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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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FILE NO OPA-PA: 16-012

8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

9 IN THE APPEAL OF

APPEAL NO.: OPA-PA-16-012

10 ALVAREZ & MARSAL PUBLIC SECTOR
11 SERVICES, LLC,

**MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION
BECAUSE MATTER IS NOT RIPE**

Appellant.

12 Comes now the Guam Department of Education (GDOE), the Purchasing Agency in this
13 matter, files this Motion to Dismiss.

14 **I. Introduction and Relief Requested:**

15 GDOE hereby moves the OPA to dismiss this appeal, specifically OPA-PA-16-012,
16 against GDOE based on a lack of subject matter jurisdiction because the matter is not ripe.
17 Appellant Alvarez & Marsal Public Sector Services' (Appellant) cause of action is in regards to
18 RFP 005-2016. Appellant appeals because they allege that they are the best qualified offeror.
19 See Appellant's Notice of Appeal p.4. Agency actions are only considered ripe for review when
20 they are final in nature. No intent to award has been issued for RFP 005-2016. See Declaration
21 of Carmen Taitano. In addition, GDOE cannot proceed with any offeror for RFP 005-2016
22 without first obtaining approval from the US Department of Education (USDOE). *Id.* USDOE's
23 approval of the intended offeror, for RFP 005-2016, is required in order for GDOE to receive any
24 funds from USDOE. *Id.* GDOE has not issued an intent to award and GDOE has yet to receive
25 any approval from USDOE either, so deciding who the best qualified offeror is at this point
26 premature. Should the OPA order GDOE to contract with a certain offeror and USDOE
27 disapproves of said offeror, USDOE could refrain from issuing funds to GDOE and then any
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1 agreement GDOE would be ordered to enter into would be reduced to becoming void. If and
2 when Appellant is actually served with an intent to award **and** USDOE has approved of the
3 intended awardee or offeror, the procurement will have matured and Appellant will have the
4 opportunity for OPA review. Until that time, the controversy is not ripe and dismissal of
5 Appellant's claims are warranted.

6 **II. Background Regarding RFP 005-2016**

7 On March 21, 2016 GDOE issued RFP 005-2016. On July 5, 2016 GDOE issued the
8 Proposal Status to offerors for RFP 005-2016, which included offerors ranking at that point in
9 time. On July 18, 2016 GDOE received a protest from Appellant. On August 4, 2016 GDOE
10 responded to Appellant's protest denying the Appellant's protest in its entirety.

11 **III. Legal Argument**

12 A. Ripeness is a Threshold Legal Issue That, When Absent, Warrants Dismissal

13 In the Appeal of *Purestone, LLC, vs. the Guam Economic Development*
14 *Authority/Chamorro Land Trust Commission* (Purestone), OPA-PA-15-016, the OPA dismissed
15 the appeal for lack of jurisdiction and because at that instant the appeal was not ripe. *See*
16 *Purestone* p. 2. If the controversy is not ripe, then Courts lack jurisdiction to review the matter,
17 and the case warrants dismissal. *See also* Guam R. Civ. P. 12(b)(1) (lack of subject matter
18 jurisdiction).

19 Similar to the above mentioned, RFP 005-2016 is not ripe for OPA review for several
20 reasons and should be dismissed. GDOE has yet to issue an intent to award to an offeror. More
21 importantly, USDOE has not approved any offeror. Within RFP 005-2016, specifically section
22 2.1 Project Title and Overall Scope, states the intent of this section of the RFP is to provide
23 interested Offerors with sufficient information to enable them to develop and submit a proposal
24 for services that will fulfill the specified requirements of the GDOE and USDOE. *See* RFP 005-
25 2016 p. 4. GDOE was designated as a high risk grantee by USDOE and as a result GDOE is
26 subject to special conditions for all Federal education programs it administers. *Id.* As a part of
27 GDOE's special conditions, GDOE is required to contract for a Third Party Fiduciary Agent
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1 (TPFA), acceptable to USDOE. *Id.* In other words, GDOE cannot award any offeror without
2 having obtained USDOE's prior approval. Should GDOE select an offeror that USDOE does not
3 approve, GDOE would not be able to receive any USDOE funds, and, as stated above, any
4 agreement GDOE anticipated entering into would be rendered meaningless. *See* Decl. Taitano.
5 In the alternative, if the OPA decided that GDOE must award a certain offeror, if USDOE does
6 not approve of that offeror GDOE again would not receive federal funds and GDOE would be
7 unable to utilize any services related to an agreement for RFP 005-2016. Appellant's relief
8 requested that any bid award, issuance of purchase orders and/or contracts be stayed, that
9 GDOE's determination of the most qualified offeror be rescinded are premature at this point.
10 RFP 005-2016 has been stayed since the original protest by the Appellant on July 18, 2016.
11 GDOE has been unable to move any further in the procurement process as a result, and since
12 there has been no intent to award (which would include purchase orders and contract) issued and
13 USDOE has not approved of any offeror, this matter is not ripe for a decision before the OPA and
14 should be dismissed.

15 B. There Has Been No Final Agency Action in This Matter

16 Relative to this dispute GDOE has issued a Proposal Status that has been distributed to
17 offerors. GDOE has not issued a letter of intent to award and USDOE has yet to approve any
18 offeror. *See* Decl. Taitano. Review before the OPA will become appropriate if and when GDOE
19 issues an intent to award and USDOE has approved the offeror. It follows that even if GDOE
20 selects an offeror and USDOE does not approve, GDOE would not be able to move forward.
21 USDOE is a de facto part of the selection and this is notified to offerors in RFP 005-2016. *See*
22 RFP 005-2016, section 2.1 p. 4.

23 There are additional issues present that are contested by the Appellant, because the subject
24 of this appeal is an RFP and GDOE has not issued an award. Title 2 of the Guam Administrative
25 Rules and Regulations (GAR) §3114(i)(2) entitled No Disclosure of Information states:

26 Discussions shall not disclose any information derived from
27 proposals submitted by other offerors, and the agency conducting

1 the procurement shall not disclose any information contained in
2 any proposals until after award of the proposed contract has been
3 made. The proposal of the awarded contract shall be opened to
4 public inspection except as otherwise provided in the contract.

5 The law specifically states that the agency conducting the procurement (here, GDOE)
6 shall not disclose any information contained in any proposals until after award of the proposed
7 contract has been made. Appellant argues that this section is of limited application, “as it refers
8 only to information disclosed in discussions between an agency and an offeror.” See Appellant’s
9 Opposition to Guam Department of Education’s Motion for Expedited Appeal p. 7. The title of
10 §3114(i)(2) is “No Disclosure of Information,” coupled with the plain reading of the law, “the
11 agency conducting the procurement shall not disclose any information contained in any proposal
12 until after award of the proposed contract has been made” would entail that GDOE should not
13 disclose other offeror’s information and to do so to any unauthorized persons would directly
14 violate §3114(i)(2).

15 Appellant cites 5 GCA §5250 (Appellant was referring to §5251) arguing that it provides
16 that the procurement record under section 5249 is a public record and any person may inspect and
17 copy any portion of the record. See Appellant’s Opposition at 7. Appellant’s argument that any
18 person may inspect and copy any portion of the record at any point in time would completely
19 disrupt the procurement process.

20 More to the point, Appellant relies on and cites 5 GCA §5251, but leaves out the most
21 critical language which states in its entirety, “The record required by §5249 is a public record **and**
22 **subject to rules promulgated by the Public auditor**, any person may inspect and copy any
23 portion of the record.” “Subject to rules promulgated by the Public auditor,” is crucial in this
24 instance because that means 5 GCA §5251 took into consideration that certain parts of the
25 procurement process, particularly with RFP’s that include specific proprietary proposals, require
26 that they remain confidential until the award of the contract. GDOE did not violate §5251, §5251
27 allows and enables GDOE to abide by the rules promulgated by the Public auditor which GDOE
28 has done so with the case at hand.

1 Furthermore, 2 GAR §3114(h)(1) titled Receipt and Handling of Proposals states in
2 relevant part:

3 Proposals shall not be opened publicly nor disclosed to
4 unauthorized persons, but shall be opened in the presence of two or
5 more procurement officials. A Register of Proposals shall be
6 established which shall include for all proposals, the name of each
7 offeror, the number of modifications received, if any, and a
8 description sufficient to identify the services offered. The Register
9 of Proposals **shall be opened to public inspection only after**
10 **award of the contract.** Proposals of offerors who are not awarded
11 the contract shall not be opened to public inspection.

12 Appellant is asking GDOE to directly violate these regulations by having GDOE provide
13 information that 2 GAR §3114(h)(1) explicitly deems confidential and is protected and supported
14 by 5 GCA §5251 as well. Pursuant to those referenced regulations, GDOE is prohibited from
15 releasing any information to unauthorized persons regarding proposals until after award. In
16 accordance with these laws and regulations and because GDOE has not yet awarded an offeror,
17 GDOE would not be able to provide responses that would include and disclose confidential
18 information protected by law.

19 **IV. Conclusion**

20 GDOE has yet to issue an award for RFP 005-2016, and more importantly USDOE has
21 not approved of an offeror in relation to the RFP, which is a requirement for GDOE to receive
22 funds from USDOE. For the foregoing reason, GDOE respectfully requests that the OPA dismiss
23 the Appellants complaint.

24 Dated this 1st day of September, 2016.

25 Respectfully submitted,

26 **GUAM DEPARTMENT OF EDUCATION**

27 By: 
28 **JAMES L.G. STAKE**
Legal Counsel