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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: Dec 21, 2018

TIME: 4:13 AM PM BY: FDJ

FILE NO OPA-PA: 18-004

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

IN THE MATTER OF

TELEGUAM HOLDINGS, LLC,

Appellant,

GENERAL SERVICES AGENCY,

Purchasing Agency.

Docket No. OPA-PA-18-004

**TELEGUAM HOLDINGS, LLC'S
OPPOSITION TO GENERAL
SERVICES AGENCY AND
INTERESTED PARTY PDS'S
HEARING BRIEFS**

I. INTRODUCTION

Teleguam Holdings, LLC and its wholly owned subsidiaries, GTA Telecom, LLC, GTA Services, LLC, and Pulse Mobile LLC (collectively "GTA") respectfully submit their Opposition to General Services Agency ("GSA") and Interested Party PDS's Hearing Briefs.

II. FACTUAL BACKGROUND

While the factual background has been laid out previously, it is worthwhile to highlight the key facts that form the basis of GTA's protest and appeal. In its August 8, 2014 Decision and Order, the Superior Court cancelled each award granted in IFB-064-11 (the "Bid") because the procurement record for the entire bid process was incomplete in strict contravention of Guam Procurement Law. This Decision was appealed to the Supreme Court and it found that the

ORIGINAL

procurement record was materially incomplete. Consequently, the Court affirmed the cancellation of Part E, but reversed the cancellation of the other parts solely on jurisdictional grounds. Notwithstanding its failure to follow Guam law by compiling and maintaining a complete procurement record, GSA took further official action and issued proposed awards through the Revised Bid Status on June 28, 2018. The Chief Procurement Officer denied GTA's written protest of these awards, which led to this appeal. GTA maintains that its protest was timely and that the proposed awards are in violation of Guam law as they are based on an incomplete procurement record. In opposition to the arguments raised in GSA and PDS's hearing briefs, both of which were filed on December 14, 2018, GTA proffers the following responses.

III. ARGUMENT

A. The Doctrine of *Res Judicata* Does Not Apply

GSA argues that the equitable doctrine of *res judicata* bars GTA's protest under the belief that this matter contains the same facts and issues as in previous reviews of this bid process. GSA simply misunderstands GTA's protest. *Res judicata* in the administrative setting should be applied more cautiously than in the judicial setting, taking into account: "(1) the subject matter decided by the administrative agency, (2) the purpose of the administrative action, and (3) the reasons for the later proceeding." Williams County v. Don Sorenson Investments, LLC, 900 N.W.2d 223, 226 (N.D. 2017). Further, under *res judicata* or claim preclusion, "judgment on the merits in a prior suit bars a second suit involving the same parties or their privies on the same cause of action. Claim preclusion prevents litigation of a claim that was not litigated in a previous suit, but could have been." Zahnen v. Limtiaco, 2008 Guam 5 ¶ 10.

While an appreciable amount of facts and issues in this protest and appeal are similar to those in prior reviews, the facts that form the thrust of the present protest were not part of any

matter previously examined. Quite simply, the main facts could not have been reviewed before this protest. Focusing on the third prong analyzed in Williams, the crux of this protest is that notwithstanding the findings that the procurement record was materially incomplete and could not be cured, GSA moved forward and proposed awards that could not meet statutory muster. Further, because GSA's official action took place after the previous protests, appeals, and civil actions, GTA could not have raised the present issue in any of those settings. Again, the basis for GTA's protest is GSA's official action made on June 28, 2018. Contrary to GSA's belief, GTA is not asking the Public Auditor to take a second bite of the apple – GTA merely requests the Public Auditor to review GSA's recent official action that is contrary to Guam law.

Further, in order for *res judicata* to apply, the following requirements must be satisfied: “(1) a final judgment on the merits; (2) the party against whom claim preclusion is asserted was a party or is in privity with a party in the prior suit; and (3) the issue decided in the prior suit is identical with the issue presented in the later suit. Presto v. Lizama, 2012 Guam 24 ¶ 22. In this matter, the issue of the incomplete procurement record and its required effect has not been fully decided. While the Superior Court granted GTA leave to amend its complaint, and subsequently cancelled all awards due to the incomplete record, the Supreme Court nullified the Superior Court's decision solely on jurisdictional grounds. Thus, because the Superior Court made no formal decision on the merits of the issue, the third prong of the conjunctive test has not been satisfied. Since the issue GTA raises in its protest is not one that has been previously decided, *res judicata* does not apply to this matter.¹

¹ A similar analysis would apply to an argument of issue preclusion, the other doctrine comprised in *res judicata*. “Issue preclusion bars a plaintiff from relitigating issues actually adjudicated in a prior proceeding.” Reyes v. First Net Ins. Co., 2009 Guam 17 ¶ 20. Again, because the Supreme Court reversed the Superior Court's determination

B. GTA's Protest is a Good Faith Attempt to Ensure Compliance with Guam Procurement Law

Interested Party PDS's Hearing Brief is replete with accusations that GTA is attempting to bamboozle this tribunal with trickery and misrepresentations for the purpose of "usurping the procurement process" and "gaming the system." PDS further chastises GTA's protest on the basis that it is allegedly detrimental to the Procurement System and the Government of Guam. However, these accusations are far from the truth and GTA's right to protest should not be minimized simply because PDS fails to understand the procurement process.

PDS alleges that GTA's goal is to create a new appeals process to delay this protest and that its actions are not based in good faith per 5 G.C.A. §5003. However, GTA stands by its current protest. It should be emphasized that the underlying basis for the enactment of Guam's Procurement Law is to provide rules and regulations to increase the public's confidence in the procurement process, to ensure a fair and equitable treatment of all those who deal with the procurement system, to safeguard and maintain the quality and integrity of the process, etc. 5 G.C.A. § 5001(b). GTA's arguments that its protest is timely and that the procurement record is irrevocably incomplete are not only meritorious and based on the evidence already in the record (or a lack thereof), but they also fall within the umbrella of 5 G.C.A. §5001(b) which aims to safeguard this process. Accordingly, PDS's mere opposition to GTA's protest should not equate to GTA acting in bad faith.

Moreover, the basis for GTA's protest is that GSA took official action to propose awards in this bid process in light of findings that the procurement record for the entire bid was materially

and decision on the issue of the incomplete procurement record, no such decision was made on the issue. It is factually impossible for GTA to relitigate the present issue because the issue was never actually litigated in the first place.

incomplete². There is no question that a complete procurement record³ was not maintained in accordance with Guam law and thus, the proposal of any award based on an incomplete record is an unmistakable violation of the law. The procedures codified in the Procurement Law were enacted to ensure clarity so that the underlying policies referenced above could be achieved. The decision to push these requirements aside greatly undermines these policies and cannot be considered a good faith effort by GSA to administer the procurement process appropriately. Neither increased public confidence, fair and equitable treatment, nor public access to the procurement process can be attained when compliance with Procurement law is neglected or unenforced. Delays are inherent in any protest or review. But such protests and reviews are integral to protecting the quality and integrity of the procurement process.

C. GTA Has A Right to Protest The Award

PDS further argues that GTA voluntarily withdrew its bid submission and lost its right to protest when it marked the “No” box⁴ in the June 6, 2018 correspondence from GSA which requested confirmation of the bid price that GTA previously offered on GSA-064-011. Here, PDS’s assumption that GTA effectively withdrew its bid when it checked the “No” box is clearly erroneous. A review of the June 6, 2018 document shows that GTA checked the “No” box and specifically stated, “GTA’s position is that any award of this IFB is contrary to the Guam Procurement Law.” Based on the prior litigation that has led up to GTA’s protest, it is overwhelmingly evident that the procurement record was faulty such that there is no basis for GTA to confirm its prior bid amount on a Revised Bid Status that is contrary to law. Accordingly, under

² See *Teleguam Holdings LLC v. Guam*, 2018 Guam 5 ¶¶34-35, 41.

³ 5 G.C.A. §5249 (2005)

⁴ See Exhibit E of PDS’s Interested Party Hearing Brief dated December 14, 2018.

these set of circumstances, GTA did not lose its status as an actual or prospective bidder⁵ and it remains an aggrieved party pursuant to 5 G.C.A. § 5425(a).

Further, GSA and PDS both contend that GTA's protest must fail because the Supreme Court refused to cancel the rest of the bid, namely, Parts A-D and Parts F-J of IFB GSA-064-11. Although GSA acknowledges that the Supreme Court lacked jurisdiction to take action, it then takes a huge leap and further argues that the Supreme Court, in turn, "affirmed the Public Auditor's December 15, 2014 Decision on Remand." This argument is not only nonsensical, it is wrong. The proper and more logical argument is that the Supreme Court was not able to address the legality and validity of Parts A-D and Parts F-J because it found that neither it [the Supreme Court] nor the Superior Court had jurisdiction to do so. Therefore, since the courts had no authority to address the merits of these parts, they were allowed to stand. But taking this analysis one step further, the Supreme Court's decision on this matter does not magically turn a defective procurement record into one that meets the requirements under the law. Accordingly, it is quite surprising that GSA and PDS continue to rely on this notion when they argue that the Revised Bill Status issued on June 28, 2018 is valid because Teleguam missed the statute of limitations to protest Parts A-D and Parts F-J. As discussed in Teleguam's Hearing Brief dated December 14, 2018, the focus should be on the catalyst or the new event that triggered GTA's right to file a protest, namely, when GSA took official action and released the Revised Bid Status.

GSA also argues that the Public Auditor had already made a final administrative decision with respect to all parts of the Bid such that its decision controlling. However, as a result of GTA's

⁵ In 5 G.C.A. § 5425(a), Guam law states that "[a]ny 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.

first protest, appeal, and judicial review process, only the validity of an award of Part E was decided. While GTA attempted to have the validity of all awards reviewed, the Supreme Court ultimately reversed the Superior Court's determination. Therefore, since the Revised Bid Status is based on the other parts of the Bid that have yet been determined, GTA has the right to protest the current Revised Bid Status.

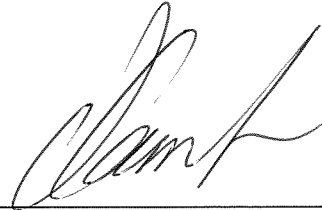
IV. CONCLUSION

At the core of this protest is whether the Guam Procurement Law is truly a set of laws whose compliance is mandated or merely a collection of guidelines or suggestions that can be followed when convenient. The basis of GTA's protest is that the requirements of Guam Procurement Law were not followed because the procurement record compiled and maintained was not complete. GSA cannot now argue that the proposed awards in the current Revised Bid Status, which lack foundation as they are based upon a faulty record, are valid and in accordance with the law. The purpose of these codified rules is to create a transparent process that safeguards taxpayers' money by ensuring that clear procedures are followed. Approving any action or award that even slightly strays from the black letter of the law is detrimental to the public's faith in the procurement system, the integrity of that system, and the proper use of taxpayers' hard-earned money entrusted to our government. GSA should not be allowed to circumvent this well established system based on arguments that don't carry much weight. Thus, these proposed awards must be cancelled.

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DATED: Hagåtña, GU, December 21, 2018.

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