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Corrected Agency Statement and First Supplement to Procurement Record

Kiana M. Santos <kmsantos@portofguam.com>

Fri, Oct 11, 2024 at 11:55 AM

To: jhernandez <jhernandez@guamopa.com>

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Hafa Adai Jerrick,

Please accept for filing the attached

1. The Corrected Agency Statement
2. First Supplement to Procurement Record

from the PAG in OPA-PA-24-004.

Note: Corrections are only to the prices listed on page 1 of the Agency Statement. No other changes made.

Thank you,

--

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2 attachments



First Supplement to Procurement Record OPA-PA-24-004.pdf

98K



Corrected Agency statement OPA-PA-24-004.pdf

228K

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7 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**
8 **PROCUREMENT APPEAL**

9 **IN THE APPEAL OF:**) **DOCKET NO. OPA-PA-24-004**
10)
11 **DATA MANAGEMENT RESOURCES,**)
12 **LLC,**)
13 **Appellant,**) **[CORRECTED]**
14 **and**) **AGENCY STATEMENT**
15 **PORT AUTHORITY OF GUAM,**)
16 **Purchasing Agency.**)

17 The Port Authority of Guam (“PAG”), hereby submits its Agency Statement, pursuant to
18 2 GAR Div. 4 § 12105(g), in response to the appeal from Data Management Resources, LLC
19 (“DMR” or “Appellant”) of IFB-PAG-008-24, re: Desktop Computers with Accessories.
20

21
22 **I. RELEVANT BACKGROUND**

23 In May 2024 the PAG issued IFB-PAG-008-24 (“IFB”) seeking bids for Desktop
24 Computers with Accessories. PDS and DMR timely submitted bids. Both of these submissions
25 were opened publicly and their prices were announced to everyone present at the bid opening on
26 June 12, 2024. PDS’s price was listed at \$50,500.00, Computer Smart’s Price was listed at
27 \$53,572.40, and DMR’s price was announced at \$58,740.00. Cade Taitano and Richard Taitano,
28

1 representing DMR, were present at the bid opening and announcement. On June 28, 2024, Notice
2 of Award announcing PDS as the awarded contractor was issued to DMR and to PDS.

3 On July 12, 2024, Appellant filed its protest document at issue in this appeal (“Protest”).
4 This Protest was filed 30 days after the bids were opened to the public, and 14 days after DMR
5 received its Notice of Award. On September 10, 2024, the PAG issued a Decision addressing
6 the Protest. The following is PAG’s Agency Statement in response to Appellant’s appeal.
7

8 9 10 **II. RESPONSES TO DMR’S ALLEGATIONS**

11 Appellant makes allegations that are interspersed with the factual statements in its Notice
12 of Appeal. This Agency Statement will attempt to decipher and respond to all material
13 allegations presented, first presenting a statement of the allegation, then presenting a response,
14 and following sequentially, as much as possible. The factual allegations are organized and
15 numbered here in order of topic for the purposes of this statement.
16

17 1) **DMR’s Allegation(s) re: “ProSupport”**--- DMR claims that PDS’ Bid should have been
18 rejected prior to award due to the bidder’s failure to offer Dell Inc. brand proprietary
19 “ProSupport” for software, which is a warranty and technical support service plan
20 trademarked by Dell Inc. for Dell Technologies and Dell Inc. computer products,
21 <https://trademarks.justia.com/864/44/dell-86444360.html>. DMR claims that “[r]ejection of
22 the bid” was a condition of the IFB, and PDS should have been disqualified from consideration
23 and award of the contract.
24

25 **PAG’s Response**---All bid submissions were publicly opened and announced on June 12,
26 2024, containing all alleged defective terms to which DMR objects. DMR was present on this
27 date, when the vendors and their prices were announced. June 12, 2024 is the date that DMR
28 was on notice that PDS’s submission was the lowest price and included all allegedly defective

1 terms. These terms have not changed, and were not changed by the Notice of Award issued
2 on June 28, 2024. As such, the Letter of Protest was submitted beyond the 14-day time period
3 of when DMR first knew or should have known of the facts giving rise to its complaints. 5
4 GCA § 5425(a) and 2 GAR, Div. 4 § 9101(c)(1); *see also* *DFS v. GIAA*, 2020 Guam 20, ¶¶84-
5 101; and *In the Appeal of ASC Trust Corporation*, OPA-PA-09-010 (finding that the fourteen-
6 day clock begins when a party first becomes aware of facts giving rise to the issues raised in
7 the protest). The Protest was untimely, and DMR’s failure to timely raise its Protest deprives
8 the OPA of jurisdiction. The PAG has substantially and materially complied with applicable
9 laws. Morrico has failed to allege how it is materially affected or prejudiced by its allegations.
10 Further, DMR is not an "aggrieved" bidder because it did not offer the second lowest priced
11 bid, and would not be entitled to an award of the contract even if it prevailed on the claims set
12 forth in its Protest. Finally, DMR’s undue delay in waiting until after award to file its Protest
13 has rendered its requests for relief moot, as the contract was awarded and is being performed.

14
15
16 2) **DMR’s Allegation re: “ProSupport” Brochures---** DMR further claims that PDS’ bid
17 should have been rejected prior to award “based on the bidder’s failure to provide descriptive
18 literature indicating compliance with [the ProSupport] IFB requirements” DMR claims
19 that “[r]ejection of the bid” was a condition of the IFB, and PDS should have been disqualified
20 from consideration and award of the contract.

21 **PAG’s Response---**All bid submissions were publicly opened and announced on June 12,
22 2024, containing all alleged defective terms to which DMR objects. DMR was present on this
23 date, when the vendors and their prices were announced. June 12, 2024 is the date that DMR
24 was on notice that PDS’s submission was the lowest price and included all allegedly defective
25 terms. These terms have not changed, and were not changed by the Notice of Award issued
26 on June 28, 2024. As such, the Protest was submitted beyond the 14-day time period of when
27 DMR first knew or should have known of the facts giving rise to its complaints. 5 GCA §
28

1 5425(a) and 2 GAR, Div. 4 § 9101(c)(1); *see also DFS v. GIAA*, 2020 Guam 20, ¶¶84-101;
2 and *In the Appeal of ASC Trust Corporation*, OPA-PA-09-010 (finding that the fourteen-day
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6 Morrico has failed to allege how it is materially affected or prejudiced by its allegations.
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8 bid, and would not be entitled to an award of the contract even if it prevailed on the claims set
9 forth in its Protest. Finally, DMR's undue delay in waiting until after award to file its Protest
10 has rendered its requests for relief moot, as the contract was awarded and is being performed.

11
12 3) **DMR's Allegation(s) re: "Data Protection Encryption Personal Edition"**--- DMR claims
13 that PDS' Bid should have been rejected prior to award due to the bidder's failure to offer
14 "Data Protection Encryption Personal Edition" software in its bid. DMR claims that
15 "[r]ejection of the bid" was a condition of the IFB, and PDS should have been disqualified
16 from consideration and award of the contract. *DMR Protest*, p. 1, ¶¶ 3-4 (July 12, 2024)

17
18 **PAG's Response**---All bid submissions were publicly opened and announced on June 12,
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24 DMR first knew or should have known of the facts giving rise to its complaints. 5 GCA §
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8 has rendered its requests for relief moot, as the contract was awarded and is being performed.

9 4) **DMR's Allegation re: "Data Protection Encryption Personal Edition" Brochure**---DMR
10 further claims that PDS' bid should have been rejected prior to award "based on the bidder's
11 failure to provide descriptive literature indicating compliance with [the Data Protection
12 Encryption Personal Edition] IFB requirements" DMR claims that "[r]ejection of the bid"
13 was a condition of the IFB, and PDS should have been disqualified from consideration and
14 award of the contract.
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16 **PAG's Response**---All bid submissions were publicly opened and announced on June 12,
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2 Further, DMR is not an "aggrieved" bidder because it did not offer the second lowest priced
3 bid, and would not be entitled to an award of the contract even if it prevailed on the claims set
4 forth in its Protest. Finally, DMR's undue delay in waiting until after award to file its Protest
5 has rendered its requests for relief moot, as the contract was awarded and is being performed.
6

7 8 **III. TIMELINESS OF PROTEST**

9 DMR waited to file its Protest until after award. The Protest is untimely, and therefore,
10 cannot be considered. DMR's late filing deprives the OPA of jurisdiction to determine its belated
11 complaints, and the PAG intends to file a Motion to Dismiss addressing this issue in full.
12

13 However, the PAG will summarize the timeliness issues for the purposes of this
14 statement. PDS's price submission was publicly opened, its price quote was announced, and the
15 full contents of its bid, including all documents submitted, were available to DMR on June 12,
16 2024. A Bid Abstract showing the PAG's acceptance of the forms and the priced submission for
17 evaluation was also provided the same day. In fact, DMR had representatives present during the
18 bid opening, Cade and Richard. All bid prices were publicly read aloud to all present. DMR was
19 fully aware that PDS had submitted the lowest price for the IFB on June 12, 2024. At that time,
20 DMR had actual notice that if PDS lowest price submission was accepted, and not rejected during
21 evaluations, PDS would win the award. Yet, it did not inspect PDS's bid or take any action at
22 that time. DMR waited until the award to PDS was announced on June 28, 2024 to do anything.
23 Now, after the fact, based on technical issues in the forms of PDS's price submission, DMR
24 claims that the PAG made "a mistake"; it should have rejected PDS's bid during evaluations, and
25 PDS should have been disqualified from consideration and award of the contract.
26
27

28 This is the exact practice that the Supreme Court of Guam has attempted to halt in its

1 ruling in *DFS Guam, L.P. v. The A.B. Won Pat International Airport Authority, Guam*, 2020
2 Guam 20 ¶¶77-101. Bidders can no longer adopt a “wait and see” approach, and wait until after
3 award is made to protest and complain that another bidder’s bid should not have been considered
4 during evaluations. *Id.* at ¶ 99. If a bidder fails to take action when it could and should do so, it
5 forfeits its complaints. *Id.*

7 **IV. APPELLANT’S UNSUPPORTED REQUESTS FOR RELIEF:**

8 Appellant fails to show its entitlement to the specific relief set forth by rule or statute.
9 DMR requests none of the available remedies set forth under Guam’s Procurement Law or
10 Guam’s Procurement Rules and Regulations. *See* 5 GCA §§ 5451, 5452; and 2 GAR, Div. 4 §§
11 9104, 9105, and 9106. Appellant makes two discernible requests for action by the OPA: 1)
12 “[t]hat the automatic stay of procurement arising under 5 G.C.A. § 5425(g) be confirmed in
13 place;” and 2) “[t]hat PAG be required to review all bid submission, determine the responsiveness
14 of all bidders, and award the IFB DMR as the lowest priced responsive and responsible bidder
15 under the IFB.”

16
17
18 The only cognizant argument supporting relief that can be discerned from the statements
19 in the Protest and this appeal is that Appellant is claiming that PDS’s bid should have been
20 rejected, and PDS should have been disqualified from consideration for award, back when the
21 bids were evaluated. However, this does not constitute a clear statement of support for the relief
22 the Appellant wants now---retroactive rejection of PDS’ bid after the bids have already been
23 evaluated, a contract has already been awarded to PDS, and after the contract is being performed.

24
25 Award of the contract was made in June of 2024. Appellant protested in July of 2024.
26 DMR fails to properly support or request the post-award remedies that are available to it; instead
27 requesting only the pre-award remedies of preventing the government from “proceed[ing] further
28

1 with the solicitation or with the award of the contract,” 5 GCA § 5425(g), and retroactively
2 rejecting PDS’s bid and awarding to DMR. *See* pre- and post-award protest remedies at 5 GCA
3 §§ 5451, 5452; and 2 GAR, Div. 4 §§ 9104, 9105, and 9106. DMR waited until after award of
4 the contract to request these remedies. These remedies are only available prior to award, and
5 cannot be requested in retrospect.
6

7 DMR has not timely and correctly invoked the appropriate pre-award redress for its
8 allegations. 2 GAR, Div. 4 § 9105 and 5 GCA § 5451. “If prior to award it is determined that a
9 solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed
10 award shall be: (a) cancelled; or (b) revised to comply with the law.” 5 GCA § 5451 (emphasis
11 added). DMR never requested revision or cancellation of the IFB, even though it had notice that
12 the IFB clearly stated that award would be granted to MAS contractors, if they offered the lowest
13 price. DMR did not request revision or cancellation of the expected award, prior to awarding,
14 even though it had notice that PDS did, in fact, offer the lowest price on June 12, 2024, and would
15 therefore, receive the award pursuant to the terms of the IFB.
16
17

18 Appellant asks for relief but fails to provide any information or law that would entitle it
19 to the pre-award relief it seeks, local or federal. After award, Guam’s Procurement Law clearly
20 sets forth the available remedies, and requires contracts to be ratified and affirmed if it is in the
21 best interests of the government, where there is no bad faith or fraud. 2 GAR, Div. 4 § 9106(a),
22 (b), and (c). For these reasons, this appeal should be denied and dismissed in its entirety.
23
24

25 **V. APPELLANT IS NOT AGGRIEVED AND NOT ENTITLED TO RELIEF**

26 The IFB only imposes the requirements of law, i.e., Guam’s Procurement Law, Guam’s
27 Procurement Rules and Regulations. Therefore, its terms are not unreasonable, arbitrary, or
28

1 capricious. Appellant fails to provide any legal authority to support its positions or evidence of
2 any violation of law materially affecting its ability to participate in the procurement process.
3 DMR is not aggrieved pursuant to 5 GCA § 5425(a) or 2 GAR, Div. 4 § 9101(a)(1)(a).
4

5 In order to pursue a protest, DMR must have standing. When standing is at issue, "the
6 relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury
7 to himself that is likely to be redressed by a favorable decision." *Simon v. E. Kentucky Welfare*
8 *Rights Org.*, 426 U.S. 26, 38 (1976). Under 5 GCA § 5245(a): "[a]ny actual or prospective bidder,
9 offeror, or contractor who may be aggrieved in connection with the method of source selection,
10 solicitation or award of a contract, may protest to ... the head of the purchasing agency." DMR
11 must show that it is "aggrieved" by the alleged violations of law. 5 GCA § 5425(a).
12

13 None of the complaints raised operate to penalize DMR or prevent DMR from
14 participating in this federally funded Invitation for Bids solicitation. DMR had actual notice of
15 all defects alleged. DMR has suffered no injury, and is not aggrieved by the alleged violations.
16 This appeal should be denied in its entirety and dismissed.
17

18 V. CONCLUSION

19 In conclusion and for the aforementioned reasons, PAG respectfully requests that this
20 appeal be denied in its entirety and dismissed with prejudice. The PAG intends to file a Motion
21 to Dismiss more completely setting forth the law and arguments requiring such dismissal.
22
23

24 Submitted this 11th day of October, 2024.

25 PORT AUTHORITY OF GUAM

26
27 By: 

28 JESSICA TOFT