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In the Appeal of All Business Enterprises Corp. OPA-PA-22-002

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Good afternoon,

Please see the attached *Opposition to Motion to Dismiss* regarding the above referend matter for filing.

Thank you.

Regards,

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OFFICE OF PUBLIC ACCOUNTABILITY

PROCUREMENT APPEAL

In the Appeal of)	OPPOSITION TO MOTION
)	TO DISMISS
All Business Enterprises Corp.,)	
)	Docket No. OPA-PA-22-002
Appellant.)	
_____)	

I. INTRODUCTION

Appellant All Business Enterprises Corp. (“ABEC”) opposes the University of Guam’s (“UOG”) “Motion to Dismiss Appellant’s JWS Claims” for the reasons set forth below. UOG’s position conflicts with on-point persuasive precedent from the United States Court of Federal Claims, procurement policies, and common sense.

II. RELEVANT FACTS AND PROCEDURAL BACKGROUND

UOG’s motion involves very limited relevant facts and a single procedural issue.

UOG issued Invitation for Bid No. UOG IFB B21-17 for the purchase of HVAC Equipment. There were three bidders: Tony’s Workshop; JWS Refrigeration and Air Condition Ltd. (“JWS”); and ABEC. When the bids were opened, Tony’s Workshop had the lowest bid, JWS was the second lowest, and ABEC was third. After obtaining the bid documents from Tony’s Workshop and JWS through a Sunshine Act request, ABEC protested. ABEC contended that the bids from both Tony’s Workshop and JWS were nonresponsive. UOG denied the protest. ABEC

appealed the denial of the protest to the OPA, again contending each of the two lower priced bids were nonresponsive. UOG is moving to dismiss that portion of the appeal directed towards JWS.

III. LEGAL ARGUMENT

A. **A third place bidder can, and must, challenge both the winning and second place bids.**

ABEC has not found Guam precedent addressing the issue of a protest and OPA appeal by a third-place bidder. However, precedents from the United States Court of Federal Claims make it clear that a third-place bidder can, and indeed must, assert challenges it may have against both the first and second place bidders in a protest and subsequent appeal.

The case of Raymond Express International, LLC v. United States, 124 Fed. Cl. 79, 87 (2015), involved a third-lowest bidder's challenge in a procurement to provide fresh fruits and vegetables to commissaries on Guam and elsewhere. The government asserted "somewhat perfunctorily" that the third place bidder lacked standing to challenge an award to the lowest bidder because, if the low bidder was disqualified, the bid would automatically go to the second lowest bidder. Thus, according to the government, the third lowest bidder had suffered no economic prejudice from the award to the lowest bidder and was not an interest party. The court rejected this challenge because the third place bidder had not challenged only the award to the lowest bidder. The third lowest bidder had also attacked evaluations of the second lowest bidder and contended its second place in line position was invalid.

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By way of contrast, in Universal Marine Co., K.S.C. v. United States, 120 Fed. Cl. 240, 248-49 (2015), a fourth place bidder challenged an award to the winning bidder, but failed to challenge the bona fides of the intervening two offerors. Since a successful challenge to only the winning offeror would only result in an award to the second place offeror, the plaintiff fourth place bidder failed to prove it had the required direct economic interest in the procurement.

Thus under Raymond Express and Universal Marine, ABEC not only **can** challenge the second place JWS bid. ABEC **must** do so in order to allege an economic interest in this procurement and establish standing.

In its motion, UOG cited some very general regulations that do not address the issue of a protest contending multiple bidders are nonresponsive or otherwise disqualified. UOG also cited TRC Environmental Corp. v. OPA, Guam Super. Ct. SP160-07 (D&O, filed Nov. 24, 2008), in support of the general proposition that the OPA's jurisdiction is limited to matters properly submitted to it. ABEC agrees with that general proposition. However, TRC is otherwise off point. In TRC, Presiding Judge Lamorena ruled the OPA had no jurisdiction over an appeal that was not "properly-submitted" because it was untimely. *Id.* at p.7. It is undisputed that ABEC's appeal to the OPA here, filed 13 days after denial of ABEC's protest, was timely.¹

¹ ABEC's protest was denied on January 25, 2022. Exhibit 6 to Notice of Appeal. ABEC's Notice of Appeal was timely filed on February 7, 2022. *See* 5 GCA §5425(e) (15 days to appeal).

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Beyond the clear logic underlying Raymond Express and Universal Marine, simple common sense mandates denial of UOG's motion. One policy underlying appeals to the OPA is to provide "expeditious resolution of controversies." 2 GAR §1201.² When possible, consolidation of all issues pertaining to all bidders that have been raised in a single procurement into a single protest and single appeal will promote a more expeditious resolution of controversies than multiple and/or successive protests and appeals.

If issues pertaining to JWS are excluded from this appeal without denying ABEC's standing, a victory by ABEC could result in an award to JWS on remand. That could result in a second protest and appeal, with substantial and otherwise avoidable delays in the procurement.

Another possibility arises from the similarity of some issues that ABEC has raised against both Tony's Workshop and JWS. If allegations against JWS are excluded from this appeal, a ruling in favor of ABEC would create a precedent that could be used against JWS if it is awarded the contract on remand, with JWS having been denied the chance to present its position in this proceeding. If this matter were being tried under the Guam Rules of Civil Procedure, joinder of JWS could be required or permitted. *Cf.* GRCP 19, 20. JWS might also have a right of intervention or grounds for permissive intervention. *Cf.* GRCP 24.

² As noted below, UOG objects to citations to the GAR rather than its own regulations. The cited GAR section is in the chapter of the GAR concerning "Procurement Appeals to the Public Auditor." Since this is a procurement appeal to the Public Auditor, ABEC stands by the citation.

Finally, there are opportunities for fraud if the OPA were to adopt both (1) UOG's position that a third-place bidder may not challenge both the first and second lowest bids, and (2) the rule that a third place bidder lacks standing if a successful challenge to the winning bid results in an award to the second place bid by default. Bidders could set up shell companies to submit bids just a few dollars higher than the real company's bid. Under UOG's theory, in this scenario a successful challenge to a nonresponsive low bid results in an award to a second place shell company that was neither responsive nor responsible but that could not be challenged in the initial protest and appeal.

B. UOG's form demand for sanctions remains silly.

UOG once again repeats the demand for sanctions. As this motion involves an apparent issue of first impression on Guam where common sense and persuasive precedent favor ABEC's position, the demand for sanctions is as nonsensical as UOG's insistence in its "Rebuttal to Comments on Agency Report" that the OPA must ignore citations to Government of Guam Procurement Regulations in ABEC's comments because UOG has its own procurement regulations. UOG Rebuttal, e-filed March 10, 2022 at p.2 n.1.³

UOG's claim, without explanation, that ABEC's inclusion of the JWS issues in its Notice of Appeal to the OPA is frivolous and fraudulent is itself utterly without merit. Raising an issue of

³ By now UOG may have actually read ABEC's Comments on the Agency Reprot, and realized that ABEC did not cite the general Government of Guam Procurement Regulations anywhere in those Comments. ABEC did cite three sections of the UOG Procurement Regulations. *See* ABEC Comments at p. 2 (citing UOG Procurement Regs. 3.9.12.1, 3.9.14.2), p. 3 (citing UOG Procurement Reg. 3.9.14.1).

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first impression on Guam where common sense and persuasive precedent favor the position of the party raising the issue is neither frivolous nor fraudulent. UOG's contention that the issue was raised to disrupt the procurement process is simply wrong for reasons noted above. UOG's position that JWS should be excluded from this proceeding, and dealt with in a second protest and appeal under some possible scenarios, is far more disruptive. Meanwhile, ABEC's inclusion of issues pertaining to JWS has had no effect on the scheduling of this appeal. The only substantial, unexplained, and unjustified delay to date in this whole process was UOG's decision to bring the procurement to a halt by simply ignoring ABEC's protest for more than a month until ABEC sent UOG a letter reminding UOG of the pending protest. *See* Exhibits 1 (Dec. 20, 2021 protest) and 5 (Jan. 24 ABEC letter to UOG) to Notice of Appeal filed Feb. 7, 2022.

IV. CONCLUSION

Persuasive precedent, common sense and the policies underlying procurement law support addressing issues pertaining to the intermediate second place bidder in a procurement appeal filed by the third place bidder. For the foregoing reasons, UOG's motion to dismiss should be denied.

Respectfully submitted,

ROBERTS FOWLER & VISOSKY LLP

Date: 3/28/2022

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