

Dooley Roberts & Fowler LLP
865 South Marine Corps Drive, Suite 201
Tamuning, Guam 96913
Telephone (671) 646-1222
Facsimile (671) 646-1223
E-mail: fowler@guamlawoffice.com

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 12/15/14
TIME: 4:15 AM PM BY: J-L
FILE NO OPA-PA: 14-009

Attorneys for
Morrico Equipment, LLC

OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of) Docket No. OPA-PA-14-009
)
Triple J Enterprises, Inc.) **REPLY MEMORANDUM IN SUPPORT OF**
) **MOTION TO SET ASIDE ORDER**
Appellant.) **DISMISSING APPEAL WITH PREJUDICE**
)
)
_____)

Morrigo Equipment, LLC, hereby files its reply memorandum in support of its motion for the Office of Public Accountability (“OPA”), to set aside its order dismissing this appeal with prejudice. Morrigo also responds to the OPA’s Order requesting briefing on the issue of the OPA’s jurisdiction with respect to the relief sought by Morrigo herein.

I. Jurisdiction.

Pursuant to 5 GCA § 5703, the OPA has jurisdiction over “any matter properly submitted to her or him.” Triple J appealed to the OPA under 5 GCA § 5425(e), which allows an appeal to the Public Auditor from an agency decision on a protest rendered under 5 GCA § 5425(c). The only question before the OPA on Triple J’s appeal was whether the GSA properly denied the Triple J protest. 2 GAR § 12201, pursuant to which Triple J brought this appeal, provides only that “[t]he Public Auditor shall determine whether a decision on the protest of method of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation.”

ORIGINAL

Here, Triple J did not appeal the question of whether GSA properly exercised its discretion in setting aside its decision to cancel and re-bid the procurement, in withdrawing its rejection of Triple J's bid for being non-responsive or in entering into a settlement agreement with Triple J. Those questions were not framed by the Triple J appeal and the OPA had no jurisdiction to review or ratify those determinations. *See, e.g., In the Appeal of Peter Alexis Ada, dba APM: Guam Medical Referral Services*, Appeal No. OPA-PA-11-016, January 6, 2012, Decision, p. 7 ("APM did not protest the issues identified herein and they were not reviewed by GSA nor are they part of GSA's August 4, 2011 Decision. Thus, the Public Auditor does not have jurisdiction to hear these issues because they are not properly before her and GSA's Motion to Exclude Appellant's Comments on the Agency Report is here GRANTED.>").

The jurisdiction of the OPA with respect to the Triple J settlement agreement appears to depend on whether the OPA's execution of the settlement agreement was procedural or substantive. If the OPA's execution of the settlement agreement was substantive, the OPA should have jurisdiction over the relief sought by Morrico herein. However, if the OPA's execution of the settlement agreement was merely procedural, simply acknowledging the dismissal of the Triple J appeal with prejudice, then the OPA should likely not have jurisdiction over the relief sought by Morrico.

The GSA and its counsel, the Office of the Attorney General ("AG"), appear to rely on the OPA's execution of the settlement agreement as substantive; as an approval of the terms and conditions of the settlement. On November 10, 2014, Morrico filed a protest with the GSA with respect to its intent to award a contract to Triple J for the purchase of the school buses that were the subject of GSA Bid No. 065-14. The GSA denied Morrico's November 10, 2014, protest on the

ground that the settlement agreement was consummated pursuant to the protest resolution provisions of 5 GCA § 5425(b), and that, “[f]urthermore, the OPA signed the agreement as well.” *See, Exhibit A.* The AG similarly takes the position that “[t]he settlement agreement was approved by the Public Auditor.” *See, December 1, 2014, AG Opposition to the Motion to Set Aside Order Dismissing Appeal With Prejudice, p. 1.* Accordingly, the GSA and the AG believe that the OPA’s execution of the settlement agreement was an approval of its terms and conditions and, therefore, of substantive effect. Triple J also takes this same position. It argues that “[t]he determination made by GSA and the OPA to approve the form and legality of the Settlement Agreement, to sign the Settlement Agreement, and to thereby allow Triple J to correct its bid” are final and conclusive. *See, Triple J December 1, 2014, Opposition to Motion to Set Aside Order Dismissing Appeal with Prejudice; Cross-Motion for Ratification and Affirmance of Contract, p. 13 (“Triple J Opposition”).*

But, the OPA’s jurisdiction would not appear to encompass the substantive approval of settlement agreements between the government and private vendors, unless such settlement agreement becomes the subject of a protest which is appealed to the OPA. With respect to procurement solicitations, the OPA only has jurisdiction over protests. The GSA and the AG pretend that they entered into the Triple J settlement agreement as a proper method of resolving a protest under 5 GCA § 5425(b). This of course is not what happened. The GSA did not enter into a settlement with Triple J under that provision. Instead, it issued a written denial of the Triple J protest pursuant to Section 5425(c). *See, Triple J October 29, 2014, Notice of Appeal, Exhibit L.* Thereafter, Section 5425(b) was of no further import.

However, if we assume hypothetically that rather than denying the Triple J protest under 5425(c) the GSA had actually entered into a settlement agreement under Section 5425(b), then

neither Triple J nor the GSA could have filed an appeal with the OPA for the purpose of obtaining the OPA's approval of the terms and conditions of that settlement agreement. This is because a settlement agreement is not a solicitation protest over which the OPA has jurisdiction. There can be no difference with respect to the OPA's jurisdiction based on the fact that GSA and Triple J entered into a settlement after Triple J had appealed to the OPA. The settlement agreement was not a protest and the OPA still would have no jurisdiction over it. This would all lead to a conclusion that the OPA did not have jurisdiction to substantively approve the terms and conditions of the settlement agreement. The jurisdiction of the OPA would only extend to the acknowledgement of the procedural dismissal with prejudice by Triple J of its appeal.

The troubling aspect of this is, however, that an appellant may dismiss an OPA appeal with prejudice of its own accord. The appellant does not appear to need the OPA's permission to dismiss an appeal with prejudice. The only time that the OPA has a say in the matter of an appeal dismissal is when an appellant seeks to dismiss its OPA appeal *without* prejudice. *See*, 2 GAR § 12104(c)(8) ("After notice of an Appeal to the Public Auditor has been filed a party may not discontinue such Appeal without prejudice, except as authorized by the Public Auditor.") (emphasis added). And, the OPA should certainly have a say in whether an Appellant can play yo-yos with an OPA appeal by dismissing without prejudice and then later re-filing the appeal. So, when Triple J submitted a document by which it dismissed its appeal with prejudice, no action of the OPA was required. But since the OPA actually did sign the settlement agreement containing a stipulation for dismissal with prejudice of the Triple J appeal, we may rightfully ask, what was the effect of that?

Frankly, the OPA has signed off on a number of procurement appeal dismissals. Some based on settlements and some not. For example, the OPA executed a stipulation and order for

dismissal of an appeal in *In the Appeal of Tokio Marine Pacific Insurance Limited and Calvo's Insurance Underwriters, Inc.*, OPA-PA-12-013. See, **Exhibit B**. The stipulated dismissal in that case did not actually state whether the dismissal was with prejudice or without; however, by the terms of the stipulation, it was clear that all of the interested parties to that matter were foregoing any further procurement related protests or appeals regarding the government of Guam insurance negotiations for fiscal year 2013 that were at issue before the OPA in that matter. One distinguishing feature of that stipulated dismissal, unlike here, was that all of the interested parties joined in the dismissal. Due process rights were acknowledged and protected. Here, Morrico was not included in the negotiations toward the settlement agreement and was not asked to sign off on the settlement agreement.

Nonetheless, however, under the statutes and rules governing the OPA, it would appear that the Public Auditor's execution of the settlement agreement was a mere procedural acknowledgement of Triple J's dismissal of its appeal with prejudice. But this must be clarified since the GSA, the AG and Triple J appear to rely on the OPA's execution of the settlement agreement as a substantive approval of its terms and conditions. Further, if the OPA's execution of the settlement agreement was substantive, then Morrico has a due process right to be heard on that matter. This is an important question that should be addressed, not only for purposes of this matter, but also for guidance in future OPA appeals in which parties attempt to resolve their procurement disputes through settlement agreements.

II. Interested Party.

Triple J and the AG argue that Morrico was not an interested party. However, on October 30, 2014, the OPA wrote to the GSA's Chief Procurement Officer and advised that she must

“provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals.” 2 GAR § 12104(c)(2) provides that “[t]he Chief Procurement Officer ... shall give notice of the Appeal to the contractor if award has been made or, if no award has been made, to all Interested Parties.” That provision further requires that the Chief Procurement Officer “shall communicate to the Public Auditor the identities and addresses of said parties.” The Chief Procurement Officer failed to provide notice of the Triple J appeal to Morrigo and also failed to advise the Public Auditor of the identities of any interested parties.

And, it is hard to understand how Morrigo was not an interested party since it was the only other bidder on the solicitation. Further, the purported settlement agreement included terms and provisions expressly mentioning and affecting Morrigo’s interests. 2 GAR § 12102(d) provides that “A prospective bidder, contractor or offeror is one who will actually submit a bid, contract or otherwise offer his services if such person would prevail in the Appeal.” 2 GAR § 12102(c) provides that an “Interested Party means an actual or prospective bidder, offeror, or contractor who appears to have a substantial and reasonable prospect of receiving an award if the Appeal is denied.” Here, Morrigo was an actual offeror having submitted a bid for the IFB. Morrigo is also a prospective bidder since it was relying on the GSA’s decision to cancel and re-bid the procurement. Morrigo has a 50/50 chance of obtaining an award since there are only two bidders and it fully intends to compete for an award upon the re-bid of the solicitation that the GSA advised it would let. Those are odds well worth competing over and Morrigo has a substantial interest herein.

In *In The Appeal of Guam Community Improvement Foundation, Inc.*, OPA-PA-09-005, p. 10, the OPA held that a losing bidder is an aggrieved bidder. Morrigo is also certainly aggrieved. It

was told by the GSA that the IFB was cancelled and would be re-bid. Morrico at that point was a prospective bidder and would have standing to challenge or protest subsequent decisions of the GSA which nullified its status as a prospective bidder. In *In The Appeal of Oceania Collection Services*, OPA-PA-08-006, the OPA heard an appeal by a fourth ranked bidder and overturned the solicitation as it was conducted in violation of the procurement code. The fourth ranked bidder was obviously an interested party. In a recent article in the Guam PDN, the Public Auditor referenced this case as an example of how the appellate procurement process serves the public interest. *See, Exhibit C*. Further, 2 GAR § 12104(c)(2) requires notice to “all Interested Parties.” This is plural, meaning that there can obviously be more than one interested party. Accordingly, this provision does not require that an interested party prove to an absolute certainty that it will obtain an award through resolution of an OPA appeal or through an agency’s re-bid of a solicitation after a cancellation.

Triple J also argues that the GSA’s Chief Procurement Officer was not required to provide notice to Morrico of the Triple J appeal under 2 GAR § 12104(c)(2) because an award was made. However, an award has not been made. The settlement agreement was made contingent on the approval of Triple J’s drawings and seating plans. The AG has expressly stated that if Triple J’s seating plan is approved, “[a] notice to award will be issued thereafter to Morrico and Triple J. In the event, the schematics do not comply, no award will be issued and the bid will be cancelled.” *See, AG Opposition*, p. 2. There has obviously been no award here.

Triple J also argues that Morrico does not have standing because the GSA rejected its bid as non-responsive. *See, Triple J Opposition*, p. 9. By that reasoning, however, Triple J had no

standing to file a protest or to file an appeal to the OPA because the GSA also rejected the Triple J bid as non-responsive.

Finally, Morrico opposes Triple J's cross-motion for ratification and affirmance of the settlement agreement. At this point, the only issue before the OPA is whether to set aside the dismissal of the Triple J appeal with prejudice. If the OPA does set aside the dismissal, perhaps Triple J could renew the motion. But it is certainly not ripe at this juncture.

Accordingly, based on the foregoing, Morrico respectfully requests that the OPA set aside its order dismissing this appeal with prejudice and allow Morrico to be heard on the merits thereof. Alternatively, Morrico requests that the OPA rule that its execution of the GSA/Triple J settlement agreement was a mere procedural acknowledgement of Triple J's dismissal of its appeal with prejudice and that the OPA's execution of that agreement was not an approval of its substantive terms and conditions.

DOOLEY ROBERTS & FOWLER LLP

Date: December 5, 2014

By:



KEVIN J. FOWLER

Attorneys for Morrico Equipment, LLC

Eddie Baza Calvo
Governor



GENERAL SERVICES AGENCY

(Ahensian Setbision Hinirat)
Department of Administration

148 Route 1 Marine Drive, Piti, Guam 96915
Tel: (671) 475-1707 Fax Nos: (671) 475-1727 / 472-4217

Ray Tenorio
Lieutenant Governor

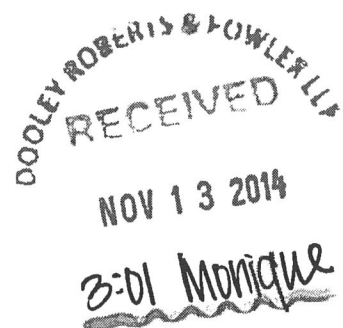
Benita A. Manglona
Director

John A.B. Pangelinan
Acting Deputy Director

November 12, 2014

Memorandum

Mr. Kevin J. Fowler, Esq.
c/o Dooley, Roberts and Fowler, LLP
865 South Marine Corps Drive, Suite 201
Tamuning, Guam 96913



Re: Protest on GSA Bid No. 065-14(School Bus)

Dear Mr. Fowler:

We are in receipt of your protest dated November 10, 2014, in which you protested the award of the above stated bid to Triple J Enterprises. You had indicated the basis for your protest as that GSA advised Morrico on September 9 that your client's bid was rejected for con-compliance with the specifications requiring the use of rivets on all exterior body parts and that this solicitation will be re-bid.

That you learned that Triple J filed a protest regarding the bid being rejected as non-responsive for failure to submit descriptive literature as a material deviation from the mandatory requirements of the bid. Further that after Triple J filed an appeal with the OPA, GSA is prepared to make a contract award to Triple J.


You are protesting the award because you believe that the Triple J bid was non-responsive for failure to provide the required literature; further, that Triple J failed to include any specifications that would allow GSA to determine whether Triple J was offering what the government was soliciting. Finally, you argue that you believe that the Triple J bid did not meet the rivet requirement of the bid.

On October 29, 2014, Triple J filed an appeal with the Office of Public Accountability (OPA case number 14-009). As stated in 5 GCA Section 5425(b) in pertinent part:

The Chief Procurement Officer....shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle, and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective concerning the solicitation or award of a contract.



This is what was done to resolve the appeal. Furthermore, the OPA signed the agreement as well. Therefore, your protest is denied. You have the right to seek any judicial or administrative review authorized by law.

 11/13/07

(
CLAUDIA S. ACFALLE
Chief Procurement Officer

MAIR, MAIR, SPADE & THOMPSON, L.L.C.

Attorneys at Law
238 A.F.C. Flores Street
Suite 801, DNA Building
Hagåtña, Guam 96910
Telephone: (671) 472-2089/2090
Facsimile: (671) 477-5206

Attorneys for Interested Party TakeCare
Insurance Company, Inc.

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

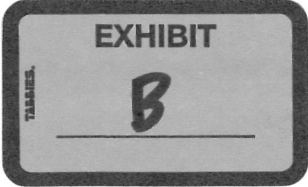
In the Appeal of)	DOCKET NO. OPA-PA-12-013
)	
TOKIO MARINE PACIFIC INSURANCE)	
LIMITED and CALVO'S INSURANCE)	STIPULATION AND
UNDERWRITERS, INC.)	[PROPOSED] ORDER FOR
)	DISMISSAL OF PROCUREMENT
Appellants.)	APPEAL
_____)	

Interested Party TakeCare Insurance Company, Inc. ("TakeCare"), Appellants Tokio Marine Pacific Insurance Limited and Calvo's Insurance Underwriters, Inc. ("SelectCare"), Interested Party Island Home Insurance Company ("Island Home"), and the Department of Administration, Government of Guam ("DOA") hereby jointly submit this stipulation for dismissal of this procurement appeal.

I.

RECITALS

WHEREAS, on September 19, 2012, SelectCare filed the instant appeal of the September 7, 2012 Notice of Decision ("Notice of Decision") by the Director of Administration in Request for Proposals DOA/HRD-RFP-GHI-13-001 (the "RFP") which was a solicitation for group health and dental insurance for Government of Guam employees and retirees for Fiscal Year 2013; and



WHEREAS, in response to the three (3) protests filed by TakeCare, SelectCare, and Island Home, DOA indicated that due to meritorious claims within these protests, the RFP will be cancelled; and

WHEREAS, the instant procurement appeal by SelectCare requests, among other things, that the Office of Public Accountability, Guam ("OPA") direct DOA to void the cancellation and reinstitute the RFP; and

WHEREAS, with nearly half of Fiscal Year 2013 having passed, SelectCare, TakeCare, Island Home, and DOA have together determined that no matter which party prevails in the instant appeal, and no matter which party prevails in any court proceedings which may follow this appeal, it is no longer economically feasible for any health insurance provider to enter into a new Fiscal Year 2013 contract for Government of Guam employees; and

WHEREAS, in light of this fact, the parties believe it would serve no purpose to continue litigating this appeal and that it is in the best interest of the Government of Guam and its employees that this appeal be dismissed so that the government may re-focus its attention and resources on a well-planned and properly implemented Fiscal Year 2014 solicitation – which must be issued and concluded all within the next few months.

II.

STIPULATION FOR DISMISSAL

Now, therefore, TakeCare, SelectCare, Island Home, and DOA hereby stipulate and agree as follows:

1. The parties agree that the instant procurement appeal shall be DISMISSED.
2. The parties agree that no action will be taken by any party to solicit, procure, or otherwise negotiate, a new group health and dental insurance contract for Government of Guam employees for Fiscal Year 2013.


3. The parties agree that the dismissal of the instant appeal shall not be construed as an admission or affirmation by any party of the merits of any assertion made, or any issue raised or argued, by any other party in these proceedings.

4. Each party agrees to be responsible for its own costs and expenses, including attorneys' fees, incurred in connection with this appeal.

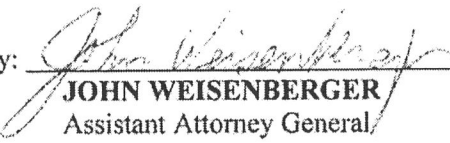
SO STIPULATED.

CALVO FISHER & JACOB LLP
Attorneys for Appellants
Tokio Marine Pacific Insurance Limited
and Calvo's Insurance Underwriters, Inc.

**OFFICE OF THE ATTORNEY GENERAL
OF GUAM**
LEONARDO M. RAPADAS, ATTORNEY
GENERAL
Attorneys for Department of Administration

By: 

JANALYNN CRUZ DAMIAN

By: 

JOHN WEISENBERGER
Assistant Attorney General

Date: 2/25/13

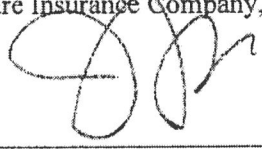
Date: 2/25/13

CABOT MANTANONA, LLP
Attorneys for Interested Party
Island Home Insurance Company

MAIR, MAIR, SPADE & THOMPSON, L.L.C.
Attorneys for Interested Party
TakeCare Insurance Company, Inc.

By: 

CATRINA CAMPANA


By: 

DAVID A. MAIR

Date: 2/25/13

Date: Feb. 25, 2013

SO ORDERED: 2/25/13


~~Peter C. Perez, Hearing Officer~~ **DORIS FLORES BORK**
Office of Public Accountability **PUBLIC AUDITOR**

CLASSIFIEDS: JOIN OUR TEAM JOBS CARS HOMES APARTMENTS LEGAL NOTICES DATING BUY & SELL PLACE AN AD SUBSCRIBE

- News
- Entertainment
- Weather
- Opinion
- Obituaries
- Lifestyle
- Sports
- Help

FEATURED: e-Newspaper Phonebook Marketplace PIKA's Best of Guam ELECTION

Find what you are looking for ..

SEARCH

ADVERTISEMENT

Public auditor: Procurement appeals benefit GovGuam

Nov. 20, 2014 | Comments

A A



The Office of Public Accountability handles about a dozen procurement appeals a year, according to Public Auditor Doris Brooks, who yesterday told lawmakers the government of Guam has benefitted from those appeals.

Vice Speaker Benjamin Cruz, D-Piti, said the intent of procurement protests is to benefit GovGuam, and protests serve the purpose of ensuring the government received the best bid.

Senators yesterday held a round-table discussion on a bill that is intended to streamline the appeals process for

government procurement.

Sen. Tom Ada, D-Tamuning, who wrote Bill 224, said the latest version of the bill incorporates some of the changes recommended during recent public hearings.

DFS case

Cruz questioned whether the proposed revisions would prevent the type of prolonged procurement protest currently being pursued by DFS over the airport concession contract. DFS, which lost the contract after holding it for decades, has argued the selection process for the airport concession was tainted by improper gifts. It brought its complaint to the Superior Court of Guam and to the Office of Public Accountability, which sent the matter back to court.

Brooks, who declined to discuss the merits of the DFS case, said the bill addresses the delay in procurement protests by setting a 60-day time limit for agencies to respond to a protest.

If the agency doesn't issue a final written decision within 60 days of being asked, the protest is automatically considered to be rejected and the petitioner can appeal to the public auditor, the bill states.

Written by
Steve Lintiacio
Pacific Daily News

FILED UNDER

News
Local News

ADVERTISEMENT

Most Popular Most Commented More Headlines

- 1 Death a homicide: Man killed by blunt-force trauma
- 2 Body of man found near Tanguisson Beach identified, police classify case as homicide
- 3 Celebrity style: Girl from Guam does makeup for STARS
- 4 Roby convicted on five counts of rape
- 5 Group questions gaming at Tiyan

Most Viewed

ADVERTISEMENT

ADVERTISEMENT



Ada said there are two main changes from the bill's original version. The first change requires the public auditor to draft rules and regulations for procurement, and the second change delays implementation of the bill for 180 days to allow time for the rules to be written and submitted to lawmakers for approval.

Also discussed yesterday was the issue of who should be allowed to file a procurement protest and whether a "protest bond" should be required as a condition of filing an appeal.

Robert Kono said GSA is concerned that bidders who are unlikely to win the contract, even if their protest is successful, are currently allowed to file protests.

"Even if they should win their issue, it may not change who would get the award," Kono said, noting that the law currently states any aggrieved person may file a protest. "So it could be the tenth (ranked) person on a bid."

Brooks said her office has consistently opposed the requirement of protest bonds, saying they would have a "chilling effect" and discourage businesses from filing protests.

"It doesn't encourage the open(ness) and transparency of the procurement process," Brooks said.

She noted one instance in which a small debt-collection business, which was ranked third or fourth for a contract with the Department of Chamorro Affairs, protested the procurement process "on principle" and won.

"It was a good appeal," Brooks said.

[View Comments \(\)](#) | [Share your thoughts »](#)