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

**PART I.**

In the Appeal of

ST Corporation, Inc.,

Appellant.

**DOCKET NO. OPA-PA-20-008**

**COMMENTS ON AGENCY REPORT**

**I. INTRODUCTION**

Pursuant to 2 GAR §§ 12104(c)(4) and 12108(a), Appellant ST Corporaton, Inc. ("ST" or "Appellant") submits its Comments on the Agency Reports submitted by the Department of Administration General Services Agency ("GSA") to the Office of Public Accountability on December 11, 2020. These comments are submitted to address the inadequacies and unavailing nature of the Agency Report regarding the procurement appeal of GSA-047-20 for Janitorial Supplies (the "IFB").

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## II. COMMENTS TO AGENCY STATEMENT

### A. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.<sup>1</sup>

General Services Agency Invitation for Bid (“IFB”) GSA-047-20 seeks a variety of janitorial and cleaning supplies, and in relaying the product descriptions for those supplies, the General Services Agency (“Agency” or “GSA”) included additional very specific size specifications for many of the products sought. The IFB was issued on September 14, 2020. ST Corporation, Inc. (“ST” or “Appellant”) sent questions regarding the IFB three days later. On September 24, 2020, ST again wrote to GSA about the narrow specifications that GSA included, and sought clarification from GSA inquiring whether pricing could be submitted for similarly sized products and in such a way so that GSA could obtain the best value offers for the various supplies requested. When GSA did not provide answers in a timeframe that would have been useful for offerors to use in shaping their bids, ST initiated an agency level protest on October 8, 2020. That protest was sustained by GSA on the same day, with the promise that the answers sought should have been provided in a timely manner, were not, and would be provided as ST had requested.

On October 14, 2020, ST finally received GSA’s responses to the questions previously posed. ST requested clarification on whether GSA would accept a price per unit that nonetheless supplied the total product amount requested by GSA in the IFB, but was not quoted in the particular product amounts specified by GSA. For example, ST asked whether GSA in GSA-047-20 would accept a price per ounce

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<sup>1</sup> Much of the this history is contained in ST’s Notice of Appeal, but is recounted here for ease of reference for the reader.

as opposed to "price per can" for item no. 2.1. GSA responded with "per specifications per can[.]" For every question posed, GSA informed ST that it would not deviate from the listed specification, even though ST could provide prices for the quantities needed in a manner that would allow GSA to determine the best value amongst various bidders for the types of products sought.

ST also asked whether GSA would accept a can or bottle in different amounts than the particular bottle sizes that were narrowly specified. For example, ST asked whether GSA would accept a 12 oz. bottle for item no. 8.1. GSA responded with "24oz or equal[.]" This answer provided no justification for the exact size specification and provided no clarity into whether two 12 oz. bottles would be considered "equal" to the 24 oz. bottle size specified. GSA responded in this way for every other similar question posed by ST. GSA also failed to respond to Question Number 19 submitted on September 24, 2020. Question Number 19 asked whether GSA would "accept products in metric units as opposed to imperial units?" GSA did not provide a response to this question and has provided no explanation for the decision to refuse to respond.

GSA's responses provided on October 14, 2020, served as the basis for ST's agency level protest filed on October 21, 2020. On November 10, 2020, the Department of Administration, General Services Agency, issued a "memorandum" denying the protest as "untimely." That protest decision was signed by Procurement Officer Claudia S. Acfalle as the Chief Procurement Officer. The Decision was attached to an email sent "per Mr. Robert Kono...." ST Appealed that Decision to

the OPA on November 24, 2020. A procurement record was submitted to the appellant and the OPA on December 3, 2020, and amended later that day. The procurement record was further amended on December 7, 2020.

**B. GSA'S AGENCY REPORT PROVIDES NO SUBSTANTIVE RESPONSE TO THE APPEAL FILED WITH THE OPA**

2 G.A.R. § 12105 (g) explains that an Agency Report shall include 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.” The GSA’s Agency report here provides no response to the allegations of ST’s appeal.<sup>2</sup> The Agency Report stands upon the same grounds for the denial issued to ST’s Agency Level protest: that ST’s protest window in this procurement began to run on August 7, 2020, and expired 14 days later. *See*, Agency report, tab 1, pg.2.<sup>3</sup> The GSA provides absolutely no response or explanation on how its reliance upon correspondence that predates the issuance of the IFB on appeal here has any support under the law.

To be certain, the IFB was issued on September 14, 2020 — a date that comes 24 days *after* when GSA argues that ST’s protest should have been filed. ST sought

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<sup>2</sup> A side by side comparison of GSA’s report in this matter is little more than its inchoate procurement denial letter taken out of the redline edits that originally were visible, and repasted on a paper marked “agency report.” *Compare* Agency Report Tab 1 *with* Tab 3. The Agency report, while addressed to the OPA, contains the same language directed to the OPA that was originally directed to ST (“you were aware...”; “you were informed....”; and “you did not raise any objections...”) The standard of diligence revealed by the Agency Report is indicative of the procurement itself.

<sup>3</sup> Neither GSA’s agency Report or Procurement Record are batestameped, or otherwise marked to allow individual page identification.

clarifications and answers to questions about the specifications on September 17, 2020, and again on September 24, 2020. Its first protest regarding the lack of responses to those questions—the same questions at issue in this Appeal—was sustained by the GSA, and the GSA found no issue with timeliness in that first protest determination. When the responses did eventually come on October 14, 2020, ST reviewed the answers and determined that it needed to protest. That protest was filed on October 21, 2020 — well before the fourteen-day statutory deadline for action lapsed. 5 G.C.A. § 5425 (a). GSA's position is, simply put, untenable. GSA would have the OPA adopt an interpretation of timeliness that would require a prospective bidder to bring a bid protest and appeal even before there was a solicitation to bid on. The OPA should reject such an invitation.

**C. GSA' S RELIANCE UPON A PREVIOUS IFB TO DECLARE THAT ST WAS UNTIMELY IN THE PROTEST OF THIS IFB HAS NO FACTUAL OR LEGAL SUPPORT**

The GSA argues that, since it has used a specification in the past, it is entitled to use that specification in future procurements without question. GSA explains that “The Government was looking to provide **the same supplies with the same specifications as it had in two (2) previous bids (GSA 0119-12 and GSA-118-16) (See Tab 6)**. As you are aware, you bid and won several items on GSA Bid 118-16.” Agency report, 2 (emphasis in original). The agency provides no legal support for its proposition that participation in a past procurement can operate as a timeliness bar to a protest or a future procurement where the specifications in the that latter procurement have not been released. The agency also provides no legal support for its chosen tack to simply attach, without

comment, a prior IFB to the procurement record of a current IFB as some attempted explanation for the development of specifications used in the current procurement vehicle. Worse, even if such legal propositions existed, the GSA is simply wrong about the prior procurement it hangs its arguments upon.

**First**, ST did not bid on any of the products in the past procurement (GSA Bid 118-16) that triggered the questions in ST had in the current procurement (GSA-047-20).<sup>4</sup> ST had no intention to bid on the products in the former procurement that GSA points toward as supporting its untimeliness argument, the fact remains that ST did even gain standing to bring a protest until the current procurement was issued, ST became a prospective bidder for the items at issue here, and ST became aggrieved when GSA did not address the unduly restrictive specifications that ST sought clarifications about.

**Second**, even if the law could somehow be contorted to allow the specifications issued in one procurement to cut off protests of a subsequent procurement issued four years later, GSA is simply wrong in informing the OPA that the “same specifications” are at issue. For instance, Specification 26.1 for GSA 118-16 seeks Detergent Powder in boxes that have 42 loads, where as the current procurement seeks boxes of 180 loads. *Compare* p. 35 of 45, Tab 6, Agency Report *with* p. 37 of 40, Tab 4, Agency Report. And again, in 2016 GSA sought “Air Freshner” without specifying a particular can size, but for some reason chose to limit the specification in 2020 to only that supplier who could provide a 10 oz. can of “Air Freshner.” *Compare* p. 30 of 45, Tab 6, Agency Report *with* p. 35 of 40, Tab 4.

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<sup>4</sup> ST's bids in GSA Bid 118-16 were for foam cups, paper towels, plastic bags, and toilet tissue.

Yet again, in 2016 GSA sought a "cleaner degreaser," but chose to limit the suppliers in 2020 to only that supplier that could provide a specific 24 oz bottle of "cleaner degreaser." *Compare* p. 33 of 45, Tab 6, Agency Report *with* p. 36 of 40, Tab 4, Agency Report.

GSA has added, in violation of 5 G.C.A §5265 (a), unduly restrictive specifications that include "requirements, such as but not limited to restrictive dimensions, weights or materials, which unnecessarily restrict competition," and has done so without any citation in the procurement record indicating why these restrictive dimensions are necessary for the Territory. By requiring prospective bidders to meet these specifications, GSA is unduly restricting competition and preventing the Territory from obtaining the best price. GSA's agency report doubles down on these unfair restrictions by its complete failure to address whether product dimensions can be marked in either metric or imperial units, so long as a price comparison can be made to allow the Territory to obtain the best pricing for the products it seeks.

It appears as if GSA may be driving the procurement to only a particular offeror(s) that can provide the unique item size requested, even though that particular item size is not material to the efficacy or usefulness of the product being procured, and may in fact cause the territory to pay more for the product. Such restrictive specifications cannot be used unless a written determination has been made that the restrictive specification must be used. *See*, 2 G.A.R. § 4106(a); 5 G.C.A. § 5268(b). No such determination exists here. The lack of such written

determinations invalidates the IFB's use of unduly restrictive and unjustified specifications altogether.

### III. CONCLUSION

GSA issued an IFB for janitorial supplies that, by including unduly restrictive product dimensions and sizes, violates procurement law and limits competition between bidders in such a manner as to prejudice the taxpayers of Guam who must ultimately pay for these janitorial supplies. Rather than confront the merits of the appeal, the GSA's Agency report stands upon a contorted timeliness argument that would make untimely an offeror's protest even before the IFB being protested was issued. Such a position cannot be adopted, and GSA should be held to account for creating a procurement that would materially prejudice the people of Guam. Based on the foregoing, ST respectfully requests that its protest appeal be sustained.

Submitted this 21<sup>st</sup> day of December, 2020.

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By: 

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