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In the Appeal of Pacific Data Systems; OPA-PA-21-004

Claire Pollard <cpollard@rwtguam.com>

Mon, Aug 9, 2021 at 4:55 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, jlgstake@gdoe.net

Dear Mr. Hernandez:

Please see the attached *Comments on Agency Report* to be filed in the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,
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**8.9.21 Comments on Agency Report.pdf**

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**PROCUREMENT APPEAL OF DENIAL OF PROCUREMENT PROTEST
IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

PART I.

In the Appeal of

Pacific Data Systems, Inc. (PDS),

Appellant.

DOCKET NO. OPA-PA-21-004

COMMENTS ON AGENCY REPORT

I. INTRODUCTION

Pursuant to 2 GAR §§ 12104(c)(4) and 12108(a), Appellant Pacific Data Systems, Inc. (PDS) (“PDS” or “Appellant”) submits its Comments on the Agency Report submitted by the Guam Department of Education (“GDOE”) to the Office of Public Accountability on July 30, 2021. These comments are submitted to address the positions taken by GDOE in its Agency Report and Statement regarding GDOE IFB 027-2021 for Telecommunication Service – Plain Old Telephone Services (POTS) issued on April 28, 2021 (the “IFB”).¹

¹ GDOE IFB 027-2021 was issued contemporaneously with GDOE IFB 028-2021 for Telecommunication Service – Digital Transmission Services (DTS). Both IFB’s were protested for similar grounds, appealed for similar grounds, and subject to similar

II. COMMENTS TO AGENCY STATEMENT

A. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.²

The Guam Department of Education (“GDOE”) issued the above Invitation for Bid procurement on April 28, 2021. On May 27, 2021, 2 bidders, Pacific Data Systems, Inc. (“PDS”) and Teleguam Holdings LLC (“GTA”) submitted bids in response to the GDOE Bid invitation. GDOE conducted a public opening of the bids, and summarized the results of that bid opening in a Bid Abstract. On June 4, 2021, GDOE sent PDS a Bid Status and Award Notification. Because the prices submitted by offeror GTA were submitted in violation of law, and because GTA could not meet the performance dates specified with the agency, PDS submitted a protest on June 10, 2021, of the award notice designating GTA for award. On June 29, 2021, the Agency denied the protest. This appeal to the OPA followed.

B. DOE’S AGENCY REPORT AND STATEMENT DOES NOT CONTEST ITS SPECIFICATION ON WHEN SERVICES SHOULD COMMENCE, AND GTA HAS CONFIRMED ITS INABILITY TO MEET THAT START DATE.

DOE does not contest that it Amended the IFB to set that “the delivery of services shall commence on and no earlier than July 1, 2021.” GDOE Agency Statement, 3. Rather, DOE skirts this requirement by claiming that the IFB, unlike the amendment, did not contain the “on and no earlier” requirement and instead required that services should start “no earlier than July 1, 2021.” GDOE Agency

procurement records. As such, these comments are substantially similar to the comments submitted in OPA-PA-21-005.

² Much of this history is contained in PDS’s Notice of Appeal, but is recounted here for ease of reference for the reader.

Statement, 3. DOE is wrong in concluding that the specifications of the IFB still control when an amendment changes those specifications. Guam law specifically recognizes the ability of amendments to an IFB to alter what is required. *See*, 2 GAR 3109(i); (t)(2) (“If, in the opinion of the Procurement Officer, a contemplated amendment will significantly change the nature of the procurement, the Invitation for Bids, shall be cancelled in accordance with §3115 (Cancellation of Solicitations; Rejection of Bids or Proposals) of this Chapter and a new Invitation for Bids issued.”) Federal procurement law, like Guam law, also recognizes the fundamental truth that amendments can lay down new specifications altering an IFB, including, as DOE did here, the delivery dates. *See, e.g., Overstreet Elec. Co. v. United States*, 47 Fed. Cl. 728, 729 (2000) (Explaining how “On December 23, 1999, the Corps issued Amendment 0001 to the IFB, which changed the contract completion time from 900 to 700 calendar days and made changes to the specifications and drawings.”).

PDS’s agency level protest informed GDOE that GTA could not meet the July 1 services start date, and as such, GTA would be non-responsive to that bid specification and lack the responsibility to perform. GDOE has ignored this in its report, and has ignored how it clarified that services must begin “on and no earlier” than July 1, 2021. PDS’s concerns about the inability for GTA to perform have been confirmed by the procurement record, as the record includes a June 2021 request to GDOE to “provide a 30-day extension for services to be activated....” Procurement Record OPA-PA-004, 183; Procurement Record of OPA-PA-005, 241. GDOE’s

selection of an offeror who could not meet the specified start date was in error, and should be reversed.

C. GDOE'S AGENCY REPORT AND STATEMENT DOES NOT CONTEST THAT GTA'S PRICE MAY VIOLATE THE LAW.

GDOE does not contest that GTA's price may violate the Telecommunications Act or may not be in accordance with Law. GDOE Agency Statement, 5. Rather, DOE explains that the law prohibits it from making such an examination, since 5 GCA §5211(e) mandates that "No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids.". GDOE Agency Statement, 5, *citing* 5 GCA §5211(e). GDOE, in merely confining itself to the contents of the bid envelope, has ignored its obligation to determine if GTA, by submitting an artificially deflated price, is in fact a non-responsible offeror as explained by PDS in its Notice of Appeal.

Guam law makes it plain that GDOE's contracting officer is required to make a responsibility determination based on standards that are not specifically in the bid envelope. *See*, 5 GCA § 5230; 2 GAR § 3116. (setting factors to consider such as "*appropriate* financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them" as well as "a satisfactory record of integrity"). GDOE is also ignoring the mandate to make sure that "Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible." 2 GAR § 3116 (b)(4). GDOE's Agency report confirms that, while being made aware of the possibility that GTA has submitted a price that violates law, GDOE has taken the position that the issue was not for GDOE to

resolve, or that resolution could be accomplished by simply asking GTA about it. GDOE is wrong, as the agency can only make an award to a responsible offeror, and was required to move beyond the GTA bid envelope to make that determination. *See, e.g., Preferred Sys. Sols., Inc. v. United States*, 110 Fed. Cl. 48, 61 (2013) (Praising procuring agency because “the record shows that the agency was attuned to the potential risk of an unrealistically low price proposal from [offeror], and actively sought clarification to resolve that risk during discussions. As [the offeror] points out, the [contracting officer] consulted multiple sources of evidence to determine whether [offeror]’s discounts were fair and reasonable, including escalation rates within GSA FSS IT–70 contracts, the U.S. Department of Labor National Compensation Survey, and statistics for the relevant St. Louis MO–IL region.”)

D. IT APPEARS THAT DOE IS SEEKING TO VIOLATE, OR HAS VIOLATED, THE AUTOMATIC STAY

Troublingly, it appears that GDOE has taken steps to violate the automatic stay or procurement mandated by Guam Law. It is axiomatic that “Once a party brings a timely protest, an automatic stay of procurement until final resolution of that protest is required by both 5 GCA, Chapter 5, and 2 GAR, Div. 4, Chapter 9.” *Teleguam Holdings, LLC v. Territory of Guam*, 2015 Guam 13, ¶ 24 (Guam Apr. 22, 2015). The Procurement Record shows that, shortly after receiving PDS’s protests, GDOE has proceeded further with the award of the contract for this and its parallel telecommunication procurement through contract negotiations and attempted contract execution. *See*, Procurement Record OPA-PA-004, 15; 183-184;

Procurement Record of OPA-PA-005, 15; 240-248. The procurement record does not show any attempted compliance with the requirements of 5 GCA § 5425 (g) that would allow pushing forward with a procurement despite the existence of the automatic stay.

GDOE's actions constitute a further violation of law. *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20, ¶ 148. ("We have consistently held that the stay following a timely, pre-award procurement protest applies automatically. In other words, the stay under section 5425(g) is triggered by a timely protest. It applies where a protest is both factually timely and ... pursued before the award has been made. This is in accord with the mandatory nature of 5 GCA § 5425(g). For this reason, once a party brings a timely protest, an automatic stay of procurement until final resolution of that protest is required. While our cases have indicated that parties have sought to enforce the automatic stay by court order, our case law is equally clear that the automatic stay is a legal entitlement that vests upon a timely, pre-award protest. No court order is necessary for the automatic stay to become effective. The automatic stay set forth in section 5425(g) remains in effect from the date of protest and continues until final resolution of the action by the Superior Court."). (Internal quotations, citations, and edits omitted). GDOE's pushing forward with the procurement award to GTA hampers any remedy PDS may have to become an awardee of the quotation request.

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E. DOE'S RECORD SUBMISSION VIOLATES THE LAW.

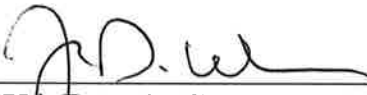
GDOE's submission shows further flaws with the procurement record. First, it appears that GDOE has not certified the procurement record. Furthermore, it appears that the agency has held back portions of GTA's submissions as confidential material, and has taken no steps, despite the legal obligation to do so, to protect the confidential submissions of PDS.³

III. CONCLUSION

GDOE issued an IFB that was awarded to an offeror who informed GDOE it could not meet the delivery date and submitted an illegally deflated price. GDOE's Agency report and accompanying statement does not alter the reality of these errors. Based on the foregoing, PDS respectfully requests that its protest appeal be sustained.

Submitted this 9th day of August, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSHUA D. WALSH
EDWIN J. TORRES
Attorneys for Appellant

³ PDS reserves its rights, as the facts continue to develop through investigation and research, to address the failings of the procurement record, the violation of its right to confidentiality, and the apparent violation of law *vis a vis* the automatic stay through motion practice before the OPA, or action through the courts of Guam if necessary.