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Re: OPA-PA-17-011 Order RE: Motion to Strike Amended Opposition and Motion to Dismiss for Lack of Jurisdiction or, Alternatively, for Expedious Disposition

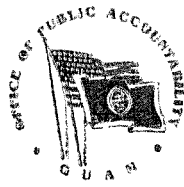
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OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

IN THE APPEAL OF

Docket No. OPA-PA-17-011

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

Appellant.

**ORDER RE: MOTION TO STRIKE
AMENDED OPPOSITION AND MOTION
TO DISMISS FOR LACK OF
JURISDICTION OR, ALTERNATIVELY,
FOR EXPEDITIOUS DISPOSITION**

Before the Public Auditor are two motions: (1) Purchasing Agency's Motion to Strike Appellant's Amended Opposition, filed December 11, 2017; and (2) Purchasing Agency's Motion to Dismiss for Lack of Jurisdiction or, Alternatively, for Expeditious Disposition, filed November 16, 2017. On January 4, 2018, the Public Auditor and Hearing Officer Delia Lujan Wolff heard oral argument on the motions. Present at the hearing were Attorney Daniel J. Berman, counsel for Appellant Phil-Gets (Guam) International Trading Corp. dba J&B Modern Tech ("J&B"), J&B President Gene Bangayan, and counsel for Purchasing Agency Guam Community College ("GCC"), Rebecca J. Wrightson. The Public Auditor hereby issues this Order on the motions.

I. Motion to Strike

GCC moves to strike the Amended Opposition to Motion to Dismiss for Lack of Jurisdiction, filed on December 6, 2017, by J&B. J&B opposes the motion and in its opposition requests leave to supplement its Opposition. (Opp'n to Mot. Strike at 3.)

1 A hearing officer's authority includes fixing time limits for submitting written documents
2 and ruling on motions and other procedural items on matters pending before the officer. 2 GAR 4
3 § 12109(d), (g).

4 The Scheduling Order issued in this matter does not provide a deadline for filing an
5 opposition to the motion to dismiss for the reason that J&B had already filed an opposition on
6 December 1, 2017. (See Scheduling Order ¶ 1.) Although the Amended Opposition was filed only
7 two business days before GCC's December 11 deadline to file a reply to J&B's opposition, GCC
8 was able to and did respond to the supplemental briefing contained in the Amended Opposition.
9 (See Reply at 9-11.) Further, GCC has not argued that it suffered any prejudice from the filing of
10 the Amended Opposition. Accordingly, the Public Auditor denies the motion to strike and permits
11 the submission of the Amended Opposition by J&B.
12

13 **II. Motion to Dismiss**

14 GCC moves to dismiss J&B's appeal for lack of jurisdiction, based on a failure to lodge a
15 timely protest as required under 5 GCA § 5425(a). J&B opposes the motion, arguing that it was
16 not required to protest until after GCC provided notice of an intent to award the contract to the
17 competing bidder, ProPacific Builder Corporation ("PBC").
18

19 Section 5425(a) provides:

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

26 5 GCA § 5425(a).

27 The parties do not dispute that J&B and PBC timely submitted competing bid packets to
28 GCC on July 19, 2017. GCC argues that J&B's protest arises from facts which J&B knew or should
have known when it received PBC's competing bid documents on July 27, 2017, in response to a

1 Sunshine Act request. Specifically, GCC asserts that J&B had knowledge of PBC's bid price and
2 any related arithmetical errors, and any failure by PBC to submit records from the Guam
3 Contractors Licensing Board, insurance certificates, and a "Certificate of Owner's Attorney."
4 Notably, J&B does not dispute the timing of when it knew or should have known the contents of
5 PBC's bid. Since J&B submitted its protest to GCC on September 20, 2017, 55 days after receiving
6 PBC's bid packet, J&B failed to timely protest, asserts GCC. In response, J&B argues that it was
7 not required to protest flaws in a competing bid and that the time to protest does not start running
8 until there is government action.
9

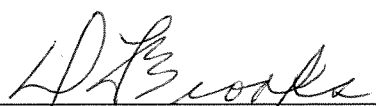
10 The Public Auditor finds that, although J&B first had knowledge of the information
11 contained in PBC's bid packet on July 27, 2017, J&B was not aggrieved until after GCC served its
12 notice of intent to award the contract to PBC on September 7, 2017. While PBC submitted a bid
13 which J&B considers higher and flawed, GCC's mere receipt of the bid on July 20 does not amount
14 to a determination that PBC was eligible for award of the contract. See Kimmins Thermal Corp.,
15 B-238646.3, 90-2 CPD ¶ 198, 1990 WL 278456, at *2 (Comp. Gen. Sept. 12, 1990) ("An agency's
16 acceptance of a proposal for evaluation does not itself amount to a determination that the offeror is
17 eligible for award of the contract. Therefore, in applying our timeliness rules, we will not charge
18 a protester with knowledge that another firm was considered eligible for award simply because the
19 protester knew that the other firm had submitted an offer."). As J&B submitted its protest on
20 September 20, 13 days after GCC served notice of its intent to award the contract to PBC, J&B's
21 protest was timely. Therefore, the Public Auditor denies GCC's motion to dismiss the appeal for
22 lack of jurisdiction.
23
24

25 **III. Motion for Expeditious Resolution**

26 GCC moves for expeditious resolution of the appeal on the record and without a hearing.
27 As J&B has filed a request for hearing pursuant to 2 GAR 4 § 12108(a) and indicated at the motion
28

1 hearing that it intends to call witnesses to provide oral testimony in support of its appeal, the Public
2 Auditor denies the motion.

3 **SO ORDERED** this 16th day of January, 2018.
4

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6 _____
7 DORIS FLORES BROOKS, CPA, CGFM
8 Public Auditor of Guam
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