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GUAM DEPARTMENT OF EDUCATION
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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

**PROTEST OF ARRA-RELATED PROCUREMENT
GDOE IFB NO. IFB 014-2012**

PACIFIC DATA SYSTEMS (“PDS”)

OPA-PA-12-014

vs.

**DEPARTMENT OF EDUCATION’S
ANSWER**

DEPARTMENT OF EDUCATION,

This matter comes before the Office of Public Accountability (“OPA”) pursuant to the expedited protest procedures at 5 GCA §5425.1. The subject of the protest is Guam Department of Education (“GDOE”) Invitation for Bid (“IFB”) 014-2012 for the purchase of an Indefinite Quantity of Laptops, Mobile Computer Labs, Laptops with Docking Stations and Desktop Computers.

BACKGROUND

The funding for the purchases of computers and equipment under IFB 014-2012 is comprised of multiple sources, the majority of which is grant monies pursuant to the 2009 American Recovery and Reinvestment Act (“ARRA”). See GDOE Procurement Record, Exhibit 11, Bates Stamp No. GDOE00684.

IFB 014-2012 was issued on June 29, 2012. Bids were due on August 15, 2012. The following companies submitted bids: PDS, Softchoice, and Compacific. As part of the bid, GDOE sought a flat rate for non-warranty repairs for the laptops included in the bid. See Item 4

1 of the IFB Bid Form at GDOE Procurement Record, Exhibit 6, Bates Stamp No. GDOE00557.
2 After bid opening, each bid was evaluated to determine compliance with the technical
3 specifications. After multiple reviews, each bid was determined to be compliant with the
4 equipment technical specifications, but flaws were noted with each bidder's cost submission.
5 Two of the bidders, Softchoice and Compacific, included a per unit non-warranty service cost but
6 failed to extend that cost to the total number of units. Neither Softchoice nor Compacific altered
7 their bid forms. PDS altered its bid form and included multiple categories for non-warranty
8 services.

9 GDOE interpreted the Softchoice and Compacific bids as containing a simple error where
10 the correct bid was evident. Specifically, GDOE took the unit price for Item 4 of the bid form
11 and extended that price across the number of laptops to arrive at the total price for non-warranty
12 repairs. The process employed by GDOE as well as the justification for the correction of the bids
13 was explained in detail in the Notice of Bid Status and Intent to Award issued on September 20,
14 2012. *See* GDOE Procurement Record, Exhibit 8, Bates Stamp No. GDOE00580-00581.

15 Purchase orders under the IFB were issued on September 21, 2012. *See* GDOE
16 Procurement Record, Exhibit 10, Bates Stamp No. GDOE00663-00683.

17 Cancellation or modification of the purchase orders issued pursuant to the IFB may
18 jeopardize the underlying ARRA funding in an amount over \$2,000,000.00. *See* GDOE
19 Procurement Record, Exhibit 14, Bates Stamp No. GDOE00684.

20 21 ARGUMENT

22 PDS' bid did not contain a simple error where the correct bid was evident. Instead, PDS
23 altered its bid form to include several subcategories of non-warranty repairs. These subcategories
24 contained differences in hourly rates and types of repairs. There was no clear indicator of a flat
25 rate price per unit. Additionally, PDS physically altered its bid form, in direct contravention of
26 the instructions contained in Section 2.2.5 of the IFB which states that "[b]ids should be
27 submitted in accordance with the attached Bid Form." As explained in the Notice of Bid Status,
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1 PDS was determined to be non-compliant with a significant requirement of the bid and therefore
2 non-responsive and disqualified from consideration for award.

3 Based on the facts above, PDS' allegations that its bid submission conforms in all material
4 respects to the IFB is without merit. PDS' statement that its changes were minor informalities is
5 similarly invalid because the form of PDS' bid, particularly differing prices for repair categories
6 and labor rates, makes it impossible to determine what the flat rate charge for non-warranty
7 services would be.

8 PDS is also incorrect in its assertion that GDOE cannot justify its correction of the
9 Softchoice and Compacific bids. Pursuant to 2 GAR Div 4 3109(m)(4)(C), a purchasing agency
10 is allowed to correct a bid mistake when the intended correct bid is evident. Section 3109
11 specifically describes an example of mistakes that may be clearly evident on the face of the bid as
12 "*errors in extending unit prices.*" The correction of the Softchoice and Compacific bids is a
13 textbook example of an allowable correction. GDOE acknowledges that no unit amount was
14 provided in the Item 4 of the bid form. However, this omission did not prevent bidders from
15 providing a cost for Item 4. Even considering that none of the bidders were error-free in their
16 price submissions, at least Softchoice and Compacific submitted a unit price for non-warranty
17 repairs and did so *without altering their bid forms.* The same cannot be said for PDS.

18 PDS asserts that GDOE's actions are absurd as "there is no way that all of the laptop
19 computers will require non warranty repairs." While it is correct that no one can determine
20 whether every computer purchased under the IFB will require non-warranty repairs, what GDOE
21 is purchasing is protection for every unit in the event it requires non-warranty repair. This is
22 similar to purchasing extra insurance to cover events that may not be covered under a primary
23 insurance policy. GDOE properly requested what it would cost to cover each of the units in the
24 event it required repair not covered by an existing warranty. Softchoice and Compacific provided
25 that cost per unit. PDS did not. PDS' allegation that it is now absurd to consider Item 4 of the
26 bid form is not only incorrect but also deceitful considering that PDS provided several cost
27 proposals in response to Item 4.

1 For the reasons above, PDS' protest should be found to be without merit and dismissed in
2 its entirety. In the event the OPA should find any portion of PDS' protest to be valid, and makes
3 a determination that the award made pursuant to the IFB was somehow in violation of law,
4 GDOE request that the OPA allow the award to stand as it is in the best interest of the territory as
5 further explained below:

7 **RATIFICATION OF CONTRACT**

8 Under Guam law, if a party is unlawfully awarded a contract, the Public Auditor may
9 sustain the award of the contract if (1) the party awarded the unlawful contract neither acted
10 fraudulently nor in bad faith, and (2) it is in the best interest of to ratify and affirm the award. 5
11 G.C.A. § 5452(a)(1)(i). In this instance, in order to protect the interest of Guam the Public
12 Auditor must sustain GDOE's award to Softchoice.

13 GDOE asserts that Softchoice did not act fraudulently or in bad faith. In the instant case,
14 there is neither evidence nor information that has been presented to substantiate that Softchoice
15 acted fraudulently or in bad faith in responding to the IFB. In addition, PDS failed to produce
16 any evidence to suggest Softchoice either defrauded GDOE or mislead GDOE in order to be
17 awarded the contract. The Public Auditor must find that Softchoice neither acted fraudulently nor
18 acted in bad faith.

19 Furthermore, GDOE asserts that it is in the best interest of Guam to ratify and affirm the
20 award to Softchoice. The Government of Guam is facing a critical financial shortfall. GDOE has
21 been fortunate to be awarded over \$2,000,000.00 of ARRA funds in order to fund this IFB. *See*
22 GDOE Procurement Record, Exhibit 11, Bates Stamp No. GDOE00684. These ARRA funds
23 allow GDOE to purchase items, such as laptops, to facilitate learning at the Guam public schools.

24 There are requirements that GDOE must perform in order to be able to utilize ARRA
25 funds. One of the requirements is a specific timeline to utilize ARRA funds. *See* GDOE
26 Procurement Record, Exhibit 11, Bates Stamp No. GDOE00684 and 14, Bates Stamp No.
27 GDOE00699. ARRA funds must be obligated before September 30, 2012 or these funds will
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1 expire. *Id.* The issuance of the purchase orders met this requirement. *See* GDOE Procurement
2 Record, Exhibit 10, Bates Stamp No. GDOE00663-00683. The third-party fiduciary, Alvarez &
3 Marsal, has indicated that under the Education Department General Administrative Regulations
4 (“EDGAR”) any obligations that are cancelled or modified or if any orders cannot be filled by
5 September 30, 2012, will result in the loss of these federal funds. *See* GDOE Procurement
6 Record, Exhibit 14, Bates Stamp No. GDOE00699.

7 Cancellation or other modification, and possible loss of these funds would be devastating
8 to Guam’s educational system and Guam’s students. The loss of these funds would result in
9 students and teachers deprived of valuable technology to be used to facilitate and foster learning.
10 The sad reality is the Government of Guam is in no position to replace lost ARRA funds with
11 non-existent local funds for this project. The loss of these funds is not in the best interest of
12 Guam. Therefore, the Public Auditor must find that it is in the best interest of Guam to ratify and
13 affirm GDOE’s contract with Softchoice.

14 In addition, GDOE asserts the Public Auditor must deny PDS’ claim for compensation for
15 the reasonable cost in preparation of its solicitation and in making this protest. Under Guam law,
16 if a protest is sustained, the protestant shall be entitled to reasonable costs incurred in connection
17 with the solicitation and protest, which includes bid preparation costs, excluding attorney’s fees,
18 if the protestant should have been awarded the contract under the solicitation. 5 G.C.A. §
19 5425(h)(1).


20 Item 4 is entitled Bid Price NonWarranty service (per Laptop). *See* Item 4 of the IFB Bid
21 Form at GDOE Procurement Record, Exhibit 6, Bates Stamp No GDOE00557. Item 4 contained
22 required fields as follows: (1) the quantity, (2) price per unit and (3) the extended price. *Id.* Item
23 4 allowed for only one response per field, but PDS altered Item 4 and entered numerous figures
24 per field. *See* GDOE Procurement Record, Exhibit 3, Bates Stamp No GDOE00107. Even if
25 GDOE was to evaluate PDS’ bid form, there is no way GDOE could ascertain which figures to
26 evaluate in PDS’ “Item 4.” All that was required in Item 4 was a single number in each of the
27 three fields. PDS failed do this. PDS is unable to prove that they would have been the lowest
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1 responsive and responsible bidder. Therefore, PDS is not entitled to reasonable costs pursuant to
2 5 G.C.A. § 5425(h)(1).

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4 Dated this 28th day of September, 2012.

5 Respectfully submitted,

6 **GUAM DEPARTMENT OF EDUCATION**

7 By: 
8 **ANDREW T. PEREZ, ESQ.**
9 *Legal Counsel*

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