

CARLSMITH BALL LLP

ELYZE M. IRIARTE
eiriarte@carlsmith.com
VINCENT C. CAMACHO
vcamacho@carlsmith.com
MICHAEL J. GATEWOOD
mgatewood@carlsmith.com
Bank of Hawaii Bldg., Suite 401
134 West Soledad Avenue
Hagåtña, Guam 96932-5027
Telephone No. 671.472.6813
Facsimile No. 671.477.4375

Attorneys for Teleguam Holdings, LLC and its wholly owned subsidiaries

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 1/2/2013
TIME: 8:53 AM PM BY: R. Feld
FILE NO OPA-PA: 12-017

IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

IN THE APPEAL OF
PACIFIC DATA SYSTEMS, INC.,
Appellant.

Docket No. OPA-PA-12-017

**REPLY TO PACIFIC DATA SYSTEMS,
INC.'S OPPOSITION TO GTA'S
MOTION IN LIMINE TO EXCLUDE
IRRELEVANT AND UNDISCLOSED
EVIDENCE**

I. INTRODUCTION

Pacific Data Systems, Inc. ("PDS") asserts that the National Exchange Carrier Association ("NECA") Tariff is relevant because Teleguam Holdings LLC ("GTA") mistakenly put the words NECA Tariff in its "Terms and Conditions". PDS, however, fails to show how the NECA Tariff is relevant in light of GSA's failure to take it into consideration.

II. PDS FAILS TO SHOW HOW THE NECA TARIFF IS RELEVANT

PDS fails to recognize the OPA's ruling *In the Appeal of Town House Dept. Stores, Inc.*

dba Island Business Sys. & Supplies, OPA-PA-11-02 (Decision and Order filed Aug. 8, 2012), at 15-16. In that case, in response to a bid, competing bidder Xerox Corporation submitted terms and conditions which eventually became part of DOE's Purchase Order. The OPA found that the additional terms and conditions were offers which the agency had the right to reject. *Id.* The OPA found that Xerox remained bound to the specific terms specified in the IFB, and not to any additional offered terms. *Id.*

As stated in GTA's Comments, the same ruling is applicable to this case. Inclusion of additional terms and condition did not render GTA's bid non-responsive because GSA rejected any additional terms offered by any bidder, including those additional terms mistakenly submitted by GTA. As GTA's submission of these terms was unintentional and rejected by GSA, they are irrelevant to the issues raised in this appeal because the NECA Tariff was neither used nor reviewed with regards to the formation of the contract.

III. CONSIDERATION OF THE EQUITIES FAVORS EXCLUDING THE NECA DOCUMENTS

PDS' Opposition shows that they have no intention of limiting themselves to evidence relevant to the issues in this case. PDS admits it plans to use the NECA Tariff with regards to the pricing of monthly recurring costs. (Opp. at 2) (NECA Tariff differs because its monthly recurring costs states it is subject to revision whereas IFB states it shall be at a firm fixed price). The monthly recurring costs, however, is a non-issue because the "terms and conditions" provide for monthly recurring costs at a fixed rate. *See* Agency Rep. filed in OPA-PA-12-011, Tab 6 at 28 (The IFB Pricing of Monthly Recurring Cost shall be a firm fixed price. GTA's bid does not include any surcharges or other fees to the service that have not been identified in its bid price in compliance with the Bid Specifications).

In its Opposition, PDS claims that GTA incorporated the NECA Tariff into its "terms and

conditions". The relevance, however, of whether the NECA documents changed the "terms and conditions" is moot because the "terms and conditions" of the IFB state otherwise. PDS fails to explain how the NECA Tariff, makes it more or less probable that GTA changed the "terms and conditions" of the IFB.

Further, an order *in limine* will help ensure an efficient hearing that will conserve the time of the OPA, the witnesses, and the parties by focusing solely on the relevant issues.

IV. CONCLUSION

For the reasons set forth above and in GTA's Motion in Limine, GTA respectfully requests that the OPA grant its Motion.

DATED: Hagåtña, Guam, January 2, 2013.



VINCENT C. CAMACHO
Attorneys for Interested Party Teleguam
Holdings, LLC and its wholly owned
subsidiaries