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

IN THE APPEAL OF)	APPEAL NO. OPA-PA-17-011
)	
J&B Modern Tech,)	
Appellant,)	PURCHASING AGENCY'S
)	FORMAL HEARING BRIEF
and)	
)	
Guam Community College)	
)	
Purchasing Agency.)	

On November 16, 2017, Purchasing Agency Guam Community College (“GCC”) filed a Motion to Dismiss for Lack of Jurisdiction or, Alternatively, for Expeditious Disposition (“Motion to Dismiss”) because the undisputed facts in the record clearly establish that Appellant J&B Modern Tech (“J&B”) untimely protested every substantive issue presented in its Notice of Appeal.¹ GCC’s Motion to Dismiss is awaiting decision by the Public Auditor and should be granted. In the interim, pursuant to the Scheduling Order (*see* Order (Dec. 4, 2017)), GCC submits its Formal Hearing Brief for the scheduled January 17, 2018 Hearing on Appellant J&B Modern Tech’s (“J&B”) Appeal.

¹ GCC’s Motion to Dismiss alternatively requested an Expeditious Disposition because there are no undisputed facts regarding the issues presented by J&B’s Appeal, which renders it proper to decide this Appeal solely on the procurement record. GCC maintains its position that a hearing on this Appeal is an unnecessary use of this tribunal’s and the parties’ time and resources. J&B, however, insisted on a formal hearing and, for this reason, the Hearing Officer denied the alternative portion of the Motion to Dismiss.

BACKGROUND SUMMARY

On June 7, 2017, GCC issued Bid Invitation No. GCC-FB-17-105 (“IFB” or “Solicitation”) for the construction of a Forensic DNA Lab (“Project”). (See Procurement Record [cited “PR”], Tab 2 at 0002; see also GCC’s Agency Report [cited “AR”], Tab 6.) At the Bid Opening on July 19, two bidders submitted bid packets for the Solicitation: (1) J&B, and (2) ProPacific Builder Corporation (“PBC”). (See AR, Tab 10 at 003-04.) As prominently stated in their respective bid packets, PBC’s Base Bid was \$3,863,714.00 (see AR, Tab 8 at 009), and J&B’s Base Bid was \$4,394,450.00 (see AR, Tab 7 at 061).

On July 20, 2017, the day after the Bid Opening, J&B — acting on the advice of its attorney — “submitted a Sunshine Act request to GCC for a copy of PBC’s bid documents.” (Appeal at 2; AR, Tab 5 at 001-02.) “J&B received a copy of [PBC’s bid] documents on July 27, 2017.” (Appeal at 2; AR, Tab 5 at 003-06.)

On August 4, 2017, GCC forwarded the bid packets to its architect (“Architect”) for evaluation. (See AR, Tab 9 at 025.) Noting that both bidders’ packets had “issues,” the Architect recommended that GCC seek clarification for items in both J&B’s bid packet and PBC’s bid packet. (See *id.* at 018-20.) By August 18, GCC had sought, and received, clarification from both bidders regarding the items noted by the Architect. (See *id.* at 003-11.) The Architect reviewed both J&B’s and PBC’s clarifications and recommended that the contract be awarded to PBC because it was the lowest responsive and responsible bidder. (See *id.* at 002.) GCC approved the Architect’s recommendation (see *id.* at 001) and, on September 7, issued a notice of intent to award to PBC and a notice of non-award to J&B (see PR, Tab 12 at 0346-50).

On September 20, 2017, GCC received a protest (“Protest”) from J&B grounded solely on four items in PBC’s bid packet. (See AR, Tab 4.) Because J&B had received a copy of PBC’s bid packet in July, GCC rightfully denied J&B’s September 20 Protest as untimely, and also denied the Protest on its merits. (See AR, Tab 3 at 002-04.)

In its Appeal, J&B reiterates its Protest’s allegations that “PBC’s bid was not the low bid and was also not responsive” because PBC’s bid packet contained four errors. (Appeal at 3-4.) J&B also complains that GCC incorrectly denied its Protest as untimely. (See *id.* at 5.)

ISSUES PRESENTED BY J&B’S APPEAL FOR THE HEARING

At the outset, GCC remains steadfast in its position that the Public Auditor lacks jurisdiction to consider any of the substantive issues presented in J&B’s Appeal because J&B failed to timely protest these issues. Assuming *arguendo* that the Public Auditor does have jurisdiction, the issues presented by J&B’s Appeal are as follows.

(1) Whether, under Guam’s procurement laws and OPA precedent, J&B untimely lodged its Protest when every salient fact underlying the issues presented in that Protest arises from PBC’s bid packet and J&B received a copy of PBC’s bid packet fifty-five days before lodging its protest.

(2) Whether GCC could accept PBC’s stated Base Bid price for the Project, when PBC’s division cost breakdown did not sum to the amount of its Base Bid but PBC confirmed that its offered Base Bid price is the price stated in its bid packet.

(3) Whether the IFB required PBC to include records from the Guam Contractors Licensing Board (“GCLB”) in its bid packet, when the IFB clearly required the bidders to only “indicate outstanding issues with the GCLB and OSHA,” which PBC did.

(4) Whether the IFB required PBC to include insurance certificates in its bid packet when the IFB clearly stated that only the prevailing bidder would submit insurance certificates prior to award of the contract.

(5) Whether PBC should have included a signed Certificate of Owner's Attorney in its bid packet when this document is to be completed only by the Owner's Attorney at the time the contract documents are executed.

GCC'S POSITION ON THE ISSUES PRESENTED IN J&B'S APPEAL

In its Appeal, J&B complains that GCC incorrectly denied its Protest as untimely and that "PBC's bid was not the low bid and also was not responsive" because PBC's bid packet contained four alleged errors. (*See* Appeal at 3-5.) A de novo review of the record, *see* 5 GCA § 5703, reveals that J&B's complaints are meritless.

A. Under Both the Governing Law and the Indisputable Facts, J&B's Protest Was Clearly Untimely; Therefore, the Public Auditor Lacks Jurisdiction to Consider the Substantive Issues in the Instant Appeal²

In its Appeal, J&B posits that its Protest was timely because, "[u]nder 5 GCA § 5425(a), a bidder can only protest 'the method of source selection, solicitation, or award of a contract,' all of which require action by the procuring agency." (Appeal at 5 (quoting 5 GCA § 5425(a)).)

J&B misguidedly reads 5 GCA § 5425(a), which provides:

Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency. The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.

² Undersigned counsel recognizes that the arguments in this section were presented in GCC's Motion to Dismiss and at the hearing thereon, and that the Public Auditor stated she will issue her decision on the Motion to Dismiss this week. Given the deadline for this brief and with apologies for the repetition, these arguments are included out of an abundance of caution to unequivocally preserve GCC's position.

5 GCA § 5425(a) (emphasis added); *see* 2 GAR § 9101(c)(1). Thus, the plain language of § 5425(a) provides that a protest is allowed for matters “in connection with” a solicitation, which means that a bidder can lodge a protest *at any point in a procurement* but must lodge its protest within fourteen days of when that bidder knows or should know of the facts underlying its protest. Indeed, the corresponding Procurement Regulations provide:

Subject of Protest. *Protestors may file a protest on any phase of solicitation* or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.

2 GAR § 9101(c)(2) (emphasis added); *see, e.g., 1-A GuamWEBZ*, OPA-PA-16-002, Decision (Aug. 22, 2016) at 7 (concluding that two issues were untimely protested because the protestor knew of the facts underlying these issues at the bid opening); *accord, e.g., James Hamilton Const. Co. v. New Mexico State Highway & Transp. Dep't*, 68 P.3d 173, 174-76 (N.M. Ct. App.) (rejecting the protestor’s argument that it could not protest another bidder’s submission because the phrase “*in connection with*” in New Mexico’s procurement law “*speaks to the entire process from solicitation to award*” and holding: “It is clear from both the statute and the regulation that *the triggering event is the knowledge of facts or occurrences giving rise to the protest during the entire procurement process, regardless of whether the protestant is protesting the solicitation, bid, or award processes.*”) (emphasis added).

Furthermore, in order to apply J&B’s desired interpretation, the Public Auditor would have to ignore and insert language into the governing statute as follows:

Right to Protest. Any actual ~~or prospective~~ bidder, offeror, or contractor who ~~may be~~ [has been] aggrieved in connection with the ~~method of source selection, solicitation or~~ award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency. . . .

5 GCA § 5425(a) (strike-outs and alterations added to illustrate, respectively, the language that would need to be ignored and inserted). And the Public Auditor would have to completely ignore governing regulations like the above-quoted 2 GAR § 9101(c)(2).

Notably, J&B's continued insistence that it could not lodge its Protest until after GCC issued the notice of non-award is not only legally incorrect, it is disingenuous. J&B is well aware that a protest can be lodged at any point because it has previously lodged protests grounded on other bidders' submissions and *before the agency informed J&B that it would not be awarded the contract*. See, e.g., *J&B Modern Tech*, OPA-PA-11-018, Decision (Apr. 13, 2012) at 7-8 (finding that J&B filed a protest grounded on two other bidders' submissions on the day of the bid opening and *one week before the purchasing agency informed J&B that its bid was rejected*).

Here, there is no question that J&B's Protest was untimely. On July 20, 2017 — the day after the Bid Opening — J&B requested a copy of PBC's bid packet “[a]s per advised of [its] corporate legal adviser [sic].” (AR, Tab 5 at 002.) And every single “fact[] giving rise” to J&B's Protest is found within PBC's bid packet, 5 GCA § 5425(a), which J&B acknowledges that it received a copy of on July 27 (*see Appeal at 2; see also AR, Tab 5 at 003-06*). In other words, J&B's Protest — filed on September 20 — clearly is grounded on items (i.e., facts) that J&B perceived to be improper within PBC's bid packet and, indeed, attached pages from PBC's bid packet. As a matter of indisputable fact, the record clearly and unquestionably establishes that J&B presented four issues in its Protest that allegedly rendered PBC's bid “not the low bid” and “not responsive”:

- (1) J&B alleged that PBC's bid packet contained an arithmetical error, and J&B attached pages from PBC's bid packet to demonstrate this alleged error;

- (2) J&B alleged that PBC should have submitted records from GCLB and OSHA, and J&B attached a page from PBC's bid packet to demonstrate this alleged error;
- (3) J&B alleged that PBC should have submitted an insurance certificate, and J&B further alleged that PBC's bid packet did not contain this item; and
- (4) J&B alleged that PBC should have submitted a Certificate of Owner's Attorney, and J&B attached a page from PBC's bid packet to demonstrate this alleged error.

(See AR, Tab 4 at 003-04; 008-12; 022; 038.)

Thus, the record unquestionably shows that the salient facts underlying every issue presented in J&B's Protest arise from PBC's bid packet. Because these are the facts giving rise to its Protest, J&B knowledge of *these facts* governs when it should have filed its Protest. *See supra*. And, most notably, the record indisputably shows that J&B had knowledge of *these facts* when it received a copy of PBC's bid packet on July 27, 2017 (*see* AR, Tab 5), but J&B did not lodge its Protest until September 20 — i.e., *fifty-five days after J&B knew of the facts giving rise to its Protest* (*see* AR, Tab 3). In short, J&B unequivocally knew about the facts giving rise to its Protest on July 27, 2017 when it received a copy of PBC's bid packet and therefore should have filed its Protest no later than August 10. *See* 5 GCA § 5425(a); 2 GAR § 9101(c)(1). And because J&B's September 20 Protest was untimely, GCC rightfully denied it as such. *See* 2 GAR § 9101(c)(1) ("Protests filed after the 14 day period shall not be considered."); *see, e.g., GuamWEBZ*, OPA-PA-16-002, Decision (Aug. 22, 2016) at 7 (concluding that two issues were untimely protested because the protestor knew of the facts underlying these issues at the bid opening).

Importantly, because every issue in J&B's Protest was untimely presented to GCC, the Public Auditor lacks jurisdiction to consider the issues in J&B's Appeal. The Public Auditor's jurisdiction "is limited to matters that are properly before her." *GuamWEBZ*, OPA-PA-16-002,

Decision (Aug. 22, 2016) at 7 (citing 5 GCA § 5703). In *GuamWEBZ*, the Public Auditor determined that she lacked jurisdiction to hear two issues in the appeal because the protestor knew about the facts giving rise to these issues at the time of bid opening, but did not file a protest within fourteen days after the bid opening. *Id.* (“[T]he issues raised by *GuamWEBZ* . . . are not properly before the Public Auditor because *GuamWEBZ* failed to file a timely protest concerning them as set forth above. Accordingly, the Public Auditor finds that she lacks the jurisdiction to hear these issues in this appeal.”).

Here, like in *GuamWEBZ*, J&B’s Appeal clearly raises issues that were not timely protested because these issues indisputably arise from facts that J&B knew about when it received a copy of PBC’s bid packet on July 27, 2017 — i.e., nearly two months before J&B lodged its Protest on September 20. (See Appeal at 3-4; AR, Tab 5 at 003-06.) In fact, every substantive issue raised by J&B’s Appeal arises from PBC’s bid packet. (See Appeal at 3-4 & Exs. B, E, K.) And, like the protestor in *GuamWEBZ*, J&B failed to timely lodge its Protest within fourteen days of when it knew of the facts giving rise to its Protest. Indeed, J&B did not lodge its Protest until *fifty-five days after it received PBC’s bid packet*. (See AR, Tab 4; AR, Tab 5 at 003-06.) Thus, like in *GuamWEBZ*, the Public Auditor “lacks the jurisdiction to hear [J&B’s] issues in this appeal.” *GuamWEBZ*, OPA-PA-16-002, Decision (Aug. 22, 2016) at 7.

J&B also seemingly believes that the decision in *JMI Edison*, OPA-PA-13-009, somehow aids its cause. J&B is wrong. Most notably, the *JMI Edison* protestor did not *request and receive a copy of the other bidder’s submission* and then *wait fifty-five days to lodge a protest grounded solely on facts arising from the other bidder’s submission*. See OPA-PA-13-009, Decision (Nov. 27, 2013) at 1-3. Indeed, *JMI Edison* does not even mention when that

protestor knew about the facts giving rise to its alleged problems in the other bidder's submission. *See id.* Thus, *JMI Edison* provides nothing that aids J&B.

Similarly, the federal authorities that J&B has cited do not help it for a variety of reasons. First, contrary to what J&B has suggested, the federal government's "procurement regime" certainly is *not* "analogous" to Guam's. In fact, as illustrated by decisions cited by J&B, the two sovereigns' procurement regulations vary significantly. For example, two of J&B's cited decisions involved application of an organizational conflict of interest regulation that Guam's law clearly does not have. *See REEP, Inc.*, B-290688, 2002 WL 31103566 (Comp. Gen. Sept. 20, 2002); *Kimmins Thermal Corp.*, B-238646, 1990 WL 278456 (Comp. Gen. Sept. 12, 1990). Second, like the Public Auditor's decision in *GuamWEBZ, Kimmins Thermal* teaches that, under the federal procurement regulations, a bidder is required to lodge its protest when it knows about the facts that allegedly render another bidder's submission problematic. *See B-238646*. Third, J&B's reliance on *Arco Management* is odd because that case involved a premature protest grounded on the protestor's anticipation of bias during the agency's re-evaluation of the bidders' submissions, *see B-248653*, 1992 WL 310270 (Comp. Gen. Oct. 13, 1992) — which clearly is not the posture of the instant matter. Fourth, *Ervin and Associates* illustrates yet another difference between the federal procurement laws and Guam's because that case dealt with a federal regulation that requires a protest to contain information establishing timeliness. *See B-278850*, 1998 WL 126843 (Comp. Gen. Mar. 28, 1998). Finally, and almost needless to say, not one of these federal agency decisions either binds the Public Auditor or negates OPA's precedent — namely, *GuamWEBZ*.

Accordingly, under both the codified Procurement Laws and OPA precedent, GCC properly denied J&B's Protest as untimely and the Public Auditor lacks jurisdiction to consider any of the substantive issues in J&B's Appeal.

B. Even Assuming that J&B's Protest Was Timely, the Substantive Issues in J&B's Appeal Lack Merit

Assuming arguendo that J&B timely filed its Protest — which it did not — and the Public Auditor has jurisdiction to hear J&B's Appeal — which she does not — the issues presented in J&B's Appeal are unavailing. In both its Protest and its Appeal, J&B insists that “PBC's bid was not the low bid and also was non-responsive” because PBC's bid packet contained an arithmetical error and because PBC did not sufficiently respond to three items in the IFB. (Appeal at 3-4; AR, Tab 4 at 003-04.) J&B is wrong.

1. J&B's Position on the Arithmetical Error Is Unavailing

The IFB contained a detailed chart for nearly eighty different costs that are incorporated in the bidders' price for the Base Bid, along with the bidders' prices for three alternate bid items. (See AR, Tab 6 at 027-31.) The IFB's cost breakdown applied to divisions in the specifications for the Project. (See AR, Tab 6 at 027.) As stated in their respective bid packets, PBC's Base Bid was \$3,863,714.00 (see AR, Tab 8 at 009), and J&B's Base Bid was \$4,394,450.00, which apparently included prices for the three alternate bid items (see AR, Tab 7 at 061, 065). While J&B correctly notes that the sum of PBC's division cost breakdown did not equal its Base Bid (see Appeal at 3), GCC properly clarified with PBC that its stated Base Bid price was the price that PBC was offering (see AR, Tab 9 at 004-07) — just like GCC clarified with J&B items in its bid packet (see *id.* at 003, 008). Without question, obvious mathematical errors can be corrected during the evaluation period of bid packets. See 2 GAR

§ 3109(m)(4)(C). And, notably, GCC could have held PBC to its stated Base Bid price, even if PBC had intended for its Base Bid to be the actual sum of the division costs in its breakdown. *See* 2 GAR § 3109(m)(4)(D).

Although not altogether clear, J&B appears to be taking the position that GCC could not clarify items in the bidders' bid packets — which is an issue that J&B clearly did not protest and therefore is not properly before the Public Auditor, *see infra*. This position is curious because if GCC had not clarified items in J&B's bid packet, then J&B's bid would have been rejected as non-responsive. Notably, according to the CPM Chart in J&B's bid packet, J&B was offering to complete the Project in 805 calendar days *although the IFB required a completion time of 540 calendar days*; and J&B's bid packet failed to denote the inclusion of required LEED activities. (*See* AR, Tab 9 at 008, 019.) If GCC had not clarified these two items with J&B, then J&B's bid packet would have been non-responsive to IFB's required completion time,³ along with the requirement for LEED activities.

J&B has also suggested that somehow a "unit price" was part of this IFB because of one sentence in a sixteen-line paragraph of the Solicitation's "General Terms and Conditions" that sets forth numerous standard conditions for "AWARD, CANCELLATION & REJECTION." (AR, Tab 6 at 010-11.) Such a suggestion is nonsensical. This IFB unequivocally did *not* solicit for any items that are sold in units — such as, reams of paper or boxes of pens. This IFB solicited for the construction of a building. And the IFB's cost breakdown applied to divisions in the specifications for construction of that building. (*See* AR, Tab 6 at 027.) Thus, "unit prices" clearly are *not* part of this IFB.

³ Paradoxically, the regulation that J&B has relied on regarding prejudice and correction of minor mistakes also applies to "delivery." *See* 2 GAR § 3109(m)(4)(B). Therefore, by J&B's own puzzled reasoning, clarification of its proposed completion time would not be allowed.

2. The IFB Did Not Require the Bidders to Submit Records from the GCLB

J&B insists that PBC should have submitted a record from the Guam Contractors Licensing Board (“GCLB”) with its bid packet. (See Appeal at 3-4.) The IFB, however, did not require bidders to submit anything from GCLB. Rather, the IFB stated:

Contractors shall indicate outstanding issues with the GCLB and OSHA and indicate methods being utilized to avoid similar problems in the future. Contractor records will be checked with the Guam Contractors Licensing Board and shall be considered in determining the most responsive responsible bidder.

(AR, Tab 6 at 032 (emphasis added).) In accordance with the IFB, PBC indicated that it had no outstanding issues with GCLB or OSHA (see AR, Tab 8 at 086-87) and GCC’s Architect confirmed this by checking PBC’s records with GCLB and OSHA (see AR, Tab 9 at 020). PBC therefore properly responded to this item in the IFB. (Accord AR, Tab 3 at 003.)

3. The IFB Did Not Require the Bidders to Submit Insurance Certificates

J&B also misguidedly insists that the IFB required PBC to submit insurance certificates with its bid packet. (See Appeal at 4.) The IFB did not contain such a requirement. The IFB required *only the prevailing bidder* to submit insurance certificates:

1.9 ADMINISTRATIVE SUBMATERIALS

A. Contractor will submit for approval *within ten (10) calendar days of award of the Contract*, the following, which may also be referred to in other portions of these Specifications:

....

6. Insurance Certificates.

(AR, Tab 6 at 039 (emphasis added).) Thus, insurance certificates were not required items for the bid packets. (Accord AR, Tab 3 at 003.)

4. *The IFB Did Not Require the Bidders to Submit a Signed Certificate of Owner's Attorney*

Further, J&B mistakenly insists that a signed “Certificate of Owner’s Attorney” was required with bid packets. (Appeal at 4.) The “Certificate of Owner’s Attorney” is a form required by the U.S. Department of Agriculture (“USDA”),⁴ and GCC confirmed with USDA that this form is completed only upon award of the contract. (See AR, Tab 9 at 012-16.) Furthermore, this form is intended for the “Owner’s Attorney” to complete — i.e., not a bidder’s or a contractor’s attorney. (AR, Tab 6 at 026; *see id.* at 037 (stating the “Contract Form shall be: AIA Standard Form – Owner/Contractor Agreement A-101-2007”); *see generally* PR, Tab 3 at 00466-522 (AIA Standard Form contract documents that are executed by and between the Owner and the Contractor).) Consequently, a completed “Certificate of Owner’s Attorney” was not a requirement for a bid packet.

Accordingly, even if J&B’s timely protested the substantive issues presented in its Appeal, these issues are clearly unavailing.

C. *The Public Auditor Lacks Jurisdiction to Entertain Any Issues that J&B Did Not Protest to GCC*

J&B has indicated that it intends to raise an issue at the Hearing that it did not protest — i.e., the evaluation of the bidders’ bid packets. Notably, J&B did not protest anything regarding how the bid packets were evaluated; rather, J&B restricted its Protest only to four specific alleged errors in PBC’s bid packet. The Public Auditor has many times concluded that she lacks jurisdiction to entertain issues that were not protested to the agency. *See, e.g., GuamWEBZ*, OPA-PA-16-002, Decision (Aug. 22, 2016) at 9 (“The Public Auditor finds that

⁴ This project is federally funded. (See PR, Tab 7 at 0061.)

this issue is not properly before her *because it was not a claim made in GuamWEBZ's initial protest.*") (emphasis added); *see also, e.g., Kim Brothers Constr.*, OPA-PA-11-017, Decision and Order re Purchasing Agency's Mot. to Dismiss (Feb. 22, 2012) (dismissing for lack of jurisdiction because the appellant had not protested the issues in its appeal); *Data Mgmt. Resources*, OPA-PA-11-010, Order Dismissing Appeal for Lack of Jurisdiction (Aug. 29, 2011) (dismissing for lack of jurisdiction because the appeal was filed before the agency issued its protest decision); *Mega United Corp.*, OPA-PA-09-001, Order of Dismissal (Jan. 26, 2009) (dismissing for lack of jurisdiction because the purchasing agency had not issued a decision on the issues raised in the protest).

Accordingly, the Hearing should be confined to only the issues that J&B protested, and the evaluation of the bid packets most certainly is not one of those issues.

CONCLUSION

For the foregoing reasons, GCC respectfully requests that the Hearing Officer find and the Public Auditor conclude that, as a matter of both law and fact:

- (1) J&B's Protest was untimely;
- (2) the Public Auditor lacks jurisdiction to hear the issues in J&B's Appeal because J&B failed to timely protest them to GCC;
- (3) the substantive issues presented in J&B's Appeal lack merit; and
- (4) all relief requested by J&B must be denied.

Respectfully submitted this 11th day of January 2018.

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By:


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