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GDOE Motions in the appeal of G4S OPA-PA-21-007

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Hafa Adai All,

Please see attached for Appeal No. OPA-PA-21-007.

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Guam Department of Education

3 attachments **GDOE Motion to Dismiss Failure to State a Claim OPA-PA-21-007 102721.pdf**
338K **GDOE Motion to Dismiss Lack of SMJ OPA-PA-21-007 102721.pdf**
344K **GDOE Motion to Exclude OPA-PA-21-007 102721.pdf**
433K

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8 **OFFICE OF THE PUBLIC AUDITOR**
9 **PROCUREMENT APPEALS**

10 In the Appeal of

11 APPEAL CASE NOS.: OPA-PA-21-007

12 G4S Security Systems (Guam) Inc.,

13 **MOTION TO EXCLUDE THIRD PLACE**
14 **BIDDER (PDS) FROM THIS APPEAL**
15 **PROCESS.**

16 Appellant.

17
18 The Guam Department of Education (GDOE), by and through its undersigned counsel,
19 moves to exclude the third place bidder, Pacific Data Systems Inc. (also “PDS”), from
20 participation in the Appeal of Case Nos. OPA-PA-21-007.

21 **BACKGROUND**

22 On April 13, 2021, GDOE issued its Multi-Step IFB 026-2021 for Indoor and Outdoor
23 Wireless Local Area Network (WLAN) Infrastructure Installation Project (hereinafter referred to
24 as the “IFB”). The final prices of the IFB from lowest to highest were Technologies for
25 Tomorrow Inc. (TFT) (\$1,531,820.00), G4S Security Systems (Guam) Inc. or Appellant
26 (\$1,944,000.00), PDS (\$2,213,208.00), and California Pacific Technical Services LLC
27 (\$3,750,285.30). See Procurement Record at 545. On July 13, 2021, GDOE awarded to TFT as
28 the lowest, most responsible and responsive bid for the IFB. On August 10, 2021, Appellant
protested the award for TFT. On September 3, 2021, GDOE issued its denial of Appellant’s
protest. On September 20, 2021, GDOE received the notice of receipt of appeal from the Office
of the Public Auditor (OPA). On October 14, 2021, PDS as the third place bidder for the IFB,

1 filed its Comments on the Agency Report. GDOE now respectfully moves the OPA to exclude
2 the participation of third place bidder PDS from this Appeal process, because Guam Procurement
3 law does not authorize PDS's participation herein since PDS is not the protestant, not the
4 appellant, not an interested party, and has no legal standing in this appeal.

5 ARGUMENT

6 The Public Auditor shall have the power to review and determine *de novo* any matter
7 properly submitted. See 5 GCA §5703; see also 2 GAR Div. 4 §12103(a). This includes the
8 power to rule on motions, and other procedural matters before the OPA. See 2 GAR Div. 4
9 §12109(d).

10 **1. PDS has no legal authority to interrupt this Appeal Process.**

11 Guam Procurement law provides the authority of the Hearing Officer for Procurement
12 Appeals to regulate the course of the hearing and conduct of participants therein and to consider
13 testimony and evidence submitted by any competing bidder, offeror or contractor **of the**
14 **protestant or appellant.** See 2 GAR Div. 4 §§12109(e) & (j). In addition, the Public auditor
15 may consider testimony and evidence submitted by any competing bidder, offeror or contractor **of**
16 **the protestant.** See 5 GCA §5703(e).

17 **PDS is not the protestant and not the appellant in this Appeal.** See 5 GCA §5703(e);
18 see also 2 GAR Div. 4 §§12109(e) & (j). PDS is the third place bidder in the IFB and fails to
19 provide any legal authority for their disruption of the integrity of the Appeal process, and to
20 authorize their improper participation. Rather, Guam Procurement law provides exactly who
21 does have authority, and that is Appellant G4S. *Id.* Therefore, PDS should not be permitted to
22 disrupt this Appeal with its unauthorized participation.

24 **2. PDS is not an interested party in this Appeal.**

25 Guam Procurement law defines an interested party as an actual or prospective bidder,
26 offeror, or contractor **who appears to have a substantial and reasonable prospect of receiving**
27 **an award if the Appeal is denied.** See 2 GAR Div. 4 §12102(b); compare with 31 USC

1 §3551(2) (defines an interested party with respect to a contract or solicitation or other request for
2 offer as an actual or prospective bidder or offeror **whose direct economic interest would be**
3 **affected by the award** of the contract or by failure to award the contract).

4 Based on the above, PDS does not have a substantial and reasonable prospect of receiving
5 an award in any outcome of this Appeal, because the award was made to TFT and Appellant is
6 the second place bidder who has any prospect of receiving an award depending on the outcome of
7 this Appeal. See 2 GAR Div. 4 §12102(b). PDS is not the Appellant and has no chance now to
8 receive the award as a result of this Appeal. PDS has no direct economic interest in this Appeal.
9 Compare with 31 USC §3551(2). Instead, PDS is actively disrupting the integrity of this appeal
10 process. PDS will literally gain nothing from the result of this appeal. PDS appears to be
11 improperly using this appeal process as a vehicle to force the OPA to entertain separate issues not
12 included in the original protest by G4S for the purpose of benefitting PDS's own personal
13 interest. Guam Procurement law does not allow this, PDS's misconduct does nothing to promote
14 the integrity of the procurement process. See 5 GCA §5703. PDS is clearly not an interested
15 party, and there is no integrity in what PDS is doing now.

16 **3. PDS has no legal standing before the OPA for this Appeal.**

17 In Guam, standing may be conferred either constitutionally or statutorily. *Teleguam*
18 *Holdings LLC v. Guam*, 2018 Guam 5 at 8. Here, PDS has no statutory standing because it is not
19 an interested party under this appeal. In the alternative, to establish constitutional standing, a
20 party must show: (1) it has suffered an injury in fact; (2) that the injury can be fairly traced to the
21 challenged action taken by the defendant; and (3) that it is likely beyond mere speculation that a
22 favorable decision will remedy the injury sustained. See *In re A.B. Won Pat Int'l Airport Auth.*,
23 2019 Guam 6 at 9 (also citing *Guam Mem'l Hosp. Auth.*, 2012 Guam 17 ¶ 10). The requirement
24 of an injury in fact is a hard floor of jurisdiction that cannot be removed by statute, and the party
25 seeking to establish injury has the burden of proving standing. *In re A.B. Won Pat Int'l Airport*
26 *Auth.*, 2019 Guam 6 at 11. Here, PDS has failed to show all three (3) required factors.

