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dooik, opa-pa-23-004 gpa's motion to dismiss

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Mon, Nov 13, 2023 at 4:43 PM

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Dear Mr. Hernandez,

Attached for filing is GPA's motion to dismiss.

Thanks very much,

-Marianne

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10 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
11 **PROCUREMENT APPEAL**

12 **In the Appeal of:**

13 **Appeal Case No. OPA-PA-23-004**

14 **DOOIK ENG., LTD.,**

15 **MOTION TO DISMISS**

16 Appellant.

17 **I. Introduction.**

18
19 The Guam Power Authority (GPA), appellee, hereby moves to dismiss this procurement
20 appeal for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim
21 upon which relief can be granted.

22 **II. Factual and Procedural Background.**

23
24 On January 12, 2023, the Guam Power Authority (GPA) announced Invitation for Multi-
25 Step Bid No. GPA-023-23 for Performance Management Contract (PMC) Yigo Diesel
26 Generators. *See R. at 5117 of 6970 (Binder 9 of 11, Pdf p. 5130).*

27
28 Dooik Eng Co., Ltd. (Dooik) tendered its submission on March 8, 2023. R. at 3077, 3083
29 of 6970 (Binder 5 of 11, Pdf p. 3090, 3096).

30
31 On May 23, 2023, GPA rejected Dooik's bid as non-responsive based on its qualitative
32 proposal score. R. at 760 of 6970 (Binder 2 of 11, Pdf p. 773).

1 On May 30, 2023, Dooik, filed a protest pursuant to 5 GCA § 5425. R. at 759 of 6970
2 (Binder 2 of 11, Pdf p. 772). In its protest, Dooik argued that:

- 3
- 4 (1) GPA deemed Dooik's bid to be non-responsive;
 - 5 (2) Dooik should have qualified for GPA-023-23 because GPA-023-23 had the
6 same specifications as an earlier solicitation, GPA-061-20, and GPA's
7 evaluation committee had recommended that Dooik be awarded the contract
8 under the earlier solicitation, GPA-061-20; and
 - 9 (3) Dooik had invested substantial time and effort into the bid process and should
10 therefore qualify.

11 R. at 759 of 6970 (Binder 2 of 11, Pdf p. 772).

12 On September 6, 2023, GPA issued its decision, denying Dooik's protest. R. at 444 of
13 6970 (Binder 1 of 11, Pdf p. 457). GPA responded to Dooik's arguments in turn:

- 14 (1) GPA's bid rejection informed Dooik that Dooik had received an unacceptable
15 score, the score was based on the criteria set forth in the bid's Technical
16 Proposal Workbook in accordance with 5 GCA § 5211(e), Dooik consented
17 to the criteria by submitting a bid, Dooik's unacceptable score made it
18 ineligible for additional opportunity to supplement its technical offer, and the
19 reference in GPA's bid rejection of Dooik's bid as "non-responsive" did not
20 mitigate Dooik's unacceptable score;
- 21 (2) GPA-023-23 and GPA-023-23 differed in significant ways, namely, in
22 contrast to the earlier bid, the later bid stated that GPA would rely on the
23 contractor to perform operations and maintenance at the plant and would not
24 commit to supply any of its own GPA personnel; and
- 25 (3) the bid instructions informed all bidders, including Dooik, that they must bear
26 the costs incurred in preparing and submitting a bid themselves and GPA
27 could not consider a bidder's time and effort when determining whether a bid
28 is acceptable.

29 R. at 444-445 of 6970 (Binder 1 of 11, Pdf p. 457-458).

30 Dooik filed the instant appeal with the OPA on September 18, 2023. R. at 4 of 6970
31 (Binder 1 of 11, Pdf p. 17). In its appeal, Dooik argued:

- 32 (1) Dooik qualified in GPA-061-20, an earlier multi-step bid for a PMC for the
Yigo diesel generators that GPA cancelled, and therefore, according to Dooik,
it should have qualified for GPA-023-23, another multi-step bid for a PMC
for the Yigo diesel generators, because both procurements allegedly involved
"the same services" and the non-availability of GPA personnel in GPA-023-
23 is a "minor change" insufficient to disqualify Dooik;

- 1 (2) the non-availability of GPA personnel to staff the plant is allegedly a mere
2 “cost factor” that cannot be used as an evaluation criterion to determine
3 whether a bidder is qualified;
4 (3) Dooik is allegedly qualified to operate and manage the Yigo diesel generators
5 because Dooik’s president has spent many years operating and managing
6 GPA generators at another company.

7 R. at 5-6 of 6970 (Binder 1 of 11, Pdf p. 18-19).

8 In its ruling request, Dooik seeks the following relief:

- 9 (1) Appellant requests that GPA reevaluate Appellant’s qualifications based on
10 experience and ability to perform the contract.
11 (2) Section 3.8 GPA Staffing should not be scored as an evaluation criteri[on] to
12 determine qualification but rather a cost component in the bid price.
13 (3) GPA evaluate bids consistent with the procurement policy of fostering
14 competition.

15 R. at 6 of 6970 (Binder 1 of 11, Pdf p. 19).

16 GPA issued a stay in GPA-023-23 on September 18, 2023. R. at 668 of 6970 (Binder 2
17 of 11, Pdf p. 681). GPA submitted a copy of the procurement record to the OPA on
18 September 26, 2023.

19 On October 3, 2023, GPA submitted a copy of its Agency Report to the OPA. In its
20 report, GPA responded to Dooik’s appeal:

- 21 (1) GPA-061-20 and GPA-023-23 are not identical procurements, because in the
22 latter procurement, unlike in the former procurement, bidders had to assume
23 that they would need to completely staff plant operations and maintenance
24 and no GPA staff would be available; and
25 (2) the technical requirements for bidder personnel to support plant operations
26 were factors used to determine a bidder’s acceptability, not factors to be
27 negotiated or determined at pricing, and Dooik’s proposal, when scored under
28 the compliance, regulatory, and capability criteria, fell short of the
29 requirements.

30 Agency Report, Case No. OPA-PA-23-004 at 3-5 (Oct. 3, 2023).

31 Dooik filed a Comment to the Agency Report on October 13, 2023. In its comment,
32 Dooik argues:

- 1 (1) GPA 061-20 and GPA-023-23 are the same, because in the latter procurement
2 the scoring workbook is identical and because GPA reserves the right to
3 assign GPA employees to staff the Yigo diesel generators;
- 4 (2) GPA itself linked staffing to pricing when it stated that bidders, when
5 establishing their bid prices, had to assume that they would need to
6 completely staff the plant and no GPA staffing would be available, leading
7 bidders to believe that they would be expected to adjust their bid price rather
8 than their technical proposal; and
- 9 (3) one of the evaluators, GPA's controller, left blanks in her scoresheets.

10 Comment to Agency Report, Case No. OPA-PA-23-004 at 3-5 (Oct. 13, 2023). In addition,
11 Dooik's Comment to the Agency Report includes comments to the Procurement Record,
12 alleging:

- 13 (1) GPA violated the Procurement Law for failing to include "potentially
14 acceptable" as an evaluation category;
- 15 (2) The procurement record does not include planning records to justify the need
16 to procure a PMC through a Multi-Step IFB rather than through an RFP.

17 Comment to Agency Report, Case No. OPA-PA-23-004 at 5-7 (Oct. 13, 2023).

18 GPA now moves for the dismissal of Dooik's procurement appeal for lack of subject
19 matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be
20 granted.

21 **III. Argument.**

22 **A. Standards governing motions to dismiss for lack of jurisdiction or failure to state a claim 23 upon which relief can be granted.**

24 When deciding a motion to dismiss for lack of jurisdiction or failure to state a claim upon
25 which relief can be granted, a court or tribunal generally construes the allegations in favor of the
26 non-moving party, presuming factual allegations to be true and giving the non-movant every
27 favorable inference that may be drawn from the allegations of fact. *See generally Arnold v.*
28 *Melwani*, CV. NO. 09-00030 DAE, 8-12 (D. Guam Jan. 10, 2013). The tribunal need not,
29 however, accept as true any legal conclusions or inferences unsupported by the facts. *Id.*
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1 **B. Appellant’s award of an earlier procurement does not entitlement it to award of this**
2 **procurement because the two are different.**

3 Dooik contends that, because it was awarded in GPA-061-20, it should have been
4 awarded in GPA-023-23, because the two procurements are the same: they seek the same
5 services, i.e., a performance management contract for the Yigo diesel generators, and have the
6 same staffing requirements for trained, qualified personnel.
7

8 In its Comment to the Agency Report, Dooik compares the staffing requirements between
9 the earlier procurement, GPA-061-20, and the later procurement, GPA-023-23:
10

11 GPA-061-20, Section 3.8: “The CONTRACTOR shall manage the GPA
12 employees assigned to operate and maintain the Yigo Diesel Generators, and
13 ensure that the personnel receive appropriate training, certification and
14 experience to be able to operate and maintain the unit with above-average
15 competence and abilities.” Comment to Agency Report, Case No.
OPA-PA-23-004 at 3 & Exhibit B, Bates 000266 (Oct. 13, 2023).

16 GPA-023-23, Section 3.8: “GPA may assign GPA employees to operate and
17 maintain the Yigo Diesel Generators. If GPA assigns employees for the
18 operations of the Yigo Diesel Generators, the CONTRACTOR shall manage the
19 GPA employees and ensure that the personnel receive appropriate training.”
20 Comment to Agency Report, Case No. OPA-PA-23-004 at 3 & Exhibit A, Bates
000067-000068 (Oct. 13, 2023).

21 The language in the two procurements differs, and the difference turns out to be
22 significant. In the earlier project, the contractor was expected to manage GPA employees, who
23 GPA already knows are trained and qualified. In the later project, GPA may assign its employees
24 to work with the contractor, which implies that GPA may not assign its own employees but will
25 rely on the contractor to supply staff. As a consequence, the contractor must supply trained,
26 qualified personnel capable of performing the work.
27

28 Dooik brushes this off as a “cost component”, because GPA said “[b]idders shall assume
29 that they will need to completely staff the plant, both in operations and maintenance and that no
30 GPA staffing is available when establishing their bid prices”. R. at 4727 of 6970 (Binder 8 of
31 11, Pdf p. 4740). According to Dooik, this meant that GPA expected bidders to adjust their bid
32

1 price rather than their technical proposal. Instead, it shows that GPA expects bidders to have the
2 technical know-how because the contractor will not be able to rely on GPA's employees. This
3 would affect how the bidders wish to proceed, so GPA is giving them appropriate notice.
4

5 Dooik suggests that, because the staffing scoresheets are the same for both procurements,
6 the evaluations must necessarily be the same as well. Both projects require the workers to do the
7 same (or almost the same) work—the difference arises with the bidder's ability to meet staffing
8 requirements. Thus, although the scoresheets are the same, the bidder's ability to meet the
9 staffing requirements of the earlier procurement does not translate to an ability to meet the
10 staffing requirements of the later procurement. Because GPA was supplying staff for the earlier
11 procurement, Dooik was able to attain an acceptable score. Now that GPA will not necessarily
12 supply the staff for the later procurement, Dooik was not able to attain an acceptable score.
13
14
15

16 The facts are not in dispute. The later procurement requires greater expertise than the
17 earlier one. The mere fact that Dooik qualified for the earlier PMC does not entitle it to qualify
18 for the later one. Dooik has failed to state a cause of action and its appeal should be dismissed.
19

20 **C. Appellant has waived issues raised for the first time on appeal.**

21 **1. Evaluator's blank scoresheets.**

22 Dooik complains that one of the evaluators, GPA's controller, left blanks in her
23 scoresheets. Dooik raises this issue for the first time in its Comment to the Agency Report, and
24 did not raise it in the notice of appeal. Dooik could have requested its scores when it initiated the
25 protest, but did not do so. As a result, Dooik has waived the issue and the OPA lacks jurisdiction
26 to decide it.
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30 In any event, GPA's controller left the same blanks in all of her scoresheets for all
31 bidders, *see* Agency Report, Case No. OPA-PA-23-004 at Ex. A at A-49, A-53, A-56, A-59
32 (Oct. 3, 2023) (Pdf pp. 54, 58, 61, 64), because the controller evaluates only financial factors.

1 Dooik received the same treatment as the other bidders and suffered no prejudice as a result.
2 Dooik therefore has failed to state a valid claim on these grounds.

3
4 **2. Scoring categories.**

5 Dooik alleges that GPA's failure to include "potentially acceptable" as an evaluation
6 category violated the Procurement Law. GPA does not concede Dooik's point, but notes that its
7 complaint touches on the actual solicitation and should therefore have been raised earlier. *See*
8 5 GCA § 5425(a) (giving an aggrieved bidder fourteen days from constructive notice of the
9 relevant facts to protest a solicitation). Dooik, however, did not raise until now the issue of the
10 three requirement categories that GPA needed to score or evaluate the bidders' proposals on:
11 acceptable, potentially acceptable, and unacceptable. Only now does Dooik contend that the only
12 viable categories are acceptable and unacceptable.
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16 Dooik's complaint comes too late. *See* 5 GCA § 5425(a) ("A decision under Subsection
17 (c) of this Section [i.e. a decision on the protest] . . . may be appealed by the protestant, to the
18 Public Auditor within fifteen (15) days after receipt by the protestant of the notice of decision.").
19 Consequently, the OPA lacks jurisdiction to address Dooik's claim on these grounds.
20

21 **3. Method of solicitation.**

22 Dooik argues that it is entitled to relief because the procurement record does not include
23 planning records to justify the need to procure a PMC through a Multi-Step IFB rather than
24 through an RFP. A multi-step IFB is but one method of solicitation among various methods used
25 to procure government goods and services and supplies, including IFBs, RFPs, small purchases,
26 sole source procurements, and others. Dooik went through Phase I of the Multi-Step IFB,
27 protested, was denied, and appealed, but did not mention the method of solicitation. Only now,
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32 in its Comment to the Agency Report, does Dooik challenge the method of solicitation.

1 “Any actual or prospective bidder, offeror, or contractor who may be aggrieved in
2 connection with the method of source selection, solicitation, or award of a contract, may protest
3 to the . . . head of a purchasing agency. The protest shall be submitted in writing within fourteen
4 days after such aggrieved person knows or should know of the facts giving rise thereto.” 5 GCA
5 § 5425(a). GPA does not concede Dooik’s point, but notes that, as with the scoring categories,
6 Dooik’s complaint is untimely. *See* 5 GCA § 5425(e). As a result, the OPA lacks jurisdiction
7 over Dooik’s claim on this basis.
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10 **D. Appellant’s ruling request is inconsistent with the Procurement Law.**
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12 In its ruling request, Dooik asks the OPA to direct “GPA [to] evaluate bids consistent
13 with the procurement policy of fostering competition.” R. at 6 of 6970 (Binder 1 of 11, Pdf p.
14 19). GPA acknowledges that section 5001 of the Guam Procurement Law provides that the
15 underlying purposes and policies of the law include “foster[ing] effective broad-based
16 competition within the free enterprise system”. 5 GCA § 5001(b)(6). But GPA points out that,
17 in that same section, the law also endeavors “to provide safeguards for the maintenance of a
18 procurement system of quality and integrity”. 5 GCA § 5001(b)(7).
19
20

21 Section 12013 of Title 2 of the Guam Administrative Rules and Regulations governs the
22 OPA’s jurisdiction and provides in pertinent part: “The Public Auditor’s jurisdiction shall be
23 utilized to promote the integrity of the procurement process and the purposes of 5 GCA
24 Chapter 5.” 2 GAR § 12103(a). By asking the OPA to rule that staffing should be scored to
25 determine not qualification but rather cost, Dooik undermines the safeguards for quality and
26 integrity while doing nothing to foster competition. This subverts the OPA’s jurisdictional role.
27 The OPA lacks jurisdiction on these grounds and should therefore deny Dooik the requested
28 relief.
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1 **IV. Conclusion.**

2 In light of the foregoing, appellant Dooik has either failed to state a claim upon which
3 relief can be granted or show that the OPA has jurisdiction. The OPA should therefore dismiss
4 this appeal.
5

6 Respectfully submitted this 13th day of November 2023.

7 *Attorney for Guam Power Authority*

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9
10 By: /s/
11 Marianne Woloschuk
12 GPA Legal Counsel
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