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THE OFFICE OF PUBLIC ACCOUNTABILITY

IN THE APPEALS OF)	Docket No. OPA-PA-14-011
)	Docket No. OPA-PA-14-012
MORRICO EQUIPMENT, LLC,)	
)	BRIEF
Appellant)	

COMES NOW, the General Services Agency of the Government of Guam, (hereafter referred to as "GSA"), by and through its counsel of record, Shannon Taitano, hereby submits its Brief pursuant to the Scheduling Order.

ARGUMENT

The Public Auditor does not have the authority to set aside settlement agreements which resolve procurement protests or appeals, including those agreements reached pursuant to 5 G.C.A. § 5425, and including agreements which are not signed by an interested party. The Settlement Agreement between GSA and Triple J Enterprises (hereafter referred to as "Triple J") was entered into pursuant to 5 G.C.A. § 5425. According to the terms in the Settlement

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ORIGINAL

Agreement, Morrico Equipment, LLC's (hereafter referred to as "Morrico") appeal is not ripe and is untimely.

A. Morrico's Protest is Untimely.

Morrico failed to file a protest within the time required from when it knew of the facts giving rise to its protest. A protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto. 5 G.C.A. § 5425(a). Pursuant to 2 GAR § 9101(c)(1), protests filed after the fourteen (14) day period after the protestor knows or should have known of the facts giving rise to the protest shall not be considered.

Morrico protests any contract award to Triple J in IFB No. GSA065-14 School Bus (60 Passengers) (hereinafter referred to as IFB) because its bid was nonresponsive. Morrico argues Triple J's bid was nonresponsive because Triple J did not provide the required schematics to determine whether their buses are compliant with the IFB. They also claim that Triple J buses uses screws when rivets are required in the IFB and that Triple J's buses use of rivets are proprietary.

Bids were publicly opened on August 12, 2014. Morrico should have known these concerns at the time of bid opening. Even if Morrico wasn't immediately aware of these issues around bid opening, Morrico definitely knew or should have known on October 14, 2014 when Allan Morrison and Jennifer Cabuhat of Morrico reviewed Triple J's bid packet at GSA. Morrico should have protested within the 14 days from that date because that was when they knew or should have known of these facts that give rise to their protests.

Morrico also disputes GSA's determination that their bid was nonresponsive for failure to meet the exterior rivet bid specification. Again, this should have been protested within 14 days

from when they received notice on September 10, 2014 that their bid was rejected. These protests are untimely and should be dismissed.

Morrigo alleges that GSA was deceitful when it notified Morrigo the IFB would be cancelled and rebid which caused the untimeliness of their protest. However, if Morrigo believed it should have been awarded a contract, at the time of bid opening, bid rejection or bid review, then they should have protested within the statutory timeframe. The time to protest has expired.

More importantly, Morrigo's accusation that GSA was deceitful is untrue. GSA did cancel the IFB. GSA was in the process of preparing the rebid when Triple J protested the cancellation of the IFB.

B. Morrigo's Appeal is Not Ripe.

Morrigo protests GSA's intent to award the bus contract to Triple J because Triple J's buses are noncompliant with the IFB. However, Triple J's award is contingent upon GSA's review and determination that Triple J's schematics comply with the bid specifications. Since an award has not been issued, Morrigo's appeal is not ripe. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed, may not occur at all." Davis v. Guam, No. CIVIL CASE 11-00035, 2013 WL 204697, at *7 (D. Guam Jan. 9, 2013).

As mentioned, no award will be issued unless Triple J's schematic conforms to the bid specifications. If no award is issued, GSA will cancel and rebid the procurement. Until such time an award is issued, there is no controversy. Therefore, Morrigo's protest is not ripe.

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C. The Public Auditor Does Not Have Statutory Authority to Set Aside Settlement Agreements.

The Public Auditor is without statutory authority to set aside settlement agreements which resolve procurement protests or appeals, including those agreements reached pursuant to 5 G.C.A. § 5425, and including agreements which are not signed by an interested party.

Title 5 G.C.A. § 5425 grants GSA broad authority to resolve protests prior to the commencement of an action in court concerning the protest. There is nothing in this statute, the Guam Procurement Law, or the Public Auditor's enabling act that authorizes the Public Auditor to set aside such settlement agreements.

“It is well settled ... that a public service commission is an administrative agency created by statute and as such as no inherent powers, but only such as have been expressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted.” *Blanas v. Brower Co.*, 938 P.2d 1056 (Supreme Court of Alaska 1997) (Whether Workers' Compensation Board had the power to set aside a settlement agreement). Clearly, the legislature has not expressly or implicitly granted the Public Auditor the authority to set aside settlement agreements.

Even if it is argued that the Public Auditor has implicit powers to set aside settlement agreements, this power would be limited to settlement agreements obtained through fraud, duress, mistake or similar compelling circumstances. *Fields v. McPherson*, 756 A.2d 420 (D.C. 2000). It is well established that settlement agreements are not lightly set aside. *Colton v. Colton*, 244 P.3d 1121 (Alaska 2010). Courts are reluctant to set aside settlement agreements. *Perez v. Uline, Inc.*, 157 Cal. App. 4th 953, 68 Cal. Rptr. 3d 872 (4th Dist. 2007). Therefore, the

Public Auditor should not set aside the Settlement Agreement with Triple J if she determines she has implicit authority to set aside settlement agreements.

The Settlement Agreement with Triple J was not obtained through fraud, duress, mistake or similar compelling circumstances. The parties felt it would be in the public's best interest to try and resolve the protest as there is a dire need to procure school buses for Guam's schoolchildren. The current fleet is aging and potentially unsafe for our young passengers. Therefore, it is essential that new buses be procured as soon as possible. In order to facilitate a timely procurement of buses, GSA also contacted Morrigo about settlement negotiations. Although Morrigo did not respond to GSA's settlement offer, the parties agreed to include in the settlement an award to Morrigo with the intent of getting the buses to Guam in time for the new school year. Since the Settlement Agreement was executed in good faith and not obtained through fraud or similar compelling circumstances, there is no legal base to set it aside.

Morrigo argues it did not receive notice of Triple J's appeal. However, Morrigo is not an interested party in the appeal requiring notice.

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.” 2 GAR § 12102(b). Morrigo's bid was rejected for failure to meet an exterior rivet specification. Since Morrigo's bid was determined to be noncompliant and rejected, Morrigo does not have a reasonable prospect of receiving an award in this procurement absent the Settlement Agreement. Therefore, Morrigo is not an interested party as defined in the rules. Since Morrigo is not an interested party, notice was not required in the Triple J appeal.

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CONCLUSION

Based on the foregoing argument, the OPA should deny Morrigo's protest and dismiss this matter.

Dated this 2nd day of February, 2015.

OFFICE OF THE ATTORNEY GENERAL
Elizabeth Barrett-Anderson, Attorney General

By: 

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