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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

SEP 01 2011

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FILE NO. OPA-PA 11-015

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

In the Matter of Appeal of	)	Docket Number: OPA-PA-11-015
	)	
DATA MANAGEMENT RESOURCES,	)	
LLC,	)	<b>REBUTTAL TO COMMENTS ON</b>
Appellant	)	<b>AGENCY REPORT</b>
	)	
	)	
	)	
_____	)	

Appellee Guam Community College, (hereinafter "GCC"), by and through its attorney, Catrina M. Campana, of Cabot Mantanona LLP, respectfully submits this Rebuttal to Comments on DMR's Agency Report.

**FACTUAL BACKGROUND**

On April 1, 2011 GCC issued GCC-FBB-11-007 for Information Technology Equipment. On April 4, 2011 Sanford Technology Group (hereinafter "Sanford") was the first vendor to pick up the for GCC FB-11-007 packet. As noted in GCC's agency report, the GCC Materials Management Office did not have a complete set of bid documents prepared at that time.

As described in the Decision on Protest, after the Materials Management Office realized the documents were missing, Sanford was contacted to pick up those

documents: Special Reminder to Prospective Bidders (1 page), Terms and Conditions (Section 43-47- 2 Pages) which were provided in the submission.

Because the Assurance of Compliance for the Buy American Act forms were not included in the Sanford Technology Group's Bid packet at the time of the bid opening, GCC took reasonable steps to remedy this omission and contacted Sanford to pick up the Assurance of Compliance form to be notarized. The Compliance Certification was retrieved from GCC on April 27, 2011. The notarized document was submitted by Sanford Technology on Tuesday, May 3, 2011. Sanford was subsequently awarded the bid for items No. 1 and 4.

None of the bidders met the specifications for Item No. 3 and on May 5, 2011 DMR was notified that GCC did not intend to award Item No. 3 based on the "unsubstantiated, unavailable product, vendor or manufacturer information for the following category: "High Capacity 6 Cell Up to 14 Hours of Battery Life Weight 4 lbs or less with battery".

On May 19, 2011 DMR lodged a protest of the award of Items No. 1 and 4 to Sanford and the non award of Item No. 3.

On July 19, 2011 GCC issued its decision on the protest.

On July 28, 2011 DMR appealed to the Public Auditor. and on July 29, 2011 DMR supplemented that appeal.

DMR incorrectly states in the Comments on the Agency Report that DMR's Appeal was filed on July 18, 2011. The Decision on the Protest was not rendered until July 19, 2011 and the appeal was filed on July 28, 2011. An appeal dated July 18, 2011 would have been premature and the Public Auditor would not have jurisdiction to

hear the case, as 5 G.C.A. § 5425(e) only allows the Public Auditor to hear cases that are properly before her. 5 G.C.A. § 5425(e), and 2 G.A.R. Div. 4, Chap. 12, §12201(a) give the Public Auditor jurisdiction to hear an appeal of a purchasing agency's decision on a protest concerning the purchasing agency's method of source selection, solicitation or award of contract. In the Appeal of Data Management Resources, OPA-PA-11-010.

## ANALYSIS

### 1. TIMELINESS OF GCC DENIAL OF PROTEST

GCC acknowledges that information required by either party from the other should be rendered expeditiously (2 GAR § 9103(d)). Bid protests decisions are meant to be rendered in writing “as expeditiously as possible” (2 GAR § 9101(g)(1)) and “promptly” (5 GCA § 5425(c)).

If an Agency does not issue a decision on a protest the Public Auditor has the power to compel the agency to issue a decision according to her authority to promote the integrity of the procurement process. In the Appeal of [IBSS], OPA-PA-08-003.

This process for the Public Auditor to compel an agency to issue a decision is different from the Procurement Regulations of the Compare Guam Supreme Court, which require a written decision within fourteen days, and if not given in that time, “the aggrieved party may proceed as if an adverse decision had been given”. (Sections 10 (B) and (C)).

In the present case, GCC made a good faith effort to render the decision on this protest as rapidly as possible. The decision was issued on July 19, 2011, 60 days after GCC's receipt of the protest.

5 GCA §§ 5425 (b) and (c)) states that Bid protests are intended to be settled and resolved, where possible, by "mutual agreement". On July 19, 2011 Attorney Rachel Ayuyu contacted GCC's counsel and identified herself as an attorney employed at the office of Jacqueline Taitano Terlaje, P.C., counsel for DMR. See Declaration of Catrina Campana marked and attached as Exhibit "A".

During that conversation, Attorney Ayuyu stated that the decision on the DMR protest was due on July 19, 2011, but offered to extend the due date because DMR was not aware that GCC was represented by counsel at the time they submitted their protest so they did not serve GCC's attorney with a copy of the protest.

Counsel for GCC informed Ms. Ayuyu that the protest decision had been finalized and that it would be delivered that same day so an extension of time would not be necessary. This is precisely the type of informal dialogue 5 GCA §§ 5425 (b) and (c) encourages. In any event, the decision on DMR's protest was rendered that same day, thus rendering DMR's repeated assertion that GCC's decision on the protest was untimely irrelevant.

## **2. COMPLIANCE WITH THE BUY AMERICAN ACT IS AN ISSUE OF BIDDER RESPONSIBILITY, NOT RESPONSIVENESS**

DMR again cites OPA-PA-10-005 In the Appeal of Pacific Systems, Inc., to support their argument that compliance with the Buy American Act is as an issue of

bidder responsiveness, not responsibility. Contrary to this assertion, the Public Auditor in the OPA-PA-10-005 decision declared that the issue was one of bidder responsiveness, not responsibility, explicitly because the Major Shareholder's Disclosure Affidavits were a *condition of bidding* according to 5 GCA § 5233 and 21. G.A.R. Div. 4, Chap. 3, § 3109(e)(3)(E).

The relevant language in the OPA-PA-10-005 decision reads: "The plain meaning of this clear statutory language is that bidding is conditional, based on the bidder disclosing persons holding more than ten percent (10%) of the bidder's ownership interest or shares."

Guam Procurement Law requires Major Shareholder's Disclosure Affidavits as a condition of bidding. Meanwhile, the Assurance of Compliance for the Buy American Act was not a condition of bidding for GCC-FB-11-007, as it was a clear issue of bidder qualification. Matters involving bidder qualification are a matter of responsibility, not responsiveness.

The Sanford Technology bid submitted a bid conformed in all material respects to the invitation for bids. Because this is a matter of responsibility, the proper time frame for the GCC determination of responsibility of the Sanford bid was prior to award, not at the bid opening on April 15, 2011. Unlike responsiveness decisions, responsibility determinations are based on the information supplied or available up to the time of award. In the Appeal of Jones and Guerrero Co., Inc., dba J & G Construction, OPA-PA-07-005.

The late acceptance of the Assurance of Compliance form by GCC does not merit a revocation of the award of Items No. 1 and 4 to Sanford. Because this was an

issue of bidder qualification relating to the responsibility of the bidder it was within GCC's discretion to determine that Sanford was a responsible bidder and award Items 1 and 4.

### **3. DMR WAS NON RESPONSIVE TO ITEM NO. 3**

On May 5, 2011 GCC notified DMR that it did not intend to award Item No. 3. GCC based this decision on the "unsubstantiated, unavailable product, vendor or manufacturer information for the following category: "High Capacity 6 Cell Up to 14 Hours of Battery Life Weight 4 lbs or less with battery". DMR's submission of its bid did not meet the minimum specifications and DMR was non-responsive for failure to confirm that the weight of the Netbook with a 6 cell battery does not exceed the weight limit of 4 pounds.

The technical specifications for the Latitude 2120 provided by the DMR bid note that the Preliminary Starting Weight of the Latitude 2120 is 2.9 lbs (***with a 3 cell battery***). DMR's bid, evaluated at the time of bid opening, was non responsive on its face. It was therefore in the best interest of the territory to not award Item No. 3 to DMR on the grounds that it was a non responsive bidder.

In the protest dated May 19, 2011, DMR stated that the 6 Cell primary battery has a life of up to 60 hours, and a weight of 3.26 pounds with a 6-cell battery. However, as GCC responded in the denial of protest dated July 19, 2011, the responsiveness of the bidder is determined only on the basis of information submitted with the bid and facts available at the time of bid opening and is determined at the bid opening date. 5 G.C.A. 5201 [g]; 2 G.A.R. DIV 4 Chap. 2 Section 3109 [n][1] provides, "The initiation for

Bids shall set forth the requirements and criteria which will be used to determine the lowest responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids." In the Appeal of Jones and Guerrero Co., Inc., dba J & G Construction, OPA-PA-07-005.

GCC respectfully requests that the Public Auditor dismiss this Appeal and award all legal and equitable remedies that GCC may be entitled to as a result.

Respectfully submitted this 1<sup>st</sup> day of September, 2011.

**CABOT MANTANONA LLP**  
*Attorney for **Guam Community College***

By:

  
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In the Matter of Appeal of	)	Docket Number: OPA-PA-11-015
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DATA MANAGEMENT RESOURCES	)	
LLC,	)	<b>DECLARATION OF</b>
Appellant	)	<b>CATRINA CAMPANA RE</b>
	)	<b>TIMELINESS OF PROTEST</b>
	)	<b>DECISION</b>
_____	)	

I, **CATRINA CAMPANA**, declare as follows:

1. I am over eighteen, under no civil disability and competent to testify to matters stated herein.
2. I make this Declaration based upon my own personal knowledge based upon my telephone conversation with counsel for DMR on July 19, 2011.
3. My firm represents Guam Community College in this appeal.
4. That on May 19, 2011 DMR lodged it's protest. GCC delivered a copy of this protest was delivered to the offices of Cabot Mantanona approximately a week later.
5. That on July 19, 2011, I received a phone call from the Law Offices of Jacqueline Taitano Terlaje, P.C., counsel for DMR.

**EXHIBIT "A"**



6. That the person on the phone identified herself as Rachel Ayuyuu, an associate attorney employed by the Law Offices of Jacqueline Terlaje, counsel for DMR.

7. Attorney Ayuyu stated that the decision on the DMR protest was due on July 19, 2011, but offered to extend the due date because DMR was not aware that GCC was represented by counsel at the time they submitted their protest so they did not serve GCC's attorney with a copy of the protest. Attorney Ayuyu apologized for the oversight and offered to extend the deadline as a professional courtesy.

8. That in response to Attorney Ayuyu's offer to extend the deadline of July 19, 2011, I informed her that the protest decision had been finalized and would be served that same day.

9. That the above described communications were understood by me to be a good faith effort to comply with 5 GCA §§ 5425 (b) and (c).

10. That the protest decision was served on July 19, 2011.

Dated this 1<sup>st</sup> day of September, 2011.

  
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CATRINA M. CAMPANA