor has previously rejected a similar argument made by GCC in In the Appeal of Pacific  
25 Data Systems, Inc., OPA-PA-10-005 (filed Jan. 12, 2011). In Pacific Data Systems, the Public Auditor  
26  
27  
28

1 determined the contrary and found that whether a bidder has complied with statutory mandates and an  
2 IFB's express and specific requirements is an issue of bidder responsiveness, not responsibility. Id.

3 In Pacific Data Systems, GCC issued an invitation for bid for a telephone systems project. The  
4 invitation terms and conditions required that a bidder submit an Affidavit of Disclosure of Major  
5 Shareholder and other bidder certifications with their bids. Three bidders submitted bids by an  
6 extended deadline of which they included affidavits. GCC awarded the bid to GTA. Consequently,  
7 Pacific Systems protested the award on grounds that GTA's affidavits<sup>1</sup> were nonconforming. In  
8 response to the protest, GCC decided that GTA had "substantially complied" with the bid requirements  
9 because it had initially submitted a shareholders disclosure and therefore, the issue became one of  
10 bidder responsibility which could be addressed through a responsibility inquiry.  
11

12 Rejecting GCC's arguments, the Public Auditor found that bidder certifications expressly  
13 required in an invitation to bid affects responsiveness. Like in Pacific Data Systems, GCC once again  
14 takes the position that requirements outlined in an invitation for bid, and again contained in its Special  
15 Reminder, are merely issues of bidder responsibility. Specifically, GCC asserts that "[t]he Assurance  
16 of Compliance...was not a condition of bidding for GCC-FB-11-007". GCC Agency Report at p. 3.  
17 However, a review of the procurement record clearly reveals that GCC-FB-11-007 absolutely required  
18 bidder certification for use of specific federal funding which requires the Assurance of Compliance.  
19 GCC's position is contrary to the Public Auditor's decision in Pacific Data Systems and therefore,  
20 should be rejected in the above appeal.  
21

22 As it did in Pacific Data Systems, GCC again cites In Appeal of Jones and Guerrero Co., Inc.  
23 for support that the Assurance of Compliance affects bidder responsibility. Id., OPA-PA-07-005.  
24 Similarly, GCC contends bidder's certification of compliance with the Buy American requirements is  
25

26 <sup>1</sup> The appellant protested the award on grounds that GTA's bid bond, Major Shareholder's Disclosure Affidavit,  
27 Non-Collusion Affidavit, and Representations regarding Ethics in Public Procurement did not conform to the  
28 invitation's requirements.

1 relevant only as to whether a bidder is capable of performing the contracted services. GCC Agency  
2 Report; *See also* Agency Report to Pacific Data Systems, OPA-PA-10-005. However, even in Jones,  
3 the Public Auditor found that "responsiveness goes to matters of substance evident from the bid  
4 document such as conformance to the contract conditions." Id. at p. 9. Because it involves federal  
5 funds, GCC-FB-11-007 requires that bidders submit their Assurance of Compliance as it is a required  
6 condition for funding. Contrary from GCC's position, a bidder cannot promise to perform a contract it  
7 is not otherwise eligible to enter. Therefore, the Assurance of Compliance requirement is a condition  
8 of bidding and was required to be submitted by April 15, 2011.

9  
10 **C. DMR'S BID INCLUDES MINIMUM SPECIFICATIONS FOR ITEM NO. 3**

11 Contrary to GCC's report that DMR did not meet the minimum specifications, DMR's bid  
12 included a "6-cell Primary Battery" specification. See excerpt of DMR bid attached to Appeal as  
13 Exhibit 7. Further, DMR's submission of its bid acknowledges and confirms that DMR meets the  
14 minimum specifications. Where DMR did not meet the minimum specification, significantly exceeded  
15 the minimum requirement, or provided some other form of variation from the minimum specification  
16 requested, a "Note" would have been included in the bid for each specific item number. The only  
17 variation noted for Item No.3 by DMR was a "Memory Upgrade," otherwise in all other respects, DMR  
18 has acknowledged and confirmed that it met the minimum specifications. Based on DMR's  
19 confirmation of minimum specifications met, its bid was responsive to Item No.3. 5 G.C.A. § 5201 (g).  
20  
21

22  
23 **LAW OFFICE OF  
JACQUELINE TAITANO TERLAJE, P.C.**

24  
25 By:

  
26 **JACQUELINE TAITANO TERLAJE**  
Attorneys for Appellant  
27 *Data Management Resources, LLC*