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In the Appeal of Pacific Data Systems; Consolidated Appeal No.'s OPA-PA-21-004 and OPA-PA-21-005

Claire Pollard <cpollard@rwtguam.com>

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To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Edwin J. Torres" <etorres@rwtguam.com>

Dear Mr. Hernandez:

Please see the attached *Trial Brief* to be filed in the above-referenced matter. Please feel free to contact our office if you have any questions. Thank you.

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Regards,
Claire Pollard

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**9.28.21 Appellant's Trial Brief.pdf**

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**PROCUREMENT APPEAL OF DENIAL OF PROCUREMENT PROTEST
IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Appeal of

Pacific Data Systems, Inc. (PDS),

Appellant.

**CONSOLIDATED APPEAL NOS:
OPA-PA-21-004
OPA-PA-21-005**

TRIAL BRIEF

I. INTRODUCTION

Appellant Pacific Data Systems, Inc. (“PDS” or “Appellant”) has protested the intended awards of IFB 027-2021 and IFB 028-2021 (the “IFBS”) by the Guam Department of Education’s (“GDOE” or “Procuring Agency” or “Agency”) to Teleguam Holdings LLC (“GTA”). PDS asserts that GTA's submission to GDOE was non-responsive in that GTA — a telecommunications company with prices controlled by tariffs set by the Guam Public Utility Commission (GPUC) — offered prices that violated those established tariffs. GTA’s bid was also non-responsive in that, at the time of its bid submission, GTA could not meet the specified contract start date. Notice of Appeal, Appellant’s Exhibit Binder, (“AEB”), 1-001; 2-001. GTA’s submission of a price that violated law and a proposal that could not be implemented in time also rendered GTA a non-responsible offeror. When GDOE, in its protest denial, failed to substantively examine the issues raised by PDS’s protest, PDS was compelled to bring this

appeal.

PDS submits this Trial Brief in conformance with the Order of the Office of Public Accountability ("OPA") issued on August 30, 2021. This Trial Brief will assist the OPA in addressing the following list of issues to be resolved in this consolidated Appeal:

- (1) Did GDOE's Protest Decision violate the law when GDOE did not substantively engage with the merits of PDS's protest regarding GTA's price?
- (2) Would an Award to GTA based upon the price offered by GTA violate Guam law?
- (3) Is GTA a non-responsible and non-responsive bidder by offering a price that is below the established tariff for the services it is bidding on?
- (4) Did GDOE violate the law by not substantively engaging with whether or not GTA's price submission violates Guam law and does not properly reflect the Gross Receipts Tax/Business Privilege Tax?
- (5) Did GDOE violate the law in ignoring GTA's response to GDOE's specification on when services should commence?
- (6) Did GDOE violate the law by proceeding with contract execution with GTA after receiving PDS's Agency level protest?

II. GDOE AND TELECOMMUNICATION SERVICES UNDER THIS PROCUREMENT

GDOE issued Invitation for Bid GDOE IFB 027-2021 for Telecommunication Service – Plain Old Telephone Services (POTS) on April 28, 2021. GDOE IFB 027-

2021 was issued contemporaneously with GDOE IFB 028-2021 for Telecommunication Service – Digital Transmission Services (DTS). On May 27, 2021, 2 bidders, PDS and GTA submitted bids in response to the GDOE Bid invitation. GDOE conducted a public opening of the bids, and summarized the results of that bid opening in a Bid Abstract.

III. PROTEST AND APPEAL

On June 4, 2021, GDOE sent PDS a Bid Status and Award Notification. Because the prices submitted by offeror GTA were submitted in violation of law, and because GTA could not meet the performance dates specified by the agency, PDS submitted protests on June 10, 2021, of the award notices designating GTA for award. Those protests detailed to GDOE how GTA's prices were artificially low and submitted in violation of Guam's Telecommunications Act. Rather than examine whether or not GTA's prices were indeed falsely low or examining the responsibility of an offeror that would submit such pricing, GDOE simply denied the protests on June 29, 2021. Appeals to the OPA followed, and were consolidated by the OPA on August 30, 2021.

IV. PDS's THEORY OF THE CASE ON APPEAL

On Guam, telecommunication services must be offered in conformance with the tariffs set by the GPUC. GTA General Exchange Tariff approved by the GPUC. *See*, 12 G.C.A. §12206. The pricing proposed by GTA in this procurement does not conform to the GTA tariff filed and approved by the GPUC for these services. AEB, 1-095 – 1-137. GTA's submission of a bid price that does not conform to its established tariff violates the law, and more specifically violates the requirements of the IFB that requires all bidders to comply with all applicable "laws and

regulations." *See*, IFB Proposed Contract pg. 8, Procurement Record OPA-PA-004 ("PR1"), GDOE-008.

GDOE's June 29, 2021, denial of PDS's protests did not substantively address the allegations of the protests. GDOE did no analysis of whether or not GTA's illegal price submissions and inability to begin services rendered GTA non-responsive to the IFB, and further rendered the offeror non-responsible. Rather than conduct its own inquiry into the responsiveness of GTA's submitted bid, GDOE instead explained that "As stated in the [Guam Telecommunications Act] GDOE does not have the authority to enforce and investigate allegations and violations of the Act... In regard to the IFB and the relevant rules and requirements, GDOE has confirmed GTA's compliance." Protest Denials, AEB 1-093; AEB 2-126. GDOE's protest denials contain no information on how GDOE "confirmed GTA's compliance" in response to the protests. GDOE also mischaracterized when the agency specified the start of the services to begin. This constituted error by the agency, in that GDOE (1) did not conduct an examination of the merits of PDS's assertion that GTA's prices violated established law and instead simply claimed no authority to do such a review, and (2) GDOE simply ignored the plain language of its IFBS on when a responsive offer could begin. GDOE's failure to address those issues in its Protest decisions violates procurement law, and leaves a non-responsive and non-responsible offeror slated for award of the IFBs.

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V. THE REQUIREMENTS OF THE IFB RELEVANT TO THIS APPEAL, AND GTA’S VIOLATION OF THOSE REQUIREMENTS

- a. THE IFB MANDATES THAT OFFERORS COMPLY WITH ALL APPLICABLE LAWS. GTA’S BID FOR TELECOMMUNICATION SERVICES VIOLATES THE TELECOMMUNICATION ACT.**

GDOE’s bid specifications require that all bidders seeking an award “shall comply with all U.S. and Guam laws, statutes, regulations and ordinances application to this Agreement.” Procurement Record GDOE-008. The services proposed under this procurement by GTA are regulated by the GPUC and subject to the Guam Telecommunications Act. *See Generally* Chapter 12, 12 G.C.A. These services are also subject to the GTA General Exchange Tariff approved by the GPUC. *See*, 12 G.C.A. §12206. GTA also cannot depart downward from the Tariff, as the Telecommunications Act specifically prevents a regulated entity like GTA from unilaterally charging less than the tariff. *See*, 12 G.C.A. §12206 (c)(1) (“Unless otherwise ordered by the Commission or provided by or under authority of this Article, no telecommunications company shall (1) charge, demand, collect or receive a greater or less or different compensation for such service than the charges specified in its tariffs”). The law also mandates that telecommunication providers like GTA shall not “engage in any anti-competitive act or practice” when providing telecommunications services. *See*, 12 G.C.A. §12205(d). GTA’s offer to GDOE of a price that is artificially deflated and that lies below GTA’s established tariff rate constitutes an intentional anti-competitive act.

The Telecommunications Act sets GTA’s specific rate for the services under these IFBs, and the record shows that GTA’s submission falls below that price. The result is a price submission to GDOE that, because of GTA’s violation of the

law, is below the price offered by PDS. As the price analysis below shows, GTA's offers for both the POTS and DTS services are substantially below the set tariffs, and, as a result, were below the prices offered by PDS.

POTS services

Service	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(G)
	MRC	MRC	MRC	TOTAL MRC	Quantity	Number of Months	Installation Costs	TOTAL COST
	Basic Line Rate Charge	Total Surcharge Fees	Inside Wiring Maintenance Service Charge	Per Phone Line	Number of POTS Lines			
Per Phone Line	(such as SLC, USF, E911, Etc)		(Add A+B+C)				(Multiply DxE+F)+G	
GTA BID Plain Old Telephone Services (POTS) Analog	\$7.00	\$13.27	\$0.00	\$20.27	97	36	\$0.00	\$70,782.84
<i>GTA Bid Amounts for POTS Services IFB 027-2021</i>								
GTA Tariff Rate for Analog Service (Non-Residential)	\$36.00	13.27	not regulated	n/a	97	36	\$0.00	\$172,050.84
<i>Only the Basic line rate is subject to GPUC Tariff regulations, Total Cost amount shown for illustrative purposes</i>								
PDS BID Plain Old Telephone Services (POTS) Analog	\$18.00	\$16.39	\$5.00	\$39.39	97	36	\$0.00	\$137,549.88
<i>PDS Bid Amounts for POTS Services IFB 027-2021</i>								

DTS services

Service	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)
	MRC	MRC	TOTAL MRC	Number of Months	MRC for 36 Months	NRC	Quantity	TOTAL COST
	Basic Line Rate Charge	Total Surcharge Fees	Per Phone Line				Number of POTS Lines	
Per Phone Line	(such as SLC, USF, E911, Etc)	(Add A+B)						
GTA Bid Amounts for DTS Services IFB 028-2021								
ISDN PRI	\$195.00	\$115.73	\$310.73	36	\$11,186.28	\$0.00	41	\$458,637.48
SIP Trunks	\$9.25	\$1.00	\$10.25	36	\$369.00	\$0.00	23	\$8,487.00
DID Numbers (3550x)	\$98.00	\$0.00	\$98.00	36	\$3,528.00	\$0.00	1	\$3,528.00
GTA Tariff Amounts for these Services								
ISDN PRI	\$600.00	N/A	N/A	36	\$21,600.00	\$49,200.00	41	\$826,800.00
SIP Trunks	no tariff	N/A	N/A					
DID Numbers (\$200 for the first 100, \$100 per 100 after)	\$3,700.00	N/A	N/A	36	\$133,200.00	\$3,600.00	1	\$136,800.00
<i>Only the Basic line rate is subject to GPUC Tariff regulations, Total Costs amounts shown for illustrative purposes</i>								
PDS Bid Amounts for DTS Services IFB 028-2021								
ISDN PRI	\$295.00	\$84.86	\$379.86	36	\$13,674.96	\$0.00	41	\$560,673.36
SIP Trunks	\$10.00	\$1.00	\$11.00	36	\$396.00	\$0.00	23	\$9,108.00
DID Numbers (3550x)	\$720.00	\$36.00	\$756.00	36	\$27,216.00	\$0.00	1	\$27,216.00

b. The IFB specified a start date that GTA could not meet, and GDOE subsequently ignored that specification.

DOE specified and subsequently clarified that “the delivery of services shall commence on and no earlier than July 1, 2021.” GDOE Agency Statement, 3. Though GDOE did not provide PDS with copies of the GTA Technical proposal that describes the GTA plan for installing the proposed services, PDS is aware of the timelines required to install the required services at each of the GDOE locations and also to transfer the existing GDOE numbers from the PDS network to the GTA network. At the time of bidding, GTA could not meet a performance timeline demanding that services start on July 1, 2021. This was confirmed by the procurement record, as the record includes a June 2021 request to GDOE to “provide a 30-day extension for services to be activated...” Procurement Record OPA-PA-004, 183; Procurement Record of OPA-PA-005, 241. As such, GTA was non-responsive to the IFB’s specified start date, and could not responsibly perform the requirements of the IFB. Its bids should have been rejected.

Rather than hold GTA to the specification on when an offeror should have been ready to start, GDOE claims that the IFB did not contain the “on and no earlier” requirement sent to interested parties via amendment and instead required that services should start “no earlier than July 1, 2021.” GDOE Agency Statement, 3. GDOE is wrong in concluding that the specifications of the IFB still control when an amendment changes those specifications. Guam law specifically recognizes the ability of amendments to an IFB to alter what is required. *See*, 2 GAR 3109(i); (t)(2) (“If, in the opinion of the Procurement Officer, a contemplated amendment will significantly change the nature of the procurement, the Invitation

for Bids, shall be cancelled in accordance with §3115 (Cancellation of Solicitations; Rejection of Bids or Proposals) of this Chapter and a new Invitation for Bids issued.”) Federal procurement law, like Guam law, also recognizes the fundamental truth that amendments can lay down new specifications altering an IFB, including, as GDOE did here, the delivery dates. *See, e.g., Overstreet Elec. Co. v. United States*, 47 Fed. Cl. 728, 729 (2000) (explaining how “On December 23, 1999, the Corps issued Amendment 0001 to the IFB, which changed the contract completion time from 900 to 700 calendar days and made changes to the specifications and drawings.”). GDOE should have examined bidders on their ability to conform with the specified start date. Instead of doing that, GDOE has simply chosen to ignore the specification.

VI. GDOE HAS A DUTY TO PROCURE IN A THOROUGH, FAIR, AND UNAMBIGUOUS MANNER

Once the proposals of the offerors were received, and at least after PDS’s protests were lodged, GDOE should have substantively engaged in a review of the bids in order to make its own determination that all offerors were responsive to the specifications of the bid. *See* 5 G.C.A. 5201(g) (“Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.”). Rather than determine if GTA’s proposal was actually compliant with the specifications, including the specifications mandating adherence to all applicable law, GDOE explains that the law prohibits it from making such an examination, since 5 GCA §5211(e) mandates that “No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids.” GDOE Agency Statement, 5, *citing* 5 GCA §5211(e). GDOE, in merely confining

itself to the contents of the bid envelope, has ignored its obligation to determine if GTA, by submitting an artificially deflated price, is in fact a non-responsible offeror as explained by PDS in its Protests and subsequent Notices of Appeal. The law does not allow such a derogation of duty.

Guam law makes it plain that GDOE's contracting officer is required to make a responsibility determination based on standards that are not in the bid envelope. *See*, 5 GCA § 5230; 2 GAR § 3116. (setting factors to consider such as “appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them” as well as “a satisfactory record of integrity”). GDOE is also ignoring the mandate to make sure that “Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.” 2 GAR § 3116 (b)(4). GDOE was made aware of the possibility that GTA has submitted a price that violates law, but GDOE has taken the position that the issue was not for GDOE to resolve, or that resolution could be accomplished by simply asking GTA about it. GDOE is wrong, as the agency can only make an award to a responsible offeror, and was required to move beyond the GTA bid envelope — an analysis of the tariff— to make that determination. *See, e.g., Preferred Sys. Sols., Inc. v. United States*, 110 Fed. Cl. 48, 61 (2013) (praising procuring agency because “the record shows that the agency was attuned to the potential risk of an unrealistically low-price proposal from [offeror], and actively sought clarification to resolve that risk during discussions. As [the offeror] points out, the [contracting officer] consulted multiple sources of evidence to determine whether [offeror]'s discounts were fair and reasonable, including escalation rates within GSA FSS IT-70 contracts, the U.S. Department

of Labor National Compensation Survey, and statistics for the relevant St. Louis MO–IL region.”) Rather than do the actual work of procurement, GDOE has simply thrown up its hands and selected the lowest number on the page.

VII. GDOE HAS VIOLATED THE AUTOMATIC STAY

On June 9 and 10, 2021, PDS timely submitted, and GDOE received, written, agency-level protests to GDOE of the intended awards to GTA. *See*, Procurement Record OPA-PA-004 (“PR1”), 57; Procurement Record OPA-PA-00-005 (“PR2”) 607. The Procurement Record shows that, shortly after receiving PDS’s protests, GDOE proceeded further with the attempted award of the contract for these telecommunication procurements through contract negotiations and attempted contract execution. *See*, PR1 OPA-PA-004, 15; 183-184; PR2 15. These actions, currently under review by the OPA, violate the law as PDS filed a timely, pre-award protest pursuant to 5 GCA § 5425(a). This timely protest automatically triggered the stay provision of 5 GCA § 5425(g) that prohibits GDOE from proceeding further with the award of the contract prior to final resolution of PDS’s protest and voids any such further action. *See* 5 GCA § 5425(g).

PDS’s protest triggered the stay *automatically*. Guam courts have “consistently held that the stay following a timely, pre-award procurement protest applies ‘automatically.’” *DFS Guam L.P. v. A.B. Won Pat Int’l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 148. Once a party brings a timely protest, an automatic stay of procurement until final resolution of that protest is required. *Id.* No court order is necessary for the automatic stay to become effective. *Id.* The automatic stay is a legal entitlement that vests upon a timely, pre-award protest. *Id.* Thus, PDS’s timely protest automatically triggered a stay, which has been in

place since the protest was filed on June 10, 2021. All action taken by GDOE *vis a vis* the IFBs after receipt of those protests are void.

VIII. ANTICIPATED EVIDENTIARY ISSUES

It is anticipated that the following evidentiary issues may arise:

- (1) The ability of GTA to advance positions in this appeal, including the defense of a procurement that the procuring agency has neither articulated nor advanced on its own.
- (2) The taking of evidence in accordance with COVID-19 protocols.

IX. CONCLUSION

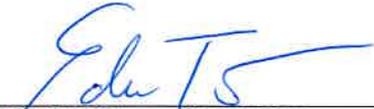
GDOE issued an IFB for telecommunication systems that mandated compliance with law, and is set to make an award to an entity that offers a price that violates the law. Based on the foregoing, PDS respectfully requests that its protest appeal be sustained. PDS respectfully requests that the Office of Public Accountability Order the following:

- (1) That GDOE disqualify GTA from eligibility for Award under these consolidated IFBs, as GTA's offerors were non-responsive and did not materially comply with the requirements of the IFB established by GDOE;
- (2) That GDOE determine GTA to be a non-responsible offeror given GTA's submission of pricing that violates the Guam Telecommunications Act, and offer of services that could not meet the specified start time; and
- (3) That GDOE award the IFBs to PDS as the next lowest priced

responsive bidder to the IFB

Respectfully submitted this 28th day of September, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

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