



Jerrick Hernandez <jhernandez@guamopa.com>

[eFile] In the Appeal of JJ Global Services - Appeal Case No. OPA-PA-21-013

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Mon, Nov 29, 2021 at 4:31 PM

To: jhernandez@guamopa.com

Cc: Rebecca Wrightson <rw@cmlaw.us>, Anissa Senior <as@cmlaw.us>, Vanessa Williams <vlw@vlwilliamslaw.com>, Lea Mara <lm@vlwilliamslaw.com>, Darlene Balagot <db@vlwilliamslaw.com>

Dear Mr. Hernandez,

Please see the attached documents for filing in the above-referenced matter, as follows:

- JJ Global's Opposition to Purchasing Agency's Motion to Dismiss for Lack of Jurisdiction
- JJ Global's Comments to Agency Report

Sincerely,

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2 attachments **2021.11.29 Opposition to Motion to Dismiss.pdf**
228K **2021.11.29 Comments to Agency.pdf**
206K

1 Global for the IFB. The Bid Award letter also stated the Notice to Proceed date was July 27, 2021
2 and that based on the 90 days calendar days “upon the issuance of the purchase order/contract,
3 the deadline to complete this project is October 24, 2021.” *See id.* at Ex. 4. On July 28, 2021, a
4 Purchase Order was signed off by the President of GCC on July 28, 2021 and issued to JJ Global.
5 *See id.* at Ex. 5. On August 6, 2021, JJ Global submitted a request to GCC seeking an extension
6 of the project completion timeline. The request was submitted following an email from GCC
7 stating, “JJ Global may submit a request in writing asking for an extension because of the time it
8 took to obtain a permit.” *See id.* at Ex. 6. On August 9, 2021, JJ Global followed up with GCC,
9 asking for the status of their request for an extension. *See id.* at Ex. 7. On August 26, 2021, JJ
10 Global sent a letter to GCC stating the proposed contract did not reflect JJ Global’s bid term
11 regarding unanticipated delays outside its control, specifically: “Completion Date may be
12 extended forward in allotment to the number of days needed for any/all the following: delay of
13 permits(s); delay due to weather conditions, *i.e.* natural disasters, storms, etc.; or delay due to the
14 COVID-19 pandemic, including, but not limited to, materials not on island.” *See id.* at Ex. 8. On
15 September 22, 2021, GCC canceled the award and purchase order for IFB No. GCC-FB-21-009.
16 *See id.* at Ex. 9. On October 5, 2021, JJ Global protested the cancellation of the award and
17 purchase order for IFB No. GCC-FB-21-009. *See id.* at Ex. 10. Paragraph 29 of the Instructions
18 of GCC-BF-21-009 states in pertinent part:

19 Award shall be made to the lowest responsible and responsive bidder, whose
20 bid is determined to be the most advantageous to the Government, taking into
21 consideration the evaluation factors set forth in this solicitation. No other
22 factors or criteria shall be used in the evaluation. Award issued to the lowest
23 responsible bidder within the specified time for acceptance as indicated in the
24 solicitation, result in a binding contract without further action by either party.
25 The right is reserved as the interest of the Government and may require to waive
26 any minor irregularity in the bid received pursuant to 2 GAR, Div. 4
27 §3109(m)(4)(B).

28 *See id.* at Ex. 1. On October 12, 2021, GCC denied JJ Global’s protest. *See id.* at Ex. 11. On
October 12, 2021, GCC denied JJ Global’s protest. *See id.* at Ex. 11. On October 27, 2021, JJ
Global filed a Notice of Appeal for the instant matter, which was docketed as OPA-PA-21-013.

1 Notice of Appeal (Oct. 27, 2021). On November 9, 2021, GCC filed a Motion to Dismiss for Lack
2 of Jurisdiction. Mot. Dismiss (Nov. 9, 2021). On November 15, 2021, GCC filed its Agency
3 Report. JJ Global now files its Comments to GCC’s Agency Report on November 26, 2021.

4 **ARGUMENT**

5 **I. The Public Auditor has jurisdiction over the appeal because JJ Global’s protest is in**
6 **connection with the award of a contract.**

7 Section 5425(a) of Guam procurement law provides in pertinent part that any “[a]ny
8 contractor who may be aggrieved in connection with...a contract...” may protest under 5 GCA §
9 5425(a). The Public Auditor has jurisdiction over the appeals of decisions rendered by the head
10 of the purchasing agency on such protests. 5 GCA § 5425(e). Protesters may protest any phase
11 of the solicitation or award and protests are not limited to those specifically enumerated in 2 GAR
12 Div. 4 § 9101(c)(2). This includes even those instances where contracts have already been
13 awarded, as evidenced by the form of protests required in 2 GAR Div. § 9101(c)(3) (“The written
14 protest shall include as a minimum the following: ... appropriate identification of the
15 procurement, and if a contract has been awarded, its number...[.]”) This is further proven by the
16 fact that protests may be filed by contractors, which are defined as “any person *having a contract*
17 *with a governmental body.*” 5 GCA § 5030(f) (emphasis added); *see* 5 GCA § 5425 (“Any actual
18 or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method
19 of source selection, solicitation or award of a contract, may protest...[.]”)

20 GCC argues the Public Auditor lacks jurisdiction because JJ Global’s protest involves a
21 contract and not the award of a contract. GCC Agency Rpt. at 8-9. However, the closely bound
22 issues of the award of a contract and a contract on its own is the fault of GCC itself. It is by GCC’s
23 own terms and conditions that the award of the IFB automatically formed a binding contract
24 without further action by the parties. Automatic contract formation without further action does
25 not exist in Guam Procurement Law, but is a unique term and condition added by GCC itself in
26 IFB No. GCC-FB-21-009. *See* Notice of Appeal, Ex. 1. Because under GCC’s terms a contract is
27 automatically formed when a bid is awarded, any winner of a GCC bid would be precluded from
28 filing any protest under § 5 GCA § 5425 by virtue of the automatic contract formation. Winners

1 would then be forced to appeal only under other statutes and unable to protest the award at all. JJ
2 Global should not be punished for attempting to cover all its bases by filing this appeal when
3 GCC is the one to cause the vague circumstances in the first place.

4 GCC cites the decision in *Mega United Corp. v. Gaum Econ. Develop. Auth.* as support
5 for its contention. OPA-PA-17-007 Dec. (Aug. 2, 2017). However, the issue in *Mega United*
6 *Corp.* concerned whether the appeal was filed within the 60-day deadline for decisions regarding
7 contracts or breaches of contracts. *Id.* at 2. The decision did not concern whether the appeal fell
8 within protests involving the award of a contract or disputes of contractual controversies. *Id.* Thus,
9 the decision in *Mega United Corp.* is irrelevant to the matter at hand.

10 JJ Global's protest is proper because it involves the "method of source selection,
11 solicitation or award of a contract" under 5 GCA § 5425(a). The vagueness of whether the
12 controversy involves an award of contract or a contract dispute is created by GCC itself. JJ Global
13 should not be punished for attempting to cover all its bases by filing this appeal. Therefore, the
14 Public Auditor has jurisdiction over this appeal.

15 **II. The Public Auditor has jurisdiction over the appeal because JJ Global's protest is**
16 **timely.**

17 JJ Global's protest is timely because it was not aware GCC would cancel the award and
18 purchase order until it had actually done so on September 22, 2021. "Where the question of when
19 the statute of limitations begins to run turns on what a reasonable person should have known, a
20 mixed question of law and facts is presented." *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.,*
21 *Guam*, 2020 Guam 20 ¶ 88 (citations omitted). Therefore, in order to determine the date of which
22 the 14-day window of section 5425(a) begins to run, the court must conduct an analysis examining
23 what facts are necessary to establish a protest claim and when the protester knew, or should have
24 known, facts establishing the essential elements of that protest claim." *Id.* (citations omitted).
25 "[A]s a general proposition, when alleged misconduct forms the basis of a procurement protest,
26 the time runs from the date on which the protesting party first learned of the purported
27 misconduct." *Id.* (citations omitted).

28 GCC argues there are several instances purporting that JJ Global knew of the grounds for

1 protest prior to the 14-day statute of limitations for filing of protests, such as (1) the existence of
2 Paragraph 29 of the IFB's terms and conditions; (2) GCC's Notice of Intent to Award and
3 corresponding email received by JJ Global on July 29, 2021; and (3) correspondence between JJ
4 Global and GCC occurring during the month of August 2021. GCC Agency Rpt. 9-12.

5 However, JJ Global was not on notice that GCC could or would renege or "cancel" the
6 award of JJ Global's contract until GCC did so. Despite had actually cancelled the award of IFB
7 and purchase order. JJ Global was operating under the knowledge that a contract had already
8 been formed between the parties because the award of the IFB created a binding agreement that
9 did not require further action by either party. See Paragraph 29 ("Award issued to the lowest
10 responsible bidder within the specified time for acceptance as indicated in the solicitation, result
11 in a binding contract without further action by either party.") Accordingly, because a binding
12 contract between the parties already existed, the further action of signing a formal contract would
13 not adversely affect its existence. No misconduct to protest occurred until GCC cancelled the
14 award of the IFB. Because GCC did not cancel the award and purchase order until September 22,
15 2021, the grounds for this protest did not arise until that date. Therefore, JJ Global's October 5,
16 2021 protest is timely because it is within 14 days of GCC's misconduct that occurred on
17 September 22, 2021.

18 GCC argues its mere Notice of Intent to Award and corresponding email, sent on July 27,
19 2021, was sufficient notice of grounds for the instant protest because JJ Global knew "that GCC
20 wanted a signed format contract since the end of July 2021...[.]" GCC Agency Rpt. at 11.
21 However, merely knowing GCC wanted a signed formal contract is a wholly different issue from
22 actually terminating the award of said IFB and purchase. Under the IFB's terms and conditions,
23 further action - such as the signing of a contract - did not affect whether a binding contract was
24 formed. Thus, even if JJ Global knew GCC wanted a formal contract signed since July 2021, it
25 had no reason to believe that its lack of signature as a contract formality would lead to the
26 termination of the award and purchase order. By the terms and conditions of the IFB, whether the
27 contract was signed or not should have no bearing on whether a binding contract was formed
28 between the parties.

1 Throughout the multiple correspondence in August 2021, not once did GCC ever indicate
2 that they believed signature on a formal contract was a condition of award. GCC points to JJ
3 Global asking for an extension for the project as proof of notice for grounds of protest, however
4 asking for an extension was suggested and permitted by GCC itself in its July 29, 2021 and August
5 4, 2021 emails. *See* GCC Agency Rpt. Tab 5, AR040, 043 (“JJ Global may submit a request in
6 writing asking for an extension because of the time it took to obtain a permit.”) Not once in any
7 of its correspondence did GCC ever indicate it would cancel the IFB award if JJ Global did not
8 sign the contract. *See* GCC Rpt. Tab 5, AR020, AR024, AR035, AR040, AR043.

9 JJ Global’s protest is timely because the grounds for protest did not arise until GCC had
10 terminated the IFB award and purchase order on September 22, 2021. Therefore, because JJ
11 Global’s protest was filed on October 5, 2021, the Public Auditor has jurisdiction over the instant
12 appeal because it was timely filed within 14-days of September 22, 2021.

13 **III. GCC had no legal grounds for cancelling the award and contract with JJ Global.**

14 GCC argues that JJ Global has failed to demonstrate the law violated that would justify
15 its protest. The point of the protest is that GCC was not permitted by law to cancel the award and
16 contract with JJ Global. GCC could not cancel the IFB without a “cogent and compelling reason
17 to believe that the cancellation of the solicitation is in the territory’s best interest.” 5 GAR Div. 4
18 § 3115(b). GCC’s reasons for cancellation must be in accordance with the regulations
19 promulgated by Guam Procurement Law. 5 GCA § 5225. JJ Global informed GCC in its response
20 to the Notice of Intent to Award that the completion timeline of 90-days did not include delays
21 due to weather or delay in materials if not on island, and that JJ Global should receive at least 36-
22 hours’ notice before the Notice to Proceed Date to allow for mobilization. *See id.* at Ex. 3.
23 Furthermore, GCC allowed JJ Global to submit a request for extension for this timeline. If GCC
24 determined the award to JJ Global to be in error due to this timeline and the lack of contract
25 formalities such as a signature, GCC must provide a written determination under 5 GCA §
26 5211(f). However, it did not. Thus, GCC’s reasons for cancelling the award of the IFB are not
27 valid.
28

1 **CONCLUSION**

2 The Public Auditor has jurisdiction over the appeal, JJ Global’s protest was timely, and
3 GCC violated the terms and conditions of the IFB and had no justification under the law to cancel
4 the award and contract to JJ Global. Therefore, JJ Global respectfully requests that the Public
5 Auditor rule that the award of IFB No. GCC-FB-21-009 to JJ Global be reinstated, that the
6 contract to JJ Global be ratified and affirmed, and that JJ Global be compensated for the actual
7 expenses reasonably incurred under the contract plus a reasonable profit, and all other legal and
8 equitable remedies available to JJ Global.

9 Respectfully submitted this 29th day of November 2021.

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13 *Attorney for Appellant JJ Global Services*
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