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TRANSMITTAL

To:	Mr. Venido Torres Office of the Governor 513 West Marine Corps Drive Ricardo J. Bordallo Governor's Complex Hagatna, Guam 96910 Email: procurement@guam.gov	From:	Mitchell F. Thompson Hearing Officer Office of Public Accountability
	Ms. Jessica Toft, Assistant Attorney General Office of Attorney General 590 S. Marine Corps Drive ITC Bldg., Ste. 802 Tamuning, Guam 96913 Email: jtoft@oagguam.org ;	Pages:	9 (including cover page)
CC:	Ms. Jacqueline Taitano Terlaje, Esq. Law Office of Jacqueline Taitano Terlaje, P.C. Attorney for Appellant Data Management Resources, LLC. 248 West Chalan Santo Papa Hagatna, Guam 96910 Phone: (671) 648-9001 Fac: (671) 648-9002 Email: info@terlajelaw.com ; jterlaje@terlajelaw.com	Date:	August 10, 2022
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Re: OPA-PA-22-004 Decision and Order

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Thank you,
 Jerrick Hernandez, Auditor
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**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

In the Appeal of) **Appeal No. OPA-PA-22-004**
)
Data Management Resources, LLC.,) **DECISION AND ORDER**
)
Appellant.)
_____)

To: **Purchasing Agency:**
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I. INTRODUCTION

This is the final administrative decision, pursuant to 2 G.A.R.R, Division 4, Section 12110, in this procurement appeal OPA Case No. OPA-PA-22-004. The undersigned was appointed Hearing Officer herein, pursuant to 2 G.A.R.R, Division 4, Section 12109, by the Public Auditor by written order filed June 8, 2022 herein.

1 **II. JURISDICTION AND STANDARD OF REVIEW**

2 The OPA has jurisdiction over this matter pursuant to 5 G.C.A. Section 5703. The
3 factual and legal determinations of the OPA are made pursuant to 5 G.C.A. Section 5704.

4 **III. RELEVANT CHRONOLOGY**

5 The Office of the Governor of Guam (“Agency”) issued its RFP-2022-001 related to the
6 procurement of professional services for a new Government of Guam licensing and permitting
7 system (“RFP”) on February 7, 2022. Appellant Data Management Resources, LLC (“DMR”)
8 submitted a series of written questions about the RFP to the Agency on February 25, 2022. The
9 Agency responded to DMR’s written questions on March 5, 2022.

10 DMR submitted, via email, its first protest related to the RFP on March 19, 2022. DMR
11 submitted, via email, its second protest related to the RFP on April 8, 2022. The Agency denied
12 both of DMR’s protests on May 24, 2022.

13 The Agency issued a determination to move forward with the procurement, pursuant to 5
14 G.C.A. Section 5425(g), which was served on DMR on May 24, 2022. DMR did not file a
15 protest of this determination.

16 DMR submitted its notice of appeal related to both of its protests to the OPA on June 8,
17 2022. The Agency submitted its motion to dismiss this appeal on July 13, 2022. DMR filed its
18 opposition to the motion to dismiss on July 25, 2022. DMR filed its reply memorandum in
19 support of its motion to dismiss on July 29, 2022.

20 DMR filed a motion for the OPA to review the Agency’s determination under
21 5 G.C.A. Section 5425(g) on June 24, 2022. The Agency filed its Opposition to that motion on
22 July 25, 2022.

23 DMR filed a waiver of hearing herein on July 13, 2022. At the pre-hearing conference
24 held July 15, 2022, the parties agreed to submit this appeal, including the pending Motions, for
25 determination on the papers.

1 **IV. ANALYSIS**

2 **A. Agency’s Motion to Dismiss**

3 **1. DMR’s Protests**

4 Before analyzing the Motion to Dismiss, it is instructive to consider the specific grounds
5 of DMR’s protests, which are discussed separately below.

6 **a. First Protest**

7 In its first protest, DMR essentially asserted three grounds. The first was “failure to
8 describe minimum specifications” for, and “failure to adequately describe,” the licensing and
9 permitting system required. DMR’s Notice of Appeal, pp.2-3. The second ground was “bad
10 faith and unreasonable conditions” based on “no certification of fund availability for the term of
11 the contact.” *Ibid.*, p. 3. The third ground was “no standard is clearly described.” *Ibid.*

12 **b. Second Protest**

13 In its second protest, DMR asserted that the Agency “has engaged in arbitrary conduct”
14 based on the fact that Mathew Santos, the point of contact designated by the Agency for the RFP,
15 had not completed the procurement training mandated by 5 G.C.A. 5141(b). DMR’s Notice of
16 Appeal, pp.3-4.

17 **2. DMR is not Aggrieved**

18 In its Motion to Dismiss this appeal, the Agency argues that DMR lacks standing, in that
19 DMR is not an “aggrieved party” who is authorized to pursue a procurement appeal under Guam
20 law. The pertinent statute provides that an actual or prospective bidder, offeror or contractor
21 *who may be aggrieved* in connection with the selection, solicitation or award of a contract may
22 protest. 5 G.C.A. §5425(a) (emphasis added).

23 It is noteworthy that Section 5425(a) imposes a requirement that the bidder or offeror
24 must be “aggrieved” in connection with the procurement process in order to pursue an appeal. A
25 party’s status as bidder or offeror, by itself, is insufficient. As noted by one commentator, the

1 fact that a bidder did not win an award, by itself, is insufficient to establish that the bidder is
2 “aggrieved.” Rather, the bidder must show that, as a result of the agency’s failure to follow the
3 law, the party has been *unfairly* not awarded the contract. *See Brown, A Guam Procurement*
4 *Process Primer* (2011), Section XVI.D.2, p. 171 (emphasis added).

5 Other jurisdictions have recognized this principle in dismissing procurement appeals for
6 lack of standing. In City of Fort Wayne v. Pierce Manufacturing, Inc., 853 N.E.2d 508 (Ind.
7 App. 2006), the offeror to a RFP appealed the award of services contract to another offeror. The
8 appellate court found that the trial court erred in denying the agency’s motion to dismiss for lack
9 of standing. The appellate court, following a lengthy analysis of the term “person aggrieved,”
10 determined that the term meant a person who has suffered, or was likely to suffer, harm to a
11 pecuniary or property interest. City of Fort Wayne v. Pierce Manufacturing, Inc., *supra*, p. 518.
12 The appellate court found that offeror did not have a legal interest that would be enlarged or
13 diminished by judicial review of the award, as the agency’s purported illegal conduct did not
14 cause the offeror to not receive the award. *Ibid.*

15 *See also* Midwest Psychiatric Center v. Indiana Dept. of Administration, 959 N.E.2d 896,
16 904 (Ind. App. 2011) (offeror lacked standing to protest award of RFP for services to another
17 offeror; the agency had broad discretion in determining the qualifications of the offerors in
18 awarding an RFP).

19 As noted by another court:

20 [I]mplicit in the definition of an RFP is the underlying rationale that,
21 in some types of competitive procurement, the agency may desire an
22 ultimate goal but cannot tell the offerors how to perform toward
achieving that goal; thus a ready distinction arises between an RFP
and an IFB [invitation for bids].

23 System Development Corp. v. Department of Health and Rehabilitation Services, 423 So.2d 433,
24 434 (Fla.App.1982).

1 The Guam Procurement Law is modeled after the ABA Model Procurement Code
2 (“MPC”). *See* Comment to Chapter 5 of Title 5 of the G.C.A. Among the other jurisdictions
3 which have adopted the MPC, the Maryland State Board of Contract Appeals (“MSBCA”) has
4 established a long line of reasoned, consistent and published decisional authority applicable to
5 MPC issues. *See* Brown, *A Guam Procurement Process Primer* (2011), p. 5, n.4.

6 In Appeal of Paul Blaine & Assoc., MSBCA No. 1123 (April 16, 1983), the Board denied
7 an appeal by an offeror who responded to an RFP for consulting services. The Board noted that,
8 unlike in competitive sealed bidding, it is not essential to provide objectively measurable criteria
9 in evaluating responses to a RFP. Appeal of Paul Blaine & Assoc., *supra*, p. 10. The Board
10 went on to note that the agency has reasonable discretion in evaluating proposals to a RFP. *Ibid.*,
11 p. 11.

12 *See also* Appeal of Xerox Corp., MSBCA No. 1111, p. 6 (April 25, 1983) (On appeal to
13 the Board, the issue is whether the agency’s bid specifications unreasonably restricted
14 competition; otherwise Board would not second guess the agency’s technical requirements).

15 In this case, DMR in its first protest, asserted that the agency’s responses to its questions
16 as to the terms of the RFP were inadequate or inaccurate. But DMR has failed to allege or show
17 how these “inadequate” or “inaccurate” responses render the process unfair, or unfairly restrict
18 competition. There is no showing how the Agency’s inadequate or inaccurate response to
19 DMR’s questions gave any other potential offeror an unfair advantage.

20 DMR also asserted that the RFP, and the Agency’s responses to DMR’s questions,
21 impose unreasonable conditions and constitute arbitrary action. However, DMR fails to
22 acknowledge the difference in process between an Invitation for Bids (“IFB”) and a RFP. A
23 critical element of an RFP is for the offeror to explain in its response how it will provide services
24 to address the agency’s request. DMR seems to argue that the Agency should tell it how to
25 provide its services, demonstrating a lack of understanding of the RFP process.

1 While competitive sealed bidding is generally required in the award of contracts by the
2 Government of Guam, there is an exception to this requirement for the procurement of
3 professional services. 5 G.C.A. §5210(a). The differences between the process for competitive
4 sealed bidding [5 G.C.A. §5211] and that for a request for proposals [5 G.C.A. §5216] are
5 significant. For example, an invitation for bids must set forth objectively measurable evaluation
6 criteria, and bids can only be accepted unconditionally. 5 G.C.A. §5211(c). However, with a
7 request for proposals, the agency first determines and ranks the qualifications of the offerors, and
8 then negotiates with the best qualified offeror as to price. 5 G.C.A. §5216(e).

9 In this case, the Agency requested proposals for the provision of information technology
10 services related to the design and implementation of a new system for licensing and permitting
11 by the Government of Guam. RFP at p. 4, attached as Exhibit 1 to DMR's Notice of Appeal.
12 The RFP set out the factors by which the offerors' qualifications would be evaluated. *Ibid.*, pp.
13 15-16. DMR submitted numerous written questions to the Agency, and, in turn, the Agency
14 submitted written responses to those questions. *See* Exhibits 3 and 4 to DMR's Notice of
15 Appeal.

16 DMR, in its first protest, asserts that the Agency's responses to its questions were
17 inadequate, inaccurate, or made in bad faith. But DMR fails to explain how other offerors would
18 somehow have an unfair advantage over it under the circumstances.

19 In its second protest, DMR asserted that the Agency violated Guam law by allowing
20 Mathew Santos, who lacks the statutorily required training, to serve as point person for the RFP.
21 But once again, DMR fails to explain how Mr. Santos' lack of the required training rendered the
22 procurement process unfair or unfairly restricts competition. There is no showing that Mr.
23 Santos' lack of the required training gave any other potential offeror an unfair advantage.

24 DMR has failed to allege, let alone establish, that the Agency's purported violation of law
25 has rendered the procurement process unfair, or has unfairly restricted competition. As such,

1 DMR is not “aggrieved” by the Agency’s conduct, and lacks standing to pursue this appeal. The
2 Agency’s motion to dismiss should be granted based on DMR’s lack of standing.

3 **B. DMR’s Motion for Review of Determination**

4 Under applicable Guam law¹, in the event of a timely protest, the agency shall not
5 proceed with the procurement unless: (1) the appropriate officials make a written determination
6 that the award of the contract without delay is necessary; (2) the protesting party has been given
7 at least two days notice of such determination; and (3) the protesting party fails to file a protest
8 with OPA within the two day notice period. 5 G.C.A. §5425(g).

9 In this matter, the Agency gave DMR notice of its determination to proceed with the
10 procurement on May 24, 2022. DMR did not file a protest with the OPA within the two day
11 notice period. Under these circumstances, the stay under Section 5425(g) does not apply to this
12 procurement.

13 **V. CONCLUSION**

14 Based on the foregoing, the duly-appointed Hearing Officer makes the following
15 determinations:

16 A. The Agency’s motion to dismiss is GRANTED. There is no need to address the
17 other issues set forth in the Agency’s motion, as they now have been rendered moot.

18 B. The stay under 5 G.C.A. Section 5425(g) does not apply to this procurement.

19 C. The Filing Deadline of August 12, 2022 for Findings of Fact and Conclusions of
20 Law is VACATED.

21 D. DMR’s appeal is hereby DENIED and DISMISSED WITH PREJUDICE.

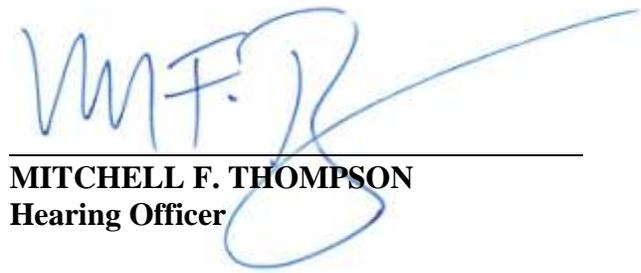
22 E. The parties shall bear their respective cost and attorney’s fees.

23
24
25

¹ DMR had no protest pending before the OPA or the court at the time the Agency made its
determination under 5 G.C.A. Section 5425(g).

1 This is a Final Administrative Decision for Procurement Appeal No.OPA-PA-22-004.
2 The Parties are hereby informed of their right to appeal this Decision to the Superior Court of
3 Guam, in accordance with Part D of Article 9 of 5 G.C.A. 5481(a), within fourteen (14) days
4 after receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the
5 Parties and their respective attorneys, in accordance with 5 G.C.A. 5702, and shall be made
6 available for review on the OPA website at www.opaguam.com.

7 Dated this 10th day of August, 2022.

8 
9
10 **MITCHELL F. THOMPSON**
11 **Hearing Officer**