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11 **THE OFFICE OF PUBLIC ACCOUNTABILITY – GUAM**  
12 **HAGÁTÑA, GUAM**

13 In the Appeal of ) DOCKET NUMBER. **OPA-PA-12-007**  
14 )  
15 )  
16 DATA MANAGEMENT RESOURCES, LLC, ) **APPELLANT’S OPPOSITION TO**  
17 ) **GOVERNMENT’S MOTION TO DISMISS AND**  
18 ) **VACATE PROCUREMENT**  
19 ) **AND**  
20 ) **REQUEST TO STRIKE**  
21 )

Appellant.

22 COMES NOW Appellant, DATA MANAGEMENT RESOURCES, LLC. (“DMR”), through  
23 undersigned counsel in opposition to the Government of Guam’s Motion to Dismiss and Vacate  
24 Procurement. Additionally, Appellant seeks an Order from the Office of Public Accountability striking  
25 the Motion to Dismiss due to the unsupported and unsworn allegations made therein.

26 **MEMORANDUM OF POINTS AND AUTHORITIES**

27 **I. Procedural and Factual Background**

28 This appeal involves the General Services Agency (GSA)/Department of Administration (DOA)  
Request for Proposal No. RFP/DOA-014-11 Point of Sale (hereinafter “RFP”) for a “Turn-Key” project

**COPY**

1 to design, develop and implement a point-of-sale system which fully integrates payment processing for  
2 all Treasurer of Guam transactions.

3 On April 1, 2011, the RFP was issued by GSA on behalf of DOA, Department of Revenue and  
4 Taxation (DRT) and departments of the Government of Guam. Agency Report, Tab. 5, ¶1.2 of RFP.

5 On June 17, 2011, Appellant DMR was the sole bidder for the RFP. Agency Report, Tab 6.  
6 DMR was deemed to be the Best Qualified Offeror on July 29, 2011. Id., Tab 9. Cost negotiations  
7 commenced by DMR's submission of its Price Proposal on June 17, 2011. Id., Tab 11.

8 On August 5, 2011, DMR submitted a cost breakdown for consideration in the cost-negotiations.  
9 Id. On August 29, 2011, GSA requested an additional price breakdown of the cost proposal, and DMR  
10 submitted a cost breakdown by module, on August 30, 2011. Id.

11 On September 28, 2011, GSA proffered its FIRST COUNTER OFFER in the amount of TWO  
12 MILLION, TWO HUNDRED NINETY-FIVE THOUSAND, FIVE HUNDRED EIGHTY-TWO AND  
13 69/100 USD (\$2,295,582.69). Id., Tab 12. An additional meeting for cost negotiation was held on  
14 October 5, 2011.

15 On February 7, 2012, the RFP Evaluation Committee requested that DMR delete certain  
16 requirements from its costs proposal and submit its best and final offer to GSA for consideration. Id.  
17 On February 8, 2012, GSA requested that DMR submit its Best and Final Offer no later than February  
18 10, 2012. Id. On February 10, 2012, DMR submitted its Best and Final Offer of ONE MILLION,  
19 EIGHT HUNDRED TWENTY-THREE THOUSAND, ONE HUNDRED AND 00/100 USD  
20 (\$1,823,100.00). Id.

21 On February 29, 2012, DMR received a Notice of Rejection of its Best and Final Offer under  
22 RFP/DOA-014-11 based on "insufficient funds for such project". *See* Notice of Appeal, Exhibit 1.

23 On March 13, 2012, DMR lodged its protest (hereinafter "Protest"). Id., Exhibit 2.

1 On March 16, 2012, DMR received Notice of Decision on the Protest setting forth the basis of  
2 the rejection of the protest as a rejection of the proposal under §3115(e)(3)(B) of Title 2, Division 4 of  
3 the Guam Administrative Rules and Regulations. Id., Exhibit 3.

4 On April 2, 2012, Appellant timely filed its Notice of Appeal to the Public Auditor.

5 On June 14, 2012, GSA/DOA filed its Motion to Dismiss and Vacate Procurement.  
6

## 7 **II. Legal Argument**

### 8 **UNFOUNDED AND UNSWORN FACTUAL STATEMENTS SHOULD BE** 9 **STRICKEN AND DISREGARDED**

10 Rather than address the legal merits of this dispute, the Government engages in a smear  
11 campaign of unfounded allegations without any supporting statement sworn under penalty of perjury.  
12 While the Motion to Dismiss on its face is supported by a verification by Investigator Felix Manglona,  
13 Manglona merely asserts that “he **believes** [the facts contained therein] to be true.” A verification “is a  
14 sworn statement of the truth of the facts stated in the instrument which is verified.” H. A. M. S. Co. v.  
15 Elec. Contractors of Alaska, Inc., 563 P.2d 258, 260 (Alaska 1977). The verification by Manglona is  
16 clearly defective in that it fails to provide a sworn statement that the facts are true, a belief is simply  
17 insufficient.  
18

19 As set forth fully in the Affidavit of Richard C. Taitano, submitted in support of this opposition  
20 to the Government’s Motion to Dismiss, DMR refutes the unfounded allegations by a verified statement  
21 of truth and requests that the Office of Public Accountability strike the Motion to Dismiss.

22 5 G.C.A. §5703 grants the Public Auditor power to review and determine matters properly  
23 submitted to her; the Public Auditor further “has control of” and is “responsible for” procurement  
24 appeals, including the procedure of the controversy before her. 2 G.A.R., Division 4, §12101. Thus,  
25  
26  
27  
28

1 striking the Motion to Dismiss is within the authority granted to the Public Auditor in this appeals  
2 process.

3 **GOVERNMENT CLAIMS ANTI-COMPETITIVE ENVIRONMENT AND**  
4 **VIOLATION OF PROCUREMENT LAW UNFOUNDED AND NOT GROUNDS**  
5 **TO DISMISS PROPERLY FILED APPEAL**

6 The Government further seeks a dismissal of this procurement appeal on the basis of a belief that  
7 there existed an “anti-competitive” environment. Importantly, the Government provides no authority  
8 that would allow dismissal at this phase of the appeal other than to cite the Public Auditor to the general  
9 and broad policies. Specifically, while the Government complains of an imaginary “anti-competitive”  
10 environment, there is nothing in 5 G.C.A. §5001 that supports the Government’s assertion that dismissal  
11 is authorized under Guam Procurement Law or regulations.

12 Additionally, as set forth in the Affidavit of Richard C. Taitano, filed contemporaneously  
13 herewith, every current vendor of the Government of Guam would bear some advantage over other  
14 bidders. While the Government in at least one context blatantly created an anti-competitive  
15 environment, the Office of the Attorney General did not raise any allegation of anti-competition.  
16

17 While GSA alleges that the potential bidder on the RFP was disadvantaged by the conduct of the  
18 Chief Procurement Officer and Appellant, no sworn statement has been provided to support this  
19 position. Notably, no protest was lodged on this basis by any potential bidder. The Government appears  
20 to be inappropriately lodging a protest that has no merit, and has no place in this procurement appeals  
21 process.  
22

23 **LACK OF FUNDS IS NOT IN ITSELF A SUFFICIENT BASIS IN WHICH TO**  
24 **DISMISS A PROCUREMENT PROTEST**

25 GSA and DOA seek a dismissal of this procurement protest and a cancellation of the RFP based  
26 on lack of funds without ensuring proper compliance with Guam Procurement Law, and procurement  
27

1 regulations. Generally, upon negotiation for compensation for services requested under any Requests  
2 for Proposal, the Government of Guam must make a determination of whether the Best and Final Offer  
3 is “fair and reasonable” prior to termination of cost negotiations. 5 G.C.A. 5216(e); 2 GAR, Div. 4,  
4 §3114(l) and §3115(e)(2); In Re Appeal of Joeten Development, Inc., OPA-PA-11-012 Decision (Sep.  
5 27, 2011)(Public Auditor finds that cancellation of invitation for bid violated Guam procurement law).  
6 While 5 G.C.A. §5225 permits rejection of bids, this ability is not unfettered, but necessarily requires the  
7 Government to act in good faith and in accordance with procurement regulations.  
8

9 Guam Procurement Law provides: 5 G.C.A. §5216(e) provides:

10 Award shall be made to the offeror determined in writing by the head of the purchasing  
11 agency or a designee of such officer to be best qualified based on the evaluation factors  
12 set forth in the Request for Proposals, and negotiation of compensation determined to be  
13 fair and reasonable. If compensation cannot be agreed upon with the best qualified  
14 offeror, the negotiations will be formally terminated with the selected offeror. If  
15 proposals were submitted by one or more other offerors determined to be qualified,  
16 negotiations may be conducted with such other offeror or offerors, in the order of their  
17 respective qualification ranking, and the contract may be awarded to the offeror then  
18 ranked as best qualified if the amount of compensation is determined to be fair and  
19 reasonable.

20 2 GAR, Div. 4, §3114(l) further provides that GSA upon negotiation is required to negotiate  
21 “compensation determined in writing to be fair and reasonable.” The review of whether an offer is fair  
22 and reasonable is only one of several requirements GSA must follow prior to rejecting an offer. In Re  
23 Appeal of Joeten Development, Inc., OPA-PA-11-012 (Sep. 27, 2011).

24 In this case, GSA failed to make any determination that the Best and Final Offer submitted by  
25 DMR was not fair and reasonable, as required by law. Notably, upon review of the RFP Procurement  
26 Record and the Agency Report, nowhere is there any reference to any evaluation or written  
27 determination by the RFP Committee or GSA of the fair and reasonable cost for the services requested  
28 under the RFP.

Similarly, in In Re Appeal of Joeten Development, Inc., *supra.*, the Department of Revenue and  
Taxation (DRT) issued an invitation for bid for rental space, and Joeten Development, Inc. was the sole

1 bidder to the invitation. Following the opening of the bid, DRT cancelled the invitation “due to  
2 insufficient funds.” Id., at p. 4. The Public Auditor in affirming the protest of Joeten Development, Inc.  
3 held that the rejection or cancellation of bids is governed by 5 G.C.A. §5225. In analyzing the  
4 cancellation of the bid, the Public Auditor further held that the analysis must also include §3115, Title 2  
5 Div. 4 of the Guam Administrative Rules and Regulations, which governs cancellation after bid  
6 opening. In finding in favor of Joeten Development, Inc., the Public Auditor in vacating the cancellation  
7 of the bid held that GSA failed to comply with the appropriate Procurement regulations and ordered  
8 GSA to determine whether the bid submitted was fair and reasonable.

9 GSA similarly is attempting to reject the Best and Final Offer of DMR based on insufficient  
10 funds without a written determination as required by Guam Procurement Law, and Guam Administrative  
11 Rules and Regulations. 2 GAR, Div. 4 §3115(d)(2) provides:

12 Cancellation of Solicitation: Rejection of All Bids or Proposals . . .(2) After Opening.  
13 (A) After opening, but prior to award, all bids or proposals may be rejected in whole or in  
14 part when the Chief Procurement Officer, the Director of Public Works, or the head of a  
15 Purchasing Agency determines in writing that such action is in the territory's best interest  
16 for reasons including, but not limited to:

- 17 (i) the supplies, services, or construction being procured are no longer required;  
18 (ii) ambiguous or otherwise inadequate specifications were part of the solicitation;  
19 (iii) the solicitation did not provide for consideration of all factors or significance to the  
20 territory;  
21 (iv) prices exceed available funds and it would not be appropriate to adjust quantities to  
22 come within available funds;  
23 (v) all otherwise acceptable bids or proposals received are at clearly unreasonable prices;  
24 or  
25 (vi) there is reason to believe that the bids or proposals may not have been independently  
26 arrived at in open competition, may have been collusive, and may have been submitted in  
27 bad faith.

28 DMR submits that a rejection of a proposal in whole must occur at the time of bid opening, and upon an  
immediate determination that the amount proposed in procurement process is wholly and completely  
unreasonable. In this case, more than six (6) months of cost-negotiations occurred, prior to GSA’s  
rejection of DMR’s proposal. Once negotiation commences, GSA’s conduct is governed under §3114(1)  
and §3115, amongst other provisions.

1 GSA commenced negotiations with DMR over a six (6) month period. Because negotiations  
2 were ongoing, GSA's rejection of DMR's Best and Final Offer absent a written determination that  
3 DMR's offer was not fair and reasonable, was erroneous.

4  
5 2 GAR, Div. 4, §3115(e)(3)(B) further provides:

6 As used in this Subsection, *proposal* means any offer submitted in response to any solicitation,  
7 including an offer under §3111 (Small Purchases), except a bid as defined in Subsection  
8 3115(e)(3)(a) of this Section. Unless the solicitation states otherwise, proposals need not be  
9 unconditionally accepted without alteration or correction, and the territory's stated requirements  
10 may be revised or clarified after proposals are submitted. This flexibility must be considered in  
11 determining whether reasons exist for rejecting all or any part of a proposal. Reasons for  
12 rejecting proposals include but are not limited to:

13 . . . (iii) the proposed price is clearly unreasonable.

14 GSA has qualified its rejection of DMR's Best and Final Offer as "clearly unreasonable," under 2 GAR,  
15 Div. 4, §3115(e)(B)(3). However, as noted by the Procurement Record and Agency Report, Tab 12,  
16 GSA's First Counter Offer is indisputably higher than the Best and Final Offer submitted by DMR on  
17 February 10, 2012. It is unfathomable; this independent determination of unreasonableness on February  
18 10, 2012; when a mere five months earlier, GSA proposed an offer of \$2.2 Million Dollars. Based on  
19 the services requested in the RFP, this is prima facie evidence of the fairness and reasonableness of the  
20 Best and Final Offer submitted by DMR.

21 Therefore, the Government's request to dismiss this procurement protest without any showing of  
22 the compliance of Guam Procurement Law and regulations should be denied.

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**CONCLUSION**

BASED ON THE FOREGOING, Data Management Resources, LLC. respectfully requests that the Public Auditor STRIKE the Government’s Motion to Dismiss and Vacate Procurement for failure to properly present the matter. In the event the Public Auditor intends to proceed with the merits of the Government’s claims, prior to hearing on the Motion to Dismiss, Appellant seeks leave pursuant to its Motion for Discovery filed on June 14, 2012 to commence depositions related to the matters addressed therein, and the matters referenced in the Motion to Dismiss. Alternatively, Appellant requests that the Public Auditor DENY the motion.

RESPECTFULLY SUBMITTED on this 21<sup>st</sup> day of June, 2012.

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

**Original signed by:  
Jacqueline Taitano Terlaje**

By: \_\_\_\_\_  
**JACQUELINE TAITANO TERLAJE**  
Attorney for Appellant