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OFFICE OF PUBLIC ACCOUNTABILITY
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FILE NO OPA-PA: 16-012

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5
6 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

7
8 IN THE APPEAL OF

APPEAL NO.: OPA-PA-16-012

9
10 ALVAREZ & MARSAL PUBLIC SECTOR
SERVICES, LLC,

SUBMISSION OF AGENCY REPORT

11 Appellant.

12
13 The Guam Department of Education ("GDOE"), the purchasing agency in this matter,
14 hereby submits the following exhibits as the Agency Report required by 2 GAR §12105:

15 a. A copy of the protest.

16 *A copy of the protest is included in the Procurement Record as Exhibit 22,*
17 *Bates Stamp Nos. GDOE 0849-0852.*

18 b. A copy of the bid or offer submitted by the Appellant and a copy of the bid or
19 offer that is being considered for award or whose bid or offer is being protested, if any had been
20 submitted prior to the protest.

21 *A copy of the Appellant's bid is included in the Procurement Record as Exhibit*
10, Bates Stamp Nos. GDOE 0432-0496.

22 c. A copy of the solicitation, including the specifications or portions thereof relevant
23 to the Appeal:

24 *A copy of GDOE RFP 005-2016 is included in the Procurement Record as*
25 *Exhibit 6, Bates Stamp Nos. GDOE 0012-0064. All Amendments are included*
in the Procurement Record as Exhibit 8, Bates Stamp Nos. GDOE 0067-0071.

26 d. A copy of the abstract of bids or offers or relevant or portions thereof relevant to
27 the protest.

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A copy of the Abstract of Offerors is included in the Procurement Record as Exhibit 15, Bates Stamp Nos. GDOE 0784.

e. Any other documents which are relevant to the protest; including the contract, if one has been awarded, pertinent amendments, and plans and drawings.

Not applicable.

f. The decision from which the Appeal is taken, if different than the decision submitted by Appellant.

A copy of the Response to Protest is included in the Procurement Record as Exhibit 20, Bates Stamp Nos. GDOE 0843-0845.

g. A statement answering the allegation of the Appeal and setting forth findings, actions, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the Appeal. The statement shall be fully responsive to the allegations of the Appeal.

*Exhibit 24 GDOE's Agency Statement
Bates Stamp Nos. GDOE 0859-0865.*

h. If the award was made after receipt of the protest, the report will include the determination required under 2 GAR §9101(e).

Not applicable.

i. A statement in substantially the same format as Appendix B to this Chapter, indicating whether the matter is the subject of a court proceeding.

*Exhibit 25 Declaration Regarding Court Action
Bates Stamp Nos. GDOE 0866.*

Dated this 6th day of September, 2016.

Respectfully submitted,

GUAM DEPARTMENT OF EDUCATION


By: 
JAMES L.G. STAKE
Legal Counsel

Exhibit 24

1 **GUAM DEPARTMENT OF EDUCATION**

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9 ALVAREZ & MARSAL PUBLIC SECTOR
SERVICES, LLC,

AGENCY STATEMENT

10 Appellant.
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12

13 Comes now the Guam Department of Education (GDOE) by and through its counsel and
14 files its Agency Report and Statement pursuant to title 2 of the Guam Administrative Rules and
15 Regulations (GAR) Div. 4 §12105(g) in response to appeal by Alvarez & Marsal Public Sector
16 Services, LLC. (Appellant).

17 **I. BACKGROUND**

18 This appeal corresponds to GDOE’s Request for proposal (RFP) 005-2016 for Third Party
19 Fiduciary Oversight and Funds Management Services. These professional services would
20 provide third-party fiduciary oversight and funds management services for all Federal Funds
21 awarded by the U.S. Department of Education (USDOE) to GDOE. *See* RFP 005-2016, Section
22 2.1 p. 4. Section 2.1 Project Title and Overall Scope of RFP 005-2016, states the intent of this
23 section of the RFP is to provide interested Offerors with sufficient information to enable them to
24 submit a proposal for services that will fulfill the specified requirements of the GDOE and
25 USDOE. *Id.* GDOE was designated as a high risk grantee by USDOE and as a result GDOE is
26 subject to special conditions for all Federal education programs it administers. *Id.* As a part of
27

1 GDOE's special conditions, GDOE is required to contract for a Third Party Fiduciary Agent
2 (TPFA), **acceptable to USDOE**. *Id.*

3 On March 21, 2016 GDOE issued RFP 005-2016. On May 6, 2016 GDOE then
4 distributed Amendment 2 that extended the deadline for proposals from May 6 to May 11, 2016.
5 *See* Amendment 2 p.2. On July 5, 2016 GDOE issued the Proposal Status to offerors for RFP
6 005-2016, which included offerors ranking at that point in time. On July 18, 2016 GDOE
7 received a protest from Appellant, GDOE consequently put a stay on the procurement process.
8 On August 4, 2016 GDOE responded to Appellant's protest denying the Appellant's protest in its
9 entirety.

10 **II. GDOE PROPERLY EXTENDED THE DEADLINE FOR PROPOSALS**
11 **FOR RFP 005-2016 IN ORDER TO MAXIMIZE COMPETITION AND**
12 **RECEIVE THE BEST VALUE IN THE INTEREST OF THE TERRITORY**

13 As stated above, on May 6 GDOE extended the deadline for proposals from May 6 to May
14 11. GDOE executed this extension by and through Amendment 2 of RFP 005-2016. Section
15 2.2.8 of the RFP, titled right to amend and cancel this RFP, states GDOE reserves the right to
16 amend, supplement, or cancel the RFP, in whole or in part at any time. *See* RFP 005-2016,
17 Section 2.2.8 p. 11.

18 Title 2 GAR §3102(a) extension of time for bid or acceptance, states after opening bids or
19 proposals, the Procurement Officer may request bidders or offerors to extend the time during
20 which the territory may accept their bids or proposals. Title 5 of the Guam Code Annotated
21 (GCA) §5001(b)(5) & (6) Purposes, Rules of Constructions, states that the underlying purpose of
22 the Guam Procurement Code is to provide increased economy in territorial activities and to
23 maximize to the fullest extent practicable the purchasing value of public funds of the Territory,
24 and to foster effective broad-based competition within the free enterprise system. GDOE's
25 reason for extending the deadline for proposals for RFP 005-2016 was to maximize competition
26 so that GDOE could obtain the greatest value for funds expended, in the best interest of the
27 territory. *Id.*

1 Appellant argues that they were prejudiced by the extension because it “gave other bidders
2 the advantage of additional time to provide and submit their proposals.” *See* Appellant’s Notice of
3 Appeal p.3. Appellant alleges that the extension was a deliberate attempt to give an advantage to
4 one [offeror]. *Id.* Appellant’s interpretation is incorrect and without merit. Guam Procurement
5 Rules and Regulations permit an extension of time for acceptance of proposals. *See* 2 GAR
6 §3102(a). GDOE’s purpose for extending the deadline was to maximize competition to the fullest
7 extent practicable and to foster as much competition within the free enterprise system as protected
8 and encouraged by Guam Procurement Law. *See* 5 GCA §5001(b).

9 **III. GDOE HAS YET TO AWARD AN OFFEROR**

10 Section 2.1 of RFP 005-2016 states that GDOE is required to contract a TPFA,
11 **acceptable to USDOE.** *See* RFP 005-2016, Section 2.1 p. 4. On July 18, Appellant filed their
12 protest at the agency level and GDOE immediately stayed the procurement process. GDOE has
13 yet to issue an intent to award an offeror for RFP 005-2016 and USDOE has not approved any
14 offeror. *See* GDOE’s Motion to Dismiss. Both GDOE’s approval and, more importantly,
15 USDOE’s approval are required in order for GDOE to select an offeror for RFP 005-2016.

16 Appellant’s relevant relief requested to this section includes (1) any bid award, issuance of
17 purchase orders and/or contracts be stayed, (2) that GDOE rescind their determination of the most
18 qualified offeror, and (3) that appellant be determined to be the most qualified offeror. RFP 005-
19 2016 has been stayed since July 18. GDOE’s determination of the most qualified offeror serves
20 as an internal score, however GDOE would still need to complete negotiations, and obtain
21 approval from USDOE before GDOE can execute a contract with an offeror. Should an order be
22 granted in the Appellant’s favor to be the most qualified offeror, this act would again require
23 USDOE’s approval before a contract could be executed in order to receive federal funds. For the
24 foregoing reasons, that GDOE has not yet issued an award and that GDOE would not issue an
25 award without USDOE’s approval first, therefore, this matter is not ripe and is premature for
26 review and should be dismissed.

1 **IV. GDOE PROPERLY WITHHELD PRIVILEGED INFORMATION FROM**
2 **APPELLANT’S REQUEST FOR DISCLOSURE**

3 Relative to this dispute, GDOE has not issued a letter of intent to award and USDOE has
4 yet to approve any offeror. *See* Decl. Carmen Taitano. Because the subject of this appeal is an
5 RFP and GDOE has not issued an award, additional issues are present. Appellant incorrectly
6 alleges that they have lawful right to confidential information contained in RFP 005-2016. *See*
7 Appellant’s Opposition to GDOE’s Motion for Expedited Appeal p. 8. However, a plain reading
8 of the law supports GDOE’s position. Title 2 GAR §3114(i)(2) entitled No Disclosure of
9 Information states:

10 Discussions shall not disclose any information derived from
11 proposals submitted by other offerors, and **the agency conducting**
12 **the procurement shall not disclose any information contained**
13 **in any proposals until after award of the proposed contract has**
14 **been made.** The proposal of the awarded contract shall be opened
15 to public inspection except as otherwise provided in the contract.

16 The law specifically states that the agency conducting the procurement (here, GDOE)
17 shall not disclose any information contained in any proposals until after award of the proposed
18 contract has been made. Appellant argues that this section is of limited application, “as it refers
19 only to information disclosed in discussions between an agency and an offeror.” *See* Appellant’s
20 Opposition to GDOE’s Motion for Expedited Appeal p. 7. The title of §3114(i)(2) is “No
21 Disclosure of Information,” coupled with the plain reading of the law, “the agency conducting the
22 procurement shall not disclose any information contained in any proposal until after award of the
23 proposed contract has been made” clearly precludes GDOE from disclosing other offeror’s
24 information and any disclosure to any unauthorized persons would directly violate §3114(i)(2).

25 Furthermore, 2 GAR §3114(h)(1) titled Receipt and Handling of Proposals states in
26 relevant part:

27 Proposals shall not be opened publicly nor disclosed to
28 unauthorized persons, but shall be opened in the presence of two or
29 more procurement officials. A Register of Proposals shall be
30 established which shall include for all proposals, the name of each

1 offeror, the number of modifications received, if any, and a
2 description sufficient to identify the services offered. The Register
3 of Proposals **shall be opened to public inspection only after**
4 **award of the contract. Proposals of offerors who are not**
5 **awarded the contract shall not be opened to public inspection.**

6 Appellant in their request for production of documents also asks for all documents relating
7 to **all** offerors' responses, proposals, questions and answers. Appellant has repeatedly and
8 wrongfully alleged that they are entitled to all offerors' proposals. See Appellant's Opposition to
9 GDOE's Motion for Expedited Appeal p. 7. Section 3114(i)(2) and 3114(h)(1) state the proposal
10 of the offeror awarded the contract shall be opened to public inspection. However, it is **only**
11 awarded offeror's proposal that is open to inspection, after the award of the contract.

12 Appellant cited 5 GCA §5250 (GDOE is assuming Appellant meant §5251) arguing that
13 the procurement record, for the yet to be awarded RFP 005-2016, is a public record and any
14 person may inspect and copy any portion of the record. See Appellant's Opposition to GDOE's
15 Motion for Expedited Appeal at 7. This is an erroneous interpretation of §5251, and would only
16 serve to completely disrupt the competitive procurement process. Appellant deliberately left out
17 vital language from §5251, which states in its entirety, "The record required by §5249 is a public
18 record **and subject to rules promulgated by the Public auditor**, any person may inspect and
19 copy any portion of the record." "Subject to rules promulgated by the Public auditor" is critical
20 here because it supports the protection afforded to RFP's by 2 GAR §§ 3114(i)(2) and 3114(h)(1).
21 In other words, §5251 protects the integrity of the procurement process, which in the case of
22 RFP's include keeping proprietary proposals confidential until the award of the contract. Based
23 on a plain reading of the law, GDOE has acted properly by protecting the confidential
24 information for RFP 005-2016.

25 In summary, Appellant's request for disclosure of other offerors' proposals and evaluation
26 information is tantamount to asking for an illegal order that GDOE violate procurement law and
27 regulations and expose GDOE to litigation. Pursuant to those referenced regulations, GDOE is

1 prohibited from releasing any information to unauthorized persons regarding proposals until after
2 award.

3 **V. APPELLANT IS ATTEMPTING TO STALL THE APPEAL PROCESS**

4 On August 29, 2016 GDOE filed a Motion for Expedited Appeal in an attempt to prevent
5 any lapse in service for a third party agent and to prevent losing federal funds from USDOE. As
6 previously mentioned, RFP 005-2016 has been stayed because of Appellant's protest since July
7 18.

8 On August 31, 2016 Appellant filed an opposition to GDOE's Motion for Expedited
9 Appeal. Appellant argues if GDOE is concerned that there will be a lapse in service GDOE can
10 always extend the current and expiring contract with Appellant. *See* Appellant's Opposition for
11 GDOE's Motion for Expedited Appeal p. 4. Appellant argues that any delay in the RFP 005-
12 2016 is result of GDOE's own actions stating that GDOE cannot have it both ways. "It (GDOE)
13 cannot request an expedited appeal while at the same time refusing to provide public procurement
14 records that A & M is entitled to obtain." *Id.* p. 7.

15 As discussed above, 5 GCA §5251, 2 GAR §3114(i)(2), and 2 GAR §3114(h)(1) prohibit
16 GDOE from disclosing other offerors information, particularly while an RFP is still open. This is
17 basic procurement law. Appellant's argument is flawed and is not a legitimate reason to support a
18 prolonged appeal process.

19 On September 1, 2016, at approximately 11:30am, the Office of Public Accountability
20 filed a Notice of Pre-Hearing Conference, for this appeal, to be held on September 16. *See*
21 OPA's Notice of Pre-Hearing Conference. On September 1, 2016, at approximately 3:30pm,
22 Appellant's Counsel filed a request for continuance of pre-hearing conference because Counsel
23 will be off-island and requests a new date, September 23. *See* Appellant's Request for
24 Continuance of Pre-Hearing Conference.

25 Appellant has the option of having another representative from Counsel's firm at the
26 September 16 hearing, if Appellant desired. Appellant's motive for a drawn out battle is quite
27 clear; to keep the procurement stay in place for RFP 005-2016 as long as possible because it

1 would leave GDOE with no other options but to extend the incumbent contract (which is with the
2 Appellant). Any further delay is in the Appellant's best interest, and the request for a continuance
3 of a pre-hearing on the same day it was issued only further demonstrates that. Because the
4 Appellant does not have a legitimate reason to prolong the process, the motion for an expedited
5 appeal should be granted.

6
7 In Conclusion, in regards to RFP 005-2016, GDOE properly and legally extended the
8 deadline for proposals to maximize competition, GDOE has yet to issue an award and more
9 importantly USDOE has not approved any offeror for the RFP, and because the RFP is still open
10 GDOE cannot provide information to the Appellant that would violate Guam Procurement law.
11 For the foregoing reason, GDOE respectfully requests that the OPA dismiss the Appellants
12 complaint.

13 Dated this 6th day of September, 2016.

14 Respectfully submitted,

15 **GUAM DEPARTMENT OF EDUCATION**

16 By:  _____
17 **JAMES L.G. STAKE**
18 *Legal Counsel*

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Exhibit 25

1 **GUAM DEPARTMENT OF EDUCATION**

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7 IN THE APPEAL OF

APPEAL NO.: OPA-PA-16-012

8
9 **ALVAREZ & MARSAL PUBLIC SECTOR
SERVICES, LLC,**

**DECLARATION REGARDING
COURT ACTION**


10
11 Appellant.

12
13 The undersigned party does hereby confirm that to the best of his knowledge, no case or
14 other action concerning the subject of this Appeal has been commenced in any court of Guam.
15 All parties are required to and the undersigned party agrees to notify the Office of the Public
16 Auditor within twenty-four (24) hours of being informed of the commencement of a court action
17 regarding this Appeal or the underlying procurement action.

18 Dated this 6th day of September, 2016.

19 Respectfully submitted,

20 **GUAM DEPARTMENT OF EDUCATION**

21
22 By: 
23 **JAMES L.G. STAKE**
Legal Counsel