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**E-FILE: In the Appeal of Pacific Data Systems; OPA-PA-21-001**

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Hafa Adai Jerrick,

Attached is *GHURA's Reply to Opposition to Motion to Dismiss Appeal for Lack of Jurisdiction* for E-filing. We will be serving physical copies to your office shortly.

Please let us know if you need anything further from our office to complete this filing.

Respectfully,

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7 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**  
8 **HAGATNA, GUAM**

9 In the Appeal of  
10 PACIFIC DATA SYSTEMS, INC.  
11 Appellant.

APPEAL NO: OPA-PA-21-001  
**REPLY TO OPPOSITION TO MOTION TO  
DISMISS APPEAL FOR LACK OF  
JURISDICTION**

12  
13 **INTRODUCTION**

14 The Guam Housing and Urban Renewal Authority (“GHURA”) through counsel, Anthony  
15 C. Perez, Esq., hereby replies to Pacific Data System’s (“PDS”) opposition to motion to dismiss  
16 this appeal for lack of jurisdiction. PDS failed to timely protest, and consequently, the Office of  
17 Public Accountability (“OPA”) has no jurisdiction over this Appeal. In addition, PDS has no  
18 standing to either protest or appeal the denial of the protest and thus the OPA lacks jurisdiction  
19 over this matter.  
20

21 **REPLY**

- 22  
23 **1. PDS disregards Guam law in arguing that the notice of non-award triggers the**  
24 **protest clock when in reality, the protest clock starts when PDS had knowledge of the**  
25 **grounds for its Protest.**

26 GHURA’s Motion to Dismiss is based upon the simple determination of when PDS knew  
27 of the deficiencies of the IT&E Bid which formed the grounds for its Protest. GHURA argued,  
28 and the record clearly supports such argument, that PDS was an aggrieved bidder when it knew  
of the deficiencies of the IT&E Bid on February 22, 2021 when it submitted a letter to GHURA

1 identifying the deficiencies of the IT&E Bid. PDS argues that though it was aware of the  
2 deficiencies of the IT&E Bid on February 22, 2021, the time-frame to Protest would begin on  
3 March 12, 2021 when it learned that IT&E was awarded the contract. The key issue in  
4 determining when a Protest should be filed is when an aggrieved bidder knows or should have  
5 known of the facts giving rise to the Protest. 5 GCA 5425 (a). Here, the facts giving rise to the  
6 Protest is the purported deficiency of the IT&E Bid, which PDS clearly pointed out in its  
7 February 22, 2021, letter to GHURA. The substance of the February 22, 2021 PDS letter and the  
8 Protest are the same. PDS was further aware on February 12, 2021, when the bids were opened,  
9 that IT&E submitted the lowest bid and was thus in line for the award of the contract.  
10

11 For procurement protests, any actual or prospective bidder, offeror or contractor who may  
12 be aggrieved in connection with source selection, solicitation, or award of a contract, may protest  
13 to the Chief Procurement Officer, the Director of Public Works, or the head of a purchasing  
14 agency. 5 GCA §5425(a). The protest shall be submitted in writing within fourteen days after  
15 such aggrieved person knows or should know of the facts giving rise thereto and protests filed  
16 after fourteen-day period shall not be considered. *Id.*, and 2 GAR § 9101(c)(1).  
17

18 PDS argues that it did not become an aggrieved bidder “until it received information that  
19 a non-responsive offeror-IT&E- was selected for an award”. *See* Opposition to GHURA’s  
20 Motion to Dismiss Appeal for Lack of Jurisdiction, p. 2, 3. It argues that PDS as a “losing  
21 bidder” is an aggrieved bidder. *Id.* at p. 3. PDS further concludes that it timely filed its protest  
22 fourteen (14) days after receiving the March 12<sup>th</sup> Award Notice. *Id.* PDS misconstrues Guam  
23 statutory and case law in arguing that only a “losing bidder” may protest.  
24

25 The Guam Supreme Court has stated, “when alleged misconduct forms the basis of a  
26 procurement protest, the time runs from the date on which the protesting party **first learned of**  
27 **the purported misconduct**”. *DFS Guam L.P. v. The A.B. Won Pat International Airport*  
28

1 *Authority*, 2020 Guam 20 ¶ 89. A party **does not become** “aggrieved for purposes of a  
2 procurement protest ‘**only when it loses the potential business, that is, when a bidder learns**  
3 **that it was not awarded a contract.** *Id.* ¶ 85. Guam law speaks not in terms of what is being  
4 protested, but in terms of **knowledge of the facts giving rise to a protest.** *See* 5 GCA § 5425  
5 (a); *Id.* ¶ 87. Therefore, a protest filed more than 14 days after the disappointed offeror or bidder  
6 had notice of the grounds for the protest is barred as untimely, “**even if no contract has yet been**  
7 **awarded**, even if the protest was filed within (14) days of the agency’s selection of bidders or  
8 offerors, and even if the protestant did not subjectively understand or appreciate the grounds for  
9 protest”. *Id.*

11 Here, PDS argues that it filed its Protest based upon the March 12<sup>th</sup> Award Notice, as that  
12 is when it became aggrieved. The Guam Supreme Court has held that the notice of non-award  
13 does not automatically trigger the clock to file a protest, but it is the knowledge of the grounds  
14 for protest which is controlling. Put another way, it is not about what is being protested, as PDS  
15 protests the award to IT&E, but the knowledge of the facts giving rise to the Protest, such facts  
16 being the deficiencies of the IT&E bid. The record is clear that the PDS’ Protest centers on the  
17 deficiencies of the IT&E Bid which PDS pointed out in its February 22, 2021 letter to GHURA.  
18 The February 22, 2021 letter and the March 26, 2021 Protest raise identical issues relating to the  
19 IT&E Bid.

22 PDS is being clever in the wording of its Opposition by discussing the award to IT&E  
23 rather than PDS’ argument really being about the deficiencies and non-responsiveness of the  
24 IT&E Bid. PDS attempts to divert attention from the issue of its knowledge of when it knew that  
25 the IT&E Bid was deficient and non-responsive (and thus purportedly not eligible for award) and  
26 asks the OPA to instead look at when PDS became aware of the award to IT&E. This is not  
27 what Guam law provides.



1           The Guam Procurement Law does not restrict protests only for “losing bidders”, but allows  
2 any offeror who is aggrieved in connection with a procurement to protest. *See* 5 GCA § 5425 (a).  
3 PDS became “aggrieved” with this Procurement when it learned that the lowest offeror, namely  
4 IT&E, had deficiencies in its Bid. Once it knew of such deficiencies of the lowest bid, the clock  
5 started for PDS to protest which it failed to do in a timely manner. Instead, PDS sat on its hands  
6 with the knowledge of the purported deficiencies of the IT&E Bid until March 26, 2021, when it  
7 filed its Protest protesting that the IT&E Bid submission was non-responsive due to numerous  
8 deficiencies.  
9

10           PDS relies upon the case of *Abadie v. D.C. Cont. Appeals Bd.*, to stand for the proposition  
11 that the bid protest clock began to run when protester learned of formal notification of the contract  
12 award to non-responsive party. *See Abadie*, 916 A.2d 913 (D.C. 2007). The *Abadie* case is  
13 distinguishable from the matter at hand. In *Abadie*, an unsuccessful bidder filed a protest of an  
14 award of a contract beyond the statutory time-frame. The *Abadie* case concerned the procurement  
15 of registered nurses by the Department of Health, and the procurement required that each bidder  
16 submit the names and resumes of the nurses for the proposed contract. On May 12, 2000, the bids  
17 were opened and it was noted on the Bid Abstract Form that same day that the successful bidder  
18 did not include the names or resumes of the nurses who would perform on the contract. Thus, the  
19 successful bidder’s bid was non-responsive. The successful bidder was awarded the contract on  
20 June 29, 2000, and the unsuccessful bidder received notification of non-award on August 15, 2000.  
21 On August 30, 2020, the unsuccessful bidder protested but did not include in its protest the failure  
22 of the successful bidder to identify the names and resumes of the nurses who were to perform the  
23 contract. The unsuccessful bidder stated that it was not aware of those deficiencies with the  
24 successful bidder’s bid until October 5, 2000, and consequently, did not include such grounds in  
25 its initial protest.  
26  
27  
28

1           The Court found that the unsuccessful bidder **should have known** of the deficiencies with  
2 the successful bidder's bid by August 15, 2000 as that is when it received formal notice of award.  
3 *Id.* at 920. The underlying facts for the deficiency of the successful bid were further apparent if  
4 the unsuccessful bidder inspected the Bid Abstract of May 12, 2000, or inspected the successful  
5 bid. Instead, the unsuccessful bidder claimed it was not aware of such deficiencies until October  
6 5, 2000. The Court found that the unsuccessful bidder became aggrieved by the notice of non-  
7 award date as that is when it should have known of the deficiency of the successful bid, as there  
8 was no knowledge prior to such date.

9  
10           The *Abadie* case is clearly distinguishable from this case. In *Abadie*, the unsuccessful  
11 bidder claimed it was not aware of the deficiency of the successful bid until fifty days **after** it was  
12 notified of the award to the successful bidder. Here, PDS knew on February 22, 2021, of the  
13 deficiency of the IT&E Bid, approximately three weeks **before** it became aware of the notice of  
14 the award to IT&E. Here, unlike in *Abadie*, the unsuccessful bidder PDS had knowledge of the  
15 deficiencies of a competing bid prior to notice of award.

16  
17           In *Abadie*, the unsuccessful bidder claimed it did not have knowledge of the deficiencies  
18 of the successful bid at the time of notice of non-award, but the Court found that it **should have**  
19 **known** of said deficiencies by such date. Here, PDS knew, not should have known, but knew of  
20 said deficiencies of the IT&E bid on February 22, 2021, and thus had fourteen days to Protest. The  
21 distinction between *Abadie* and the case herein is the timing and extent of the knowledge of the  
22 deficiency of a successful bidder's bid by an unsuccessful bidder. In *Abadie*, the Court found that  
23 the unsuccessful bidder should have known of such deficiencies by at least the notice of non-award  
24 and should have protested appropriately from that date. The Court noted that the unsuccessful  
25 bidder could further have known about the deficiencies of the successful bid on bid opening when  
26 such deficiencies were noted on the Bid Abstract. Here, PDS knew of the deficiencies way before  
27  
28

1 the notice of non-award, yet waited until the notice of non-award to Protest. *Abadie* actually  
2 undercuts PDS argument as the *Abadie* case was about when an unsuccessful bidder should have  
3 known about the grounds to submit a protest, whereas here, the unsuccessful bidder knew of  
4 grounds to submit a protest prior to bid opening.

5  
6 Considering that PDS, as an aggrieved bidder, had actual knowledge of information that  
7 gave rise to the grounds for its Protest on February 22, 2021, PDS failed to file its Protest within  
8 fourteen days allotted to lodge a Protest, in clear violation of the laws of Guam.

9 **2. Alternatively, PDS had no standing to Protest or Appeal.**

10 The Office of Public Accountability has addressed standing in nearly every single motion  
11 to dismiss it has adjudicated. PDS complains that the issue of standing was not raised at the  
12 Protest denial level and are thus waived. It is basic law that issues of standing and jurisdiction  
13 may be raised at any time.

14  
15 PDS argues that GHURA ignores the fact that the Guam Legislature has specifically  
16 conferred upon bidders the ability to bring Agency level protests of solicitations<sup>1</sup>. Opposition at  
17 p. 5. GHURA has not ignored this fact, and argued in its underlying Motion to Dismiss that PDS  
18 does not have statutory standing pursuant to 5 GCA § 5425 (a) or common law standing. *See*  
19 *Motion to Dismiss*, p. 7, lns 9-22.

20  
21 PDS argues that it has standing as “courts regularly allow protests to proceed even when  
22 the protestant is not the ‘next in line’ for award”. Opposition, p. 6 relying upon *Solon Automated*  
23 *Servs. Inc. v. United States*, 658 F. Supp 28, 31 (D.D.C. 1987). The *Solon* decision was made by  
24 the United States District Court, District of Columbia. In its decision, that Court noted that it “has  
25 not adopted the “substantial chance of award” test contained in other jurisdictions which require  
26

27  
28 <sup>1</sup> In its Opposition, PDS states that “IT&E ignores ...” Considering this Opposition was made to GHURA’s Motion to Dismiss, the reference to IT&E and not GHURA was erroneous.

1 that an unsuccessful bidder has a substantial chance of award to protest. *Solon* at 31, citing *Caddell*  
2 *Construction Company v. United States*, 9 Cl.Ct. 610 (1986) which found that a bidder ranking  
3 third in a field of four did not have standing to challenge an award as it did not have a substantial  
4 chance of award. The *Solon* decision is not persuasive as it is based upon a holding from one  
5 Circuit, whereas the decision itself notes that other Courts have adopted different standards  
6 concerning standing of an unsuccessful bidder to challenge a contract award.  
7

8 PDS has failed to challenge or address arguments made by GHURA that the PDS bid was  
9 unreasonably high and not subject to an award and such challenge is waived. Furthermore, PDS  
10 clearly lacks standing to protest or appeal in this matter considering it is not eligible for an award.  
11 GHURA noted in its Motion that PDS bid was almost double that of IT&E. As noted, awarding  
12 an unreasonably high bid to PDS would violate the procurement policy to provide increased  
13 economy and maximizing the purchasing value of public funds. *See* 5 GCA § 5001(b)(5).  
14 Considering PDS is not even eligible for an award related to this procurement, it is not an aggrieved  
15 bidder as it has suffered no injury by award of the bid to IT&E.  
16


### 17 CONCLUSION

18 For the foregoing reasons, GHURA respectfully requests that the OPA dismiss this Appeal  
19 for lack of jurisdiction.  
20

21 Respectfully submitted this 12<sup>th</sup> day of July, 2021.  
22

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24  
25 By:

26   
27 **ANTHONY C. PEREZ, ESQ.**  
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