

1 DANIEL J. BERMAN, ESQ.
2 BERMAN O'CONNOR & MANN
3 Suite 503, Bank of Guam Bldg.
4 111 Chalan Santo Papa
Hagåtña, Guam 96910
Telephone No.: (671) 477-2778
Facsimile No.: (671) 477-4366

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5 Attorneys for Appellant:
6 PHIL-GETS (GUAM) INTERNATIONAL TRADING CORP.
7 dba J & B MODERN TECH

8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

9 IN THE APPEAL OF

Appeal No. OPA-PA-17-011

10 PHIL-GETS (GUAM)
11 INTERNATIONAL TRADING CORP.
12 dba J & B MODERN TECH,

**PHIL-GETS (GUAM) INTERNATIONAL
TRADING CORP. dba J & B MODERN
TECH's OPPOSITION TO MOTION TO
DISMISS FOR LACK OF JURISDICTION**

Appellant.

13
14 The Appellant Phil-Gets (Guam) International Trading Corp. dba J & B Modern
15 Tech (herein "J&B") submits the following Opposition to the Guam Community College
16 (herein "GCC") Motion to Dismiss for lack of jurisdiction based on timeliness of the J&B
17 protest and appeal to the OPA.

18 **I. J&B TIMELY FILED NOTICE OF APPEAL**

19 5 G.C.A. Section 5425 (a) requires that "the protest shall be submitted in writing
20 to the head of the purchasing agency within fourteen (14) days 'after such agreed
21 person knows or should know the fact giving rise thereto'."

22 On June 7, 2017, GCC issued a invitation for bids or "IFB" for the construction of
23 a Forensic DNA Lab. See Agency Report at 1.

24 On July 20, 2017, J&B submitted a Sunshine Act Request to GCC for a copy of the
25 ProPacific Builder Corp. (herein "PBC") bid documents. Agency Report at 2.

26 On or after July 27, 2017, J&B received a copy of the PBC's bid documents from
27 GCC. Agency Report at 2. However, nothing in the PBC documents disclosed that
28

1 GCC was in violation of the procurement law, GCC intended to violate the law, nor
2 showed that GCC was in any kind of violation of law. No good cause existed to appeal
3 anything done wrong by the GCC at that point in time.

4 On September 7, 2017, GCC issued a Notice of Intent to Award the contract to
5 PBC and a Notice of Non-Award to J&B. Agency Report at 2. Accordingly, J&B then
6 understood that GCC was in violation of procurement law based on the GCC selection
7 of PBC which had submitted a higher bid than J&B.¹

8 On September 11, 2017, J&B sent and served on GCC a complaint or form of
9 protest regarding the award. Agency Report at 2, PR Tab 12 at 0352-54; *see also* PR Tab
10 13 at 1544-47.

11 On September 20, 2017, J&B served their protest on GCC, and GCC received this
12 protest, based on the violations of procurement law committed by GCC. Agency
13 Report at 2, Tabs 4, 12 and 13.

14 Only thirteen (13) days passed between the September 7, 2017 date - which was
15 the Notice of Non-Award to J&B and the September 20, 2017 date J&B served its protest.

16 POINT AND AUTHORITIES

17 **A. No Reason to Know GCC Would Violate Procurement Law** 18 **Before September 7, 2017**

19 Only after September 7, 2017, could J&B have known that GCC intended to
20 violate the procurement law, its regulations and the specifications of the IFB. Nothing
21 in the PBC bid submission proved any earlier violations by GCC of the procurement
22 law; for example, no collusion was shown between GCC and PBC, before September 7,
23 2017. Instead, the PBC bid failures to mathematically compute the sums of its unit
24 prices, and other PBC glaring deficiencies in their submittal, presented issues relevant

25 _____
26 ¹ Clearly, TRMA had explained to GCC that in fact J&B had the lower bid when properly calculated by
27 unit price. *Infra* at 3, footnote 3.

1 only to GCC as the purchasing agency - and not J&B - to make the correct award by
2 application of procurement law consistent with the TRMA evaluation that J&B had the
3 lower bid price. Stated another way, J&B had no reason to know or believe that GCC
4 would violate the procurement law, its regulations and IFB until after September 7,
5 2017.

6 On September 8, 2017, importantly, J&B sent their formal written complaint to
7 GCC regarding the award to PBC that was stamped received on September 11, 2017.
8 Tab 12.²

9 On September 20, 2017, J&B served their formal "Protest!" with detailed
10 supporting documents and records to explain the protest.³ PR, Tab 14. No doubt
11 should remain that the J&B protests were timely twice served before 14 days expired.

12 **B. The Timely Protest is Against the GCC Acts and Omissions**

13 GCC is a confused in its effort to apply the Decision of 1-A *Guam WEBZ* OPA-
14 PA-16-002. Instead of filing an appeal or protest over what PBC may have done wrong,
15 J&B is timely protesting the wrongful action and conduct of the GCC mistakes and
16 violations of procurement law. J&B could not know what GCC would do with PBC
17 error-filled miscalculations, glaring omissions and fundamentally higher unit price bid
18 in PBC's bid package, until only after the publication on September 7, 2017 of GCC's
19 intent to award the contract to PBC, and the non-award of J&B.

20 No procurement law authority supports a hypothetical protest or duty to appeal
21 on J&B as to another competing bidder's mistakes, computation errors and omissions

22 ² The OPA may deem this J&B formal Complaint another form of timely protest.

23 ³ The J&B base bid price is \$3,880,850.00. *Id.* at p. 00403. Although PBC mistakenly calculated and
24 inserted a unsupported conclusory bid number of \$3,863,714.00, the true summation of the unit prices bid
25 by PBC is \$3,903,747.00. See J&B Comments to Agency Report (11/27/17) at 4; PR Tab 14 pp. 00371-
26 00375. Therefore, J&B is lower by \$22,984.00 than PBC. Tab 14, p. 00366. In fact, GCC does not deny, and
admits that the accurate numbers as set forth by J&B are true. Tab 14, p. 00403 (GCC Response to Protest,
October 17, 2017). TRMA was employed as the evaluation consultant specifically found the properly
computed J&B bid of \$3,880,850.00 was lower than the PBC bid of \$3,903,000.00. See PR Tab 11, TRMA
(8/14/17) at p. 00339.

1 such as the instant PBC bid submission until and unless the Government; i.e. GCC,
2 commits a violation of the procurement law and publishes their profound violation of
3 procurement law in selection of a higher bidder. A bidder should only be protesting
4 Government Agency action, which means the time for a protest does not start running
5 until GCC notified the two bidders of its decision to award. If the law was somehow
6 interpreted any other way, it would be absurd. Every bidder would have to submit a
7 FOIA/Sunshine Act request for every other bidder's bid, and many piecemeal -
8 premature protests would have to be filed before any agency decision to award a
9 contract. Most procurements would be stayed and frozen in place. The interpretation
10 suggested by GCC is contrary to sound public policy, since the agency itself, before
11 award or at the time of award, can always moot and avoid any issue by finding the
12 problematic competitor's bid to be non-responsive or disqualified.

13 In the cited Decision by GCC, Guam WEBZ filed their protest late on March 10
14 after the deadline passed on March 9, 2016. Decision at 5. The Decision was careful to
15 confine its limited untimeliness finding to a single issue, among many timely filed, that
16 was premised on Guam WEBZ's actual knowledge that at the time of bid opening on
17 February 15, 2016, GCC "publically announced that WSI had submitted two proposals,
18 a proprietary option and Drupal based option, so that one of many submitted issues of
19 "submission of two proposals with its bid are not properly before the Public
20 Auditor" ..." Decision at 7.⁴ Putting that issue to the side, the OPA, proceeded to
21 address the many other merits of Guam WEBZ's timely protest and appeal as to GCC's
22 errors in the evaluation of bids and determination of WSI as a responsible bidder,

23 _____
24 ⁴ Respectfully, in light of the fact that GCC's violation of the procurement law only was known after its
25 notice of award and non-award to the bidders, even this Guam WEBZ single issue was timely appealed
26 because GCC was free to actually apply the procurement law and disqualify WSI and award the contract
27 to Guam WEBZ anytime prior to notices of award and non-award. Without knowing what GCC would
28 do with WSI's non-compliant two bids, theoretically a earlier protest by Guam WEBZ would have been
prejudice incurred by Guam WEBZ in a non-award.

1 because these other issues were determined in fact timely protested, like the J&B protest
2 at hand. Decision at 7-8. In rebuking the GCC erroneous decision to deny the protest as
3 totally untimely, the OPA concluded that GCC must rebid the procurement, found
4 GCC's evaluation "unfair, improper and violated § 5211(e) and GAR § 3109(n)(1)", and
5 therefore terminated GCC's contract with WSI. Decision at 21-23.

6 Likewise here, J&B submits that GCC's evaluation of the low bid of J&B, and
7 accepting the higher bid of PBC, was unfair, improper and violated 5 GCA § 5211(g),
8 § 5008 and GAR § 3109(m)(4)(c). See Comments on Agency Report (11/27/17) at 4-6.
9 J&B's timely notice of protest filed on September 20th followed after thirteen (13) days
10 expired from September 7, 2017 (notice of intent to non-award the contract to J&B).
11 Agency Report at 2.

12 Interestingly, the Decision in *Guam WEBZ* focused on GCC's failure to evaluate
13 the bids in accordance with the IFB requirements. Likewise here, GCC violated the IFB
14 specifications at § 23 (Award, Cancellation and Rejection) that requires "In case of an
15 error in the extension of prices, unit price will govern." AR Tab 6, p. 00551. See
16 Comments on Agency Report (11/27/17) at 5. Nothing can be more clear in the
17 procurement authorities that the unit prices will govern, and based thereon, PBC's unit
18 base bid price was higher than J&B. GCC's violation of the unit price rule of law was
19 only known after September 7, 2017.

20 As in the *Guam WEBZ* Decision, the Public Auditor should find a equivalent fatal
21 flaw in GCC's evaluation of bids because the IFB's general terms and conditions
22 mandated that unit price will govern. Decision at 18. Similarly, the Public Auditor
23 should find that GCC's failure to evaluate the bids using all the criteria and factors set
24 out in the IFB results in a violation of 5 GCA § 5211. Decision at 18. As stated in the
25 Decision, "GCC's serious evaluation errors do not end here." *Id.* at 18. Parallel to the
26 evaluation errors of GCC as concerns J&B and PBC, the Public Auditor found in *Guam*
27

1 WEBZ that GCC did not properly evaluate the price of the items offered as required by
2 the IFB. Decision at 18. The contract shall be awarded to the lowest bidder. *Id.* at 18;
3 *citing*, 5 GCA § 5211(g) and 2 GAR § 3109(m)(1). Fundamentally, the same GCC error
4 that occurred in *Guam WEBZ* is here again in the failed comparison and contrast of the
5 J&B lower price to PBC's higher bid price.⁵

6 **CONCLUSION**

7 The GCC Motion based on alleged untimeliness of J&B's Protest is not well taken
8 and should be denied.

9 DATED this 1st day of December, 2017.

10 Respectfully submitted,

11 **BERMAN O'CONNOR & MANN**
12 Attorneys for Appellant
13 **PHIL-GETS (GUAM) INTERNATIONAL**
14 **TRADING CORP. dba J & B MODERN TECH**

15 By:

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17 **DANIEL J. BERMAN**

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24 ⁵ Foreshadowing another GCC error of law, the *Guam WEBZ* Decision pointed out that the local
25 procurement preference requires a checkmark or an "X" on the block of a procurement preference.
26 Decision at 3. "Bidders claiming the local procurement preference place a checkmark or an "X" on the
27 block on a procurement preference that applies to them". *Guam WEBZ* Decision at 3. Here, J&B
28 underscores that PBC failed to check any boxes and the award to PBC by GCC is another pricing
evaluation failure of GCC. *See* Comments on Agency Report (11/27/17) at 6-7, § D ("only J&B is entitled
to 15% local procurement preference").

CERTIFICATE OF SERVICE

I, Christine Pangelinan, hereby certify that on the 1st day of December, 2017, I caused the foregoing *Phil-Gets (Guam) International Trading Corp. dba J & B Modern Tech's Opposition to Motion to Dismiss for Lack of Jurisdiction* to be served as follows:

1) Via Hand Delivery to:
Rebecca Wrightson, Esq.
Cabot Mantanona LLP
Edge Bldg., Second Floor
929 S. Marine Corps Drive
Tamuning, Guam 96913

2) Via U.S. Mail to:
Propacific Builders Corporation
750 Rt. 8, Suite 202
Barrigada, Guam 96913

DATED this 1st day of December, 2017.



CHRISTINE PANGELINAN

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