1 2 3 4 5 6	BERMAN O'CONNOR & MANN Suite 503, Bank of Guam Bldg. 111 Chalan Santo Papa Hagåtña, Guam 96910 Telephone No.: (671) 477-2778 Facsimile No.: (671) 477-4366  Attorneys for: PACIFIC DATA SYSTEMS, INC.
7	OFFICE OF PUBLIC ACCOUNTABILITY
8	PROCUREMENT APPEALS
9	IN THE APPEAL OF OPA Docket No. OPA PA 12-017
10	PACIFIC DATA SYSTEMS, INC., HEARING BRIEF OF PACIFIC DATA SYSTEMS, INC.
11	Appellant. SYSTEMS, INC.
12	The Appellant Pacific Data Systems, Inc. ("PDS") provides the following
13	Hearing Brief as instructed by the Hearing Officer in this matter:
14	WITNESSES
15	1. John Day, President of PDS.
16	2. John Kim, GTA Controller.
17	3. Rebuttal witnesses as needed.
18	EXHIBITS
19	1. The only exhibit to be offered which is not part of the existing
20	Procurement or Appeal Record is the National Exchange Carrier Association ("NECA")
21	Sections 8 and 17. Although this document is voluminous, it was incorporated into
22	GTA's bid, and its effect on the responsiveness of GTA's bid is an important issue. It is
23	therefore attached.
24	SUMMARY OF APPEAL
25	This appeal is from the denial of a PDS protest in procurement IFB GSA-
26	064-11. The PDS appeal is based on the failure of the GTA bid submission to meet the

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requirements of the IFB and Guam Procurement law or regulations. PDS will cover the following the points during its presentation to the Hearing Officer.

- 1. GSA should have rejected the entire bid by GTA because GTA did not submit a valid Affidavit of Major Shareholders as part of its original bid submission. GSA should not have allowed GTA to make changes to its bid submission after bid opening.
- 2. GSA should have rejected the GTA bid because GTA conditioned its bid by including mandatory terms that are in direct contradiction to the IFB. GSA should not have allowed GTA to make changes to its bid submission after the bid opening.
- 3. GSA should have rejected the GTA bid because the bid was submitted by four separate business entities without any clear indication as to which business entity would actually perform the service.

## **LEGAL ISSUES**

GTA made a Motion in Limine regarding the NECA Tariff. This issue has been briefed. In summary, GTA submitted a document entitled "Terms and Conditions" in its bid package. The first four paragraphs of the "Terms and Conditions" make clear that a customer accepting services agrees to be bound by the "Terms and Conditions". That distinguishes this case from the Public Auditor's Decision in the appeal of *Townhouse Department Stores, Inc. dba Island Business Systems and Supplies*, OPA-PA-11-02. In that case, the Public Auditor concluded that a document submitted by Xerox in its bid package was a "mere offer". However, GTA's "Terms and Conditions" make clear that is far more than an offer, and that to the contrary GSA is bound to those "Terms and Conditions" by its acceptance of services. The Terms and Conditions are dramatically inconsistent with the IFB requirements. *See* Exhibit "I" to PDS Appeal. The NECA Tariff is highly relevant because GTA made it so

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by incorporating it into its Terms and Conditions at ¶ I under SPYDER in its "Terms and Conditions".

GTA has also objected to PDS' position that a favorable decision for PDS in this appeal is dispositive of OPA-PA-12-016 and OPA-PA-12-018. GTA argues that the PDS protest in OPA-PA-12-017 is limited to Bid Form 10 in the procurement. It is true that the PDS protest of the award to GTA referred only to Bid Form 10. However, at the time, the only award that GSA had made to GTA in which PDS was a competitor was Bid Form 10. On the other Bid Forms, the award was either made to PDS or to other bidders including GTA. As a result, at the time of its protest, PDS was an "Interested Party" only with respect to Bid Form 10. Thereafter, GTA protested the awards to PDS on other Bid Forms. GSA denied the GTA protests, which have resulted in the GTA appeals in OPA-PA-12-016 and OPA-PA-12-018.

GTA's argument is frankly absurd. There is no possible way that the Public Auditor could rule in favor of PDS in OPA-PA-12-017 without entirely disqualifying GTA as a bidder on all portions of the procurement. That is why PDS requested that the hearing in OPA-PA-12-017 be heard first since a favorable ruling to PDS in this appeal will moot out GTA's appeals in OPA-PA-12-016 and 018. PDS now renews that request since it has the potential to save all parties a great deal of time and effort.

DATED this // day of January, 2013.

Respectfully submitted,

BERMAN O'CONNOR & MANN
Attorneys for PACIFIC DATA SYSTEMS, INC.

By: All In Man

BILL R. MANN