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FILE NO OPA-PA: 12-014

9 **OFFICE OF PUBLIC ACCOUNTABILITY**
10 **PROCUREMENT APPEALS**

11 IN RE THE PROTEST OF
12 PACIFIC DATA SYSTEMS, INC.,
13 Protestant.

OPA Docket No. OPA PA 12-014

**PARTIAL RESPONSE TO HEARING
OFFICER'S ORDER**

14 COMES NOW Pacific Data Systems, Inc. ("PDS"), the Protestant in this
15 matter, and makes the following Partial Response to the Hearing Officer's Order of
16 October 3, 2012.

17 1. In paragraph 4 of the Order of October 3, 2012, the Hearing Officer
18 requested the parties to assess whether DOE IFB 014-2012 is a "capital improvement
19 project" in light of the Public Auditor's jurisdiction under 5 G.C.A. § 5425A, which was
20 stated to pertain to "an award or a contract, funded in whole or in part by funds
21 allotted to the Guam Department of Education for Capital Improvement Projects and
22 air conditioning repair and maintenance."

23 2. PDS is presently unable to respond to that request since PDS cannot
24 find the language cited by the Hearing Office regarding capital improvement projects.
25 A copy of 5 G.C.A. § 5425.1 is attached hereto. As stated in the Source note, the
26 Compiler renumbered the section from § 5425A to § 5425.1. That section does not refer
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to capital improvement projects, but rather to ARRA funds allotted to the Guam Department of Education. That is the subject matter of DOE IFB 014-2012.

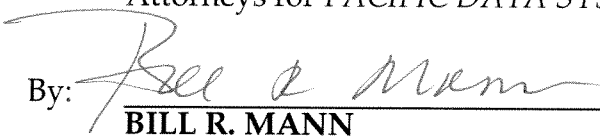
3. PDS further notes the Public Auditor's Decision in OPA-PP-11-008. The procurement in that case was likewise for computers for the Department of Education and funded in part by an ARRA grant. In her Decision, the Public Auditor recognized that 5 G.C.A. § 5425A (now 5 G.C.A. § 5425.1) was applicable.

4. PDS will respond to the other issues in the Hearing Officer's Order in a timely fashion, but to expedite this matter does note its present inability to respond to the Hearing Officer's request regarding whether DOE IFB 014-2012 is a capital improvement project due to its inability to locate the language quoted in the Hearing Officer's Order.

DATED this 4th day of October, 2012.

Respectfully submitted,

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

By: 
BILL R. MANN

**5 GCA GOVERNMENT OPERATIONS
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(3) If the protest is pending before the Public Auditor or the Court, the Public Auditor or Court has confirmed such determination, or if no such protest is pending, no protest to the Public Auditor of such determination is filed prior to expiration of the two (2) day period specified in Item (2) of Subsection (g) of this Section.

(h) Entitlement to Costs. In addition to any other relief or remedy granted under Subsection (c) or (e) of this Section or under Subsection (a) of § 5480 of this Chapter, including the remedies provided by Part B of Article 9 of this Chapter, when a protest is sustained, the protestant shall be entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, excluding attorney's fees, if:

(1) the protestant should have been awarded the contract under the solicitation but was not; or

(2) there is a reasonable likelihood that the protestant may have been awarded the contract but for the breach of any ethical obligation imposed by Part B of Article 11 of this Chapter or the willful or reckless violation of any applicable procurement law or regulation. The Public Auditor shall have the power to assess reasonable costs including reasonable attorney fees incurred by the government, including its autonomous agencies and public corporations, against a protestant upon its finding that the protest was made fraudulently, frivolously or solely to disrupt the procurement process.

SOURCE: GC §6975. MPC §9-101. Repealed and reenacted by P.L. 18-44:2. Subsections (c), (f), (g)(3), (h)(2) amended by P.L. 28-068:IV:67 (Sept. 30, 2005).

§ 5425.1. Protest Procedure for Procurement Funded with 2009 American Recovery and Reinvestment Act Moneys Allotted to the Guam Department of Education.

(a) Notwithstanding any other provision of this Chapter and any rules promulgated therefore, *if* an actual or nonselected vendor, contractor, or service provider is aggrieved by an award or a contract funded, in whole or in part, by the funds allotted to the Guam Department of Education from the 2009 American Recovery and Reinvestment Act (ARRA), the procedure for protest outlined in this Section *shall* apply, and *shall* be the exclusive means available to resolve

5 GCA GOVERNMENT OPERATIONS
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the concerns of persons aggrieved in connection with awards or solicitations involving ARRA funds, in whole or in part. The protest *shall* be submitted to the Public Auditor who may settle and resolve a protest by one (1) or more of the following means:

- (1) amending or canceling the solicitation;
 - (2) terminating the contract that was awarded;
 - (3) declaring the contract null and void from the time of its award;
- or*
- (4) affirming the contract award decision.

If the protest is *not* resolved by mutual agreement, the Public Auditor *shall* issue a decision, in writing, within *no more than* ten (10) working days of receipt of the protest. The decision *shall* state the reasons taken. A copy of the written decision *shall* be mailed, using certified mail, *or* otherwise furnished to the vendor, contractor, or service provider who initiated the protest, the person awarded the contract, and to all other non-selected bidders or offerors.

(b) For purposes of this Section, the determination of facts and decision by the Public Auditor for the resolution of protests of ARRA funded procurements *shall* be final and conclusive with *no* right of appeal *or* judicial review. The fact that a protest has been filed pursuant to this Section *shall not* stay the procurement process or award of any contract funded by ARRA moneys, whether in whole or in part, *unless* so ordered by the Public Auditor. A request for reconsideration *shall also not* stay the award of any contract funded by ARRA moneys, whether in whole or in part, *unless* so ordered by the Public Auditor. This Section is repealed effective December 31, 2011, unless the federal grantor agency authorizes an extension of time for the obligation or expenditure of ARRA funds, in which case this Section *shall* be repealed at the end of the extension period.

SOURCE: Added as § 5425A by P.L. 31-012:2 (Mar. 9, 2011) with a sunset provision of Dec. 31, 2011, unless otherwise extended. Renumbered by Compiler to harmoniously fit the general codification scheme of the GCA.

§ 5426. Authority to Debar or Suspend.