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FAX

To:	Jay Rojas Administrator Guam Economic Development Authority ITC Building, Suite 511 590 South Marine Corps Drive Tamuning, Guam 96931 Phone: (671) 647-4332 Fax: (671) 649-4146	From:	Doris Flores Brooks Public Auditor Office of Public Accountability
CC:	Thomas J. Fisher, Esq. Fisher & Associates Attorney for GEDA Suite 101 De La Corte Building 167 East Marine Corp. Drive Hagatna, Guam 96910 Phone: (671) 472-1131 Fax: (671) 472-2886	Pages:	6 (including cover page)
CC:	Jon A. Visosky, Esq. Roberts Fowler & Visosky LLP Attorney for Appellant Mega United Corp. Ltd. 865 South Marine Corps. Drive, Suite 201 Tamuning, Guam 96913	Date:	August 2, 2017
Phone: Fax:	(671) 646-1222 (671) 646-1223	Phone: Fax:	475-0390 x. 208 472-7951

Re: OPA-PA-17-007 Decision RE Purchasing Agency's Motion to Dismiss

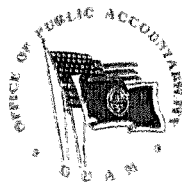
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OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,)	APPEAL NO: OPA-PA-17-007
)	
MEGA UNITED CORP., LTD.,)	DECISION RE PURCHASING
)	AGENCY'S MOTION TO DISMISS
Appellant)	

To: **Purchasing Agency:**
 Guam Economic Development Authority, Government of Guam
 C/O: Thomas J. Fisher, Esq.
 167 E. Marine Corps Drive, Suite 101
 Hagåtña, Guam, 96910
 Facsimile: (671) 472-2886

Appellant:
 Mega United Corp., Ltd.
 C/O: Jon A. Visosky, Esq.
 Roberts Fowler & Visosky LLP
 865 South Marine Corps Drive, Suite 201
 Tamuning, Guam, 96913
 Facsimile: (671) 646-1223

THIS MATTER, came before the Public Auditor on July 19, 2017 for a hearing regarding the Purchasing Agency's June 21, 2017 Motion to Dismiss an Appeal and Stay an Order. The Appellant's President, DAVID ZHANG appeared on behalf of the Appellant and he was represented by the Appellant's counsel of record, JON A. VISOSKY, ESQ. Real Property Division Manager LARRY TOVES appeared on behalf of the Purchasing Agency and he was represented by the Purchasing Agency's counsel of record, THOMAS J. FISHER, ESQ. After hearing the arguments of the parties and for good cause shown, the Public Auditor hereby **FINDS** and **ORDERS** the following:

1 1. The Appellant's Appeal is untimely. The Public Auditor shall have the power to
2 review and determine any matter properly submitted to her. 5 G.C.A. §5703 and 2 G.A.R., Div.
3 4, Chap. 12, §12103(a). This matter is the appeal of the Purchasing Agency's April 10, 2017
4 denial of the Appellant's demand for a final decision on its request for an adjustment of contract
5 price due to prolonged delay.¹ The Public Auditor has the authority to review decisions
6 concerning contract and breach of contract controversies. 5 G.C.A. §5706(a). However, to be
7 properly before the Public Auditor, appeals concerning decisions regarding contract or breach of
8 contract controversies must be filed with the Public Auditor within sixty (60) days after receipt
9 by an aggrieved contractor of a decision on a contract or breach of contract controversy, or
10 within sixty (60) days of the Purchasing Agency's failure to render a timely decision regarding a
11 contract or breach of contract controversy, or within sixty (60) days of the time established by
12 the parties for a decision concerning contract or breach of contract controversy to be rendered by
13 the Purchasing Agency. 5 G.C.A. §5427(e) and (f), and §5706(a) and (b), and 2 G.A.R., Div. 4,
14 Chap. 12, §12113(a). Hence, to be properly before the Public Auditor, the Appellant's appeal
15 must be filed within sixty (60) days after any of the aforementioned events.

16 Here, on April 10, 2017, the Purchasing Agency issued its decision regarding the contract
17 controversy.² The Appellant received the decision on April 13, 2017.³ As stated above, the sixty
18 (60) day period for the Appellant to file their appeal after April 13, 2017 expired on June 12,
19 2017. The Appellant filed its appeal on June 15, 2017, three (3) days after the expiration of the
20 sixty (60) day period to file an appeal. Therefore, the Public Auditor finds that this matter is not
21 properly before her because the Appellant failed to file its appeal of the Purchasing Agency's
22 April 10, 2017 decision denying its contract controversy claim within sixty (60) days after
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26 ¹ Page 1, Notice of appeal filed on June 15, 2017.

27 ² Letter from Administrator Jay Rojas, Guam Economic Development Authority
28 (Hereafter Referred to as "GEDA"), to Jon A. Visosky, Esq., dated April 10,
2017, Exhibit A, Purchasing Agency's Motion to Dismiss filed on June 21,
2017.

³ Email from Jha'Aunie Leon Guerrero to Jon A. Visosky, Esq., et.al., dated
April 13, 2017, Id.

1 receiving it as required by 5 G.C.A. §5427(e) and (f), and §5706(a) and (b), and 2 G.A.R., Div.
2 4, Chap. 12, §12113(a).⁴

3 The Public Auditor is not persuaded by the Appellant's argument that it has never
4 received the decision denying its contract controversy because the Purchasing Agency did not
5 send it to the Appellant at the Appellant's address specified in the contract between the
6 Appellant and the Purchasing Agency for receipt of notices by the parties.⁵ In its April 10, 2017
7 letter, the Purchasing Agency denied the Appellant's contract controversy claim because the
8 Appellant had initially filed its claim in February, 2016 and that the matter was closed because
9 the time to file an appeal before the Public Auditor had expired.⁶ The Appellant did indeed make
10 such a claim to the Purchasing Agency on February 2, 2016.⁷ However, this claim is a
11 reassertion of the Appellant's original contract controversy claim which the Appellant made on
12 October 8, 2014.⁸ Hence, the Public Auditor finds that the Appellant's contract controversy
13 claim was actually filed on October 8, 2014. There is no evidence in the record that the
14 Purchasing Agency denied or otherwise responded to this claim within the sixty (60) days after it
15 was made. Hence, as set forth above, the Appellant could have treated this as a denial of its
16 claim on or about December 7, 2014. Accordingly, the Appellant would have had to file an
17 appeal on or about February 6, 2015. Here, the Appellant's appeal was filed to the Public
18 Auditor on June 15, 2017, however, the Appellant did not do so until more than two (2) years
19

20
21 ⁴ Note: The Appellant's Attorney argued that he did not receive the April 10,
22 2017 letter with the Purchasing Agency's April 13, 2017 email. See
23 Declaration of Jon A. Visosky dated July 13, 2017. However, the Public
24 Auditor finds that the Purchasing Agency's representations that it sent the
25 letter via email on April 13, 2017 and its representations that the
26 Appellant's attorney received the letter to be more credible. See
27 Declaration of Larry Toves, Exhibit E, Purchasing Agency's Reply to
28 Appellant's Opposition to Motion to Dismiss filed on July 17, 2017.

⁵ Page 6, Appellant's Opposition to the Purchasing Agency's Motion to Dismiss
filed on July 13, 2017.

⁶ Letter from GEDA Administrator Jay Rojas to Jon A. Visosky, Esq., dated
April 10, 2017, Exhibit A, Purchasing Agency's Motion to Dismiss filed on
June 21, 2017.

⁷ Letter from Nelson J. Xu, Esq., to Thomas J. Fisher, Esq., dated February 2,
2016, Exhibit D, Purchasing Agency's Reply to Opposition to Motion to Dismiss
filed on July 17, 2017.

⁸ Id., and Letter from Zumin Zhang to GEDA Acting Administrator Mana Sylva
Taijeron dated October 8, 2014, Exhibit A, Id.

1 had passed between the initial October 8, 2014 claim and the Appellant's June 15, 2017 appeal.
2 Therefore, assuming *arguendo* that no decision was received by the Appellant, Public Auditor
3 finds that an appeal in this matter should have been filed on February 5, 2015, which is one-
4 hundred-twenty (120) days after the Appellant made its initial October 8, 2014 contract
5 controversy claim to the Purchasing Agency.

6 The Public Auditor finds that the Appellant's argument that the time periods to file an
7 appeal in this matter are flexible has no merit.⁹ Specifically, the Appellant argues that the OPA
8 should give a fair and reasonable construction to the filing deadlines for appeals of contract or
9 breach of contract controversy decisions imposed by Guam's procurement laws and regulations
10 because of the Purchasing Agency's failure to send its April 10, 2017 decision to the Appellant's
11 address for notice specified in the contract and the lack of notice of the Appellant's right to
12 administrative and judicial review of in said decision.¹⁰ As stated above, the Public Auditor's
13 jurisdiction to hear this appeal is dependent on whether the appeal is properly submitted to her. 5
14 G.C.A. §5703 and 2 G.A.R., Div. 4, Chap. 12, §12103(a). Further, as stated above, to be
15 properly before her, this appeal must have been filed within sixty (60) days after the Appellant
16 received a decision or within sixty (60) days of the Purchasing Agency's failure to render a
17 timely decision. 5 G.C.A. §5427(e) and (f), and §5706(a) and (b), and 2 G.A.R., Div. 4, Chap.
18 12, §12113(a). Here, as set forth above, the Public Auditor finds that the Purchasing Agency
19 made no decision on the Appellant's initial October 8, 2014 contract controversy claim. The
20 sixty (60) day period for the Purchasing Agency to file a timely decision expired on or about
21 December 7, 2014. Accordingly, to be properly before the Public Auditor, the Appellant would
22 have had to file its appeal on or about February 5, 2015. Hence, the Purchasing Agency's
23 transmittal of the April 10, 2017 letter to the Appellant's attorney instead of the Appellant's
24 address for notices specified in the contract and the Purchasing Agency's omission of language
25 notifying the Appellant of its right to administrative and judicial review in the April 10, 2017
26
27

28 ⁹ Page 6, Appellant's Opposition to Motion to Dismiss filed on July 13, 2017.
¹⁰ Id., pages 6 to 9.

1 letter do not toll the February 5, 2015 filing deadline because they occurred after that date and
2 not before it.


3 2. The remaining issue of whether this matter is not properly before the Public Auditor
4 because it involves money owed by the Government of Guam is moot, due to the appeal being
5 untimely, and the Public Auditor will not consider this remaining issue any further.

6 3. This matter is not properly before the Public Auditor due to the untimely filing of the
7 appeal as set forth above. Accordingly, the Public Auditor lacks the jurisdiction to hear it and
8 this matter is hereby DISMISSED.

9 4. The September 5, 2017 hearing re the Appellant's Appeal and all ancillary filing dates
10 for hearing materials are hereby VACATED.

11 This is a Final Administrative Decision. Pursuant to 2 G.A.R., Div. 4, Chap. 12,
12 §12113(b), the Parties are hereby informed of their right to judicial review of this decision as
13 provided in 2 G.A.R., Div. 4, Chap. 12 and in accordance with 5 G.C.A., Chapter 5, Article 9
14 (Legal and Contractual Remedies) of the Guam Procurement Law, within twelve (12) months
15 after the date of this decision. 5 G.C.A. §5481(c).

16
17 **DATED** this 1st day of August, 2017.

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21 _____
22 DORIS FLORES BROOKS, CPA, CGFM
23 PUBLIC AUDITOR
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