

D. GRAHAM BOTHA, ESQ.
GPA Legal Counsel
Guam Power Authority
688 Route 15
Mangilao, Guam 96913
Tel: (671) 648-3203/3002
Fax: (671) 648-3290

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 06/05/15
TIME: 9:47 AM PM BY: C. Roque
FILE NO OPA-PA: 15-007

Attorney for the Guam Power Authority

**OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS**

IN THE APPEAL OF)	DOCKET NO. OPA-PA-15-007
)	
Pacific Data Systems, Inc.,)	MOTION TO DISMISS
)	
Appellant.)	
_____)	

COMES NOW, D. GRAHAM BOTHA, ESQ., and hereby files his Motion to Dismiss the appeal, on the grounds that the Office of the Public Auditor is without jurisdiction to hear the appeal based on the time limitations set forth in 5 GCA §5481 and 2 GAR, Div 4, §9109(1)(b).

On May 14, 2015, Pacific Data Systems, Inc. ("PDS") received Guam Power Authority's ("GPA") Denial of Procurement Protest, the agency's final administrative decision, a copy of which is attached hereto as Exhibit "A". It was served via e-mail on Mr. John Day, President of PDS on May 14, 2015 at 9:36 am, and hand delivered on May 14, 2015 at 2:35pm to the offices of PDS. The appeal of PDS to the Office of Public Accountability (OPA) was received on May 29, 2015 at 4:10pm, a copy of which cover Notice of Appeal is attached hereto as Exhibit "B".

2 GAR, §9109, Time Limitations on Actions, (1) Protested Solicitations and Awards, provides that “any action under §9108(a) (Waiver of Sovereign Immunity in connection with Contracts, Solicitation and Award of Contracts) of these Regulations shall be initiated as follows: (b) within 14 days after receipt of a final administrative decision pursuant to 5 GCA §5425(c) (Authority to Resolve Protested Solicitations and Awards, Decision) of the Guam Procurement Act.

The deadline to file an appeal to the OPA was “14 days after receipt of a final administrative decision” which based on the service on PDS on both the morning and afternoon of May 14, 2015, was May 28, 2015. It is undisputed that the PDS appeal was filed with the OPA on May 29, 2015 at 4:10pm, clearly not within the 14 day period prescribed by the statute.

GPA requests that based on lack of jurisdiction of the OPA, that the PDS appeal be dismissed with prejudice, and that costs and attorney’s fees be granted to GPA.

RESPECTFULLY SUBMITTED this 4th day of June, 2015, by:



D. GRAHAM BOTHA, ESQ.
GPA Legal Counsel



GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUAHAN
P.O. BOX 2977 • AGANA, GUAM U.S.A. 96932-2977

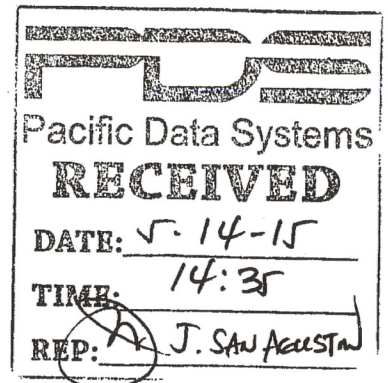
Tel: (671) 648-3225; Fax: 648-3290

DENIAL OF PROCUREMENT PROTEST

May 11, 2014

VIA FAX: 300-0265

Mr. John Day
President
Pacific Data Systems
185 Ilipog Drive
HABC Suite 204A
Tamuning, GU 96913



RE: Guam Power Authority's Response to Pacific Data Systems' Protest dated November 24, 2014, for GPA-IFB-072-14, Voice and Data Services

Dear Mr. Day:

I have reviewed your protest letter dated November 24, 2014, protesting the Guam Power Authority's (GPA) proposed award to Docomo Pacific, Inc. of items A-3, A-4 and A-5. Your Protest is hereby denied for the following reasons:

1. You indicated in your letter that you believe that Docomo Pacific, Inc. lacks proper authorization from the Guam Public Utilities Commission (GPUC) to provide local telecommunications services, specifically with regard to items A-3, A-4 and A-5 in the bid. Docomo Pacific, Inc. has been granted a Certificate of Authority by the GPUC. The OPA rendered a decision in favor of GPA on March 11, 2015 in OPA-PA-14-013, and ruled upon by the OPA in favor of GPA. No timely appeal has been taken by PDS to the Superior Court of Guam in OPA-PA-14-013. Thereby, your protest is denied on these grounds. GPA reviewed the

Exhibit "A"

bid packages and provided a notice of intent to award to the lowest responsible and **responsive** bidder. A responsive bidder is a person who has submitted a bid which conforms in all material respects to the Invitation for Bids. 5 GCA §5201(g) and 2 GAR, Div. 4, Chap. 3, §3109(n)(2).

2. GPA has determined that Docomo Pacific, Inc. should be awarded the bid for Voice and Data Services, for items A-1, A-2, A-3, A-4, and A-5, as they were deemed to be the lowest, responsive and responsible bidder. The Docomo Pacific, Inc. bid was responsive to the IFB and complied with the specifications set forth in the IFB. PDS contends that GPA improperly awarded items A3, A4 and A5 to Docomo, as PDS states that it was the lowest bidder on the bidders' abstract for items A3 and A4, and that GPA should have considered the lowest overall bid for items A3, A4 and A5. It is clear from the bid specifications that each line item for A3, A4, and A5 is evaluated separately. On November 6, 2015, GPA asked for clarification from PDS and GTA regarding several line items, specifically items A3 and A4. PDS submitted a response on November 7 to GPA, and with regard to A3 its response is as follows: "Each site is counted as one site (Fadian to Cabras = 1 site, T&D to Fadian = 1 site); **price shown on the PDS bid form is per site.**" With regard to A4 (which has 8 sites) its response is "**Yes, the price listed is per site.**"

The Abstract of Bids lists the price proposals for all three bidders for the different line items. Only with the price clarifications provided by PDS and GTA, was the evaluation committee able to properly provide an analysis of the price proposals. GPA should have disqualified both PDS and GTA based on the deficient price proposals submitted that failed to provide specific line item prices as requested in the IFB. Specifically, it is clear the Docomo provided the lowest responsive price for items A1-A6, and GPA made the evaluation according to the evaluation criteria specified in the IFB.

On the abstract Docomo properly included the price for both sites at \$7,200 per year for 3 years or a total of \$21,600. As PDS indicated in its response its price of \$6,000; \$5,700; and \$5,415.25 for 3 years was per site, so the actual price for both sites as requested by GPA is \$17,115 x 2 sites = \$34,230 for 3 years. Clearly under any mathematical calculations, the Docomo bid of \$21,600 for 3 years is lower than the total PDS bid for 2 sites of \$34,230. Similarly, in item A4, the Docomo bid was \$16,800 per year for 3 years for a total of \$50,400. The PDS bid was \$3,000; \$2,850; and \$2,707.50 or a total of \$8,557.50 for 3 year **per site**. Since there are 8 sites for item A4, then the actual PDS bid is \$8,557.50 x 8 = \$68,460 which is once again greater than the Docomo bid of \$50,400 for 3 years. While PDS concedes it was not the low bidder for item A5, the bid abstract is clear: Docomo is \$7,200 per year or a total of \$21,600 for 3 years and PDS is \$9,600; \$9,120; and \$8,664 for a total of \$27,384. Again, Docomo is the low bidder for item A5 as \$21,600 is less than \$27,384.

Therefore, GPA hereby finds that there is no merit to the Pacific Data Systems' claim that their bid was the lowest **responsive** bid for these items, and the Pacific Data Systems' bid was properly rejected due to high price on these items.

Pacific Data Systems is hereby ON NOTICE that this is the Guam Power Authority's final decision concerning Pacific Data Systems' November 24, 2014, protest for the above described IFB. You are hereby advised that Pacific Data Systems has the right to seek judicial review.

Sincerely,


JOHN M. BENAVENTE, P.E.
Interim General Manager

Graham Botha

From: Graham Botha
Sent: Thursday, May 14, 2015 9:36 AM
To: Travis Carbon
Cc: john@pdsguam.com; Jamie C. Pangelinan; Jesse R Reyes
Subject: RE: OPA-PA-15-005: PDS Denial Letter for Second Protest per OPA Decision & Order
Attachments: PDS Denial Letter 051115 OPA15-005.pdf

Importance: High

Categories: Red Category

OPA:

Please find attached GPA Denial Letter pursuant to the OPA Decision and Order of April 30, 2015 with regard to the second protest letter dated November 24, 2014. The OPA rendered a decision on several issues contained in the PDS letter of November 24, 2014, in favor of GPA on March 11, 2015 in OPA-PA-14-013, and no timely appeal has been taken by PDS to the Superior Court of Guam in OPA-PA-14-013 on those issues.

Thanks,

Graham Botha
GPA Legal Counsel

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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 5/29/15

Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL

TIME: 4:10 AM PM BY: Yuka

FILE NO OPA-PA: 15-007

PART I- To be completed by OPA

In the Appeal of)

NOTICE OF APPEAL

Pacific Data Systems, Inc (PDS)
(Name of Company), APPELLANT)

Docket No. OPA-PA 15-007

PART II- Appellant Information

Name: Pacific Data Systems, Inc (PDS)
Mailing Address: 185 Ilipog Drive, Suite 204A
Tamuning, GU 96913
Business Address: same as above
Email Address: John@pdsguam.com
Daytime Contact No: 671-300-0202
Fax No.: 671-300-0265

PART III- Appeal Information

A) Purchasing Agency: Guam Power Authority (GPA)

B) Identification/Number of Procurement, Solicitation, or Contract: IFB Bid GPA-072-14 MS

C) Decision being appealed was made on May 14, 2015 (date) by:
 GPA Chief Procurement Officer _ Director of Public Works _ Head of Purchasing Agency

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

D) Appeal is made from: (Please select one and attach a copy of the Decision to this form)

- Decision on Protest of Method, Solicitation or Award
- Decision on Debarment or Suspension
- Decision on Contract or Breach of Contract Controversy
(Excluding claims of money owed to or by the government)
- Determination on Award not Stayed Pending Protest or Appeal
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

- **Teleguam Holdings, LLC (GTA)**
- **Docomo Pacific, Inc. (Docomo)**

Exhibit B^u