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9 **BEFORE THE PUBLIC AUDITOR**

10 **PROCUREMENT APPEALS**

11 IN THE APPEAL OF: )  
12 JJ GLOBAL SERVICES, )  
13 Appellant, )  
14 and )  
15 GUAM VISITORS BUREAU, )  
16 Purchasing Agency. )

DOCKET NO. OPA-PA-19-001

**MOTION FOR INJUNCTIVE RELIEF  
AND STAY OF PROCUREMENT  
PENDING FINAL RESOLUTION  
OF APPEAL AND FOR  
ORDER REQUIRING THE GUAM  
VISITORS BUREAU TO ISSUE A  
FINAL DECISION ON PROTEST 2**

17 **I. INTRODUCTION**

18 Appellant JJ Global Services (“JJ Global ” or “Appellant”), by Appellant’s undersigned  
19 attorney, moves the Office of Public Accountability (OPA) for a temporary restraining order  
20 restraining and enjoining the Procuring Agency— the Guam Visitors Bureau (“GVB”) - from  
21 progressing forward with contract performance of GVB IFB No. 2018-001, pending final  
22 resolution of this appeal.

23 Unless this motion is granted, JJ Global will suffer immediate and irreparable injury, loss,  
24 and damage. JJ Global was the lowest bidder. Nevertheless, GVB disregarded JJ Global’s lowest  
25 bid by making a bogus determination that JJ Global was non-responsible. GVB then  
26 circumvented the automatic stay requirements of 5 G.C.A. § 5425(g) by delaying in providing JJ  
27 Global with the Notice of Non-Responsibility almost a week after the contract was awarded to a  
28 competing bidder

**ORIGINAL**

1 Further, serious issues discovered with the procurement record justify have given rise to  
2 a second protest. JJ Global has filed a second protest. (*See* Protest 2, Dec. 27, 2018). JJ Global  
3 timely filed Protest 2 on December 27, 2018, 41 days ago, and now seek an Order from the OPA  
4 requiring GVB to issue a final decision on Protest 2 forthwith. In the event that GVB denies JJ  
5 Global's Protest 2, JJ Global will appeal the denial of Protest 2. The Procurement Appeals Rules  
6 are intended to be "construed and applied to provide for the expeditious resolution of  
7 controversies in accordance with the requirement of 5 GCA Chapter 5 (Guam Procurement Law)  
8 and the Guam Procurement Regulations[.]" *See*, 2 G.A.R. § 12101. For purposes of efficiency  
9 and judicial economy, JJ Global requests that upon filing of JJ Global's Protest 2 Appeal, that JJ  
10 Global's Protest 1 Appeal be consolidated with the Protest 2 Appeal to address all issues in this  
11 Procurement - GVB IFB No. 2018-001.

12 The integrity of Guam's procurement process demands the injunctive relief of a stay and  
13 an expeditious resolution of both protests related to this procurement.

## 14 15 **II. BACKGROUND**

### 16 **A. GVB Issues the IFB.**

17 On July 23, 2018, GVB announced an invitation for bid regarding the Tumon Landscape  
18 Maintenance project. (*See* GVB IFB No. 2018-001, Jul. 23, 2018). (Procurement Record, p.2,  
19 Jan. 11, 2019.) The bid encompassed furnishing of all necessary labor, materials, equipment,  
20 tools and services for the Tumon Landscape Maintenance project. The same was announced by  
21 publication on the local section of the Post. (Procurement Record, p.54, Jan. 11, 2019). On August  
22 3, 2018, GVB released Addendum No. 1 amending the due date for bids from August 15, 2018  
23 to August 20, 2018, among other changes. (*See* Addendum No. 1, Aug. 3, 2019). (Procurement  
24 Record, p. 105, Jan. 11, 2019).

25 On August 20, 2018, JJ Global submitted their bid for \$197,258.76. (*See* JJ Global  
26 Services IFB Proposal, Aug. 20, 2018). (Procurement Record, p.122, Jan. 11, 2019). On August  
27 20, 2018, the opening of the bid submissions was held at the GVB Main Conference Room with  
28 the Appellant having the lowest bid among the other competing companies: Landscape

1 Management Services Inc. (“LMS”) and Canton Construction. (Procurement Record, p.135, Jan.  
2 11, 2019).

3  
4 **B. GVB’s Delayed and Omitted Communications with JJ Global.**

5 On August 30, 2018, a Bid Analysis and Administrative Review was received by Jon  
6 Denight from Antonio S. Muña, Jr. citing discrepancies of all bidder submissions to include  
7 additional information and clarification on issues for JJ Global. (Procurement Record, p.132, Jan.  
8 11, 2019). On November 1, 2017, LMS received the Notice of Award for GVB IFB 2018-001.  
9 (Procurement Record, p.137, Jan. 11, 2018). The notice was served to LMS days before GVB had  
10 informed JJ Global of their disqualification due to non-responsibility. On November 7, 2018, JJ  
11 Global received GVB’s Notice for Non-responsibility dated October 31, 2018. (See Notice of  
12 Non-Responsibility, Oct. 31, 2018). (Procurement Record, p.175, Jan. 11, 2019). The  
13 acknowledgement receipt clearly reflected a receipt date of November 7, 2018 at 4:11 p.m. by  
14 Ms. Rose Meno. Seven (7) days had elapsed before the notice was served to JJ Global. GVB did  
15 not include any supporting documents regarding their communication with previous agencies  
16 referenced in JJ Global’s proposal such as memorandums or emails. Neither did GVB provide the  
17 names of any individuals that communicated with GVB regards to JJ Global’s past performance.

18  
19 **C. JJ Global’s Protest and Appeal**

20 On November 19, 2018, JJ Global served GVB with a procurement protest alleging  
21 improper determination for non-responsibility and a biased procurement process. (See  
22 Procurement Protest, Nov. 19, 2018). On December 18, 2018, JJ Global received a response from  
23 GVB stating that it awarded the contract to another bidder prior to receiving the protest and  
24 rejecting all merits provided by JJ Global in its protest. (See GVB’s Response to Protest, Dec. 18,  
25 2018). On January 2, 2019, JJ Global filed its appeal with the Office of the Public Accountability  
26 requesting relief. (See Notice of Procurement Appeal, Jan. 2, 2019).

1                   **D. JJ Global’s Second Protest**

2                   On November 19, 2018, JJ Global requested that GVB provide the Procurement Record  
3 regarding the IFB under the Sunshine Reform Act of 1999. On December 14, 2018, GVB  
4 provided the documents requested. JJ Global’s review of the procurement record revealed that  
5 interested party LMS was non-responsive in bid submission due to its failure to provide wage  
6 determination information as required by section II(5) of the IFB package. Furthermore, the  
7 Procurement Record failed to meet the standards of 5 G.C.A. §5249 regarding accuracy and  
8 completeness. The record contained no formal written determination of non-responsibility as  
9 required by law, and the record appears to be completely devoid of log of all communication with  
10 GVB about the status of its lowest bid. Finally, the record reflected no GVB Board Minutes or  
11 resolutions that authorized entering into a contract with LMS or authorize entering into a contract  
12 with the more expensive contractor. All of this information was only disclosed to JJ Global on  
13 December 14, 2018, after the fact and only due to the response to the Sunshine Act request. JJ  
14 Global filed its second procurement protest on December 27, 2018. GVB has yet to issue a  
15 decision on JJ Global’s second protest

16  
17                   **III. LEGAL ARGUMENT**

18                   **A. MOTION FOR INJUNCTIVE RELIEF AND STAY OF PROCURMENT**

19                   The Procurement should be stayed pending final resolution of this appeal. The Public  
20 Auditor has the power to promote the integrity of the procurement process and the purposes of  
21 Guam’s procurement laws. *See* 5 GCA §5703 (“The Public Auditor’s jurisdiction shall be utilized  
22 to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.”). The  
23 Public Auditor has the power to review and determine “any matter properly submitted” to her. 5  
24 GCA § 5703, and reviews *de novo* denials of protests in connection with the solicitation or award  
25 or award of a contract. *See* 5 GCA § 5425(e). Further, in the regime of procurement, the OPA  
26 holds powers akin to a court, since Guam law allows procurement matters brought before a court  
27 to be, without limitation, remanded to the OPA. *See* 2 GAR § 12103(b).

1 The power of the OPA has been determined by the Guam Legislature to be as broad as is  
2 necessary. As mentioned above, Guam law provides that “[t]he Public Auditor’s jurisdiction shall  
3 be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter  
4 5.” 5 GCA §5703. Moreover, the OPA’s regulations provide that the hearing officers appointed  
5 by the OPA have the power “power, among others, to (d) Rule on motions, and other procedural  
6 items on matters pending before such officer.” 2 GAR §12109. The OPA is also specifically  
7 tasked with reviewing Agency determinations to lift the statutory stay imposed by Guam law.  
8 Title 2 GAR § 12501(b) mandates that the “Public Auditor shall review and confirm or reject any  
9 determination by the Chief Procurement Officer or the Director of Public Works that award of a  
10 contract without delay pending Appeal is necessary to protect the interests of the government.” 2  
11 GAR §12501(b).

12 The OPA also has the power to order an agency to take certain action *vis a vis* a  
13 procurement. The OPA routinely orders agencies to take certain action or cancel certain action  
14 with regard to specific procurements. *See In the Appeal of Town House Department Stores, Inc.,*  
15 *dba Island Business Systems and Supplies* OPA-PA-08-012, Decision at pp 9-10 (Feb. 10, 2009).  
16 (Ordering GSA to cancel a multi-step bid). In a prior appeal, *In the Appeal of Town House*  
17 *Department Stores, Inc., dba Island Business Systems and Supplies* OPA-PA -08-003, Decision  
18 (July 11, 2008), the Public Auditor determined that while she lacked jurisdiction over the appeal  
19 to consider the merits of the protest because there was not yet an agency decision, she did have  
20 the power and the jurisdiction under Guam law to compel an agency to render a decision on a  
21 protest. In other words, the OPA can order Government of Guam agencies to take action and—  
22 as JJ Global is requesting here— cease further action regarding procurement.

23 In order for a preliminary injunction to be granted, the movant must show: “(1) irreparable  
24 injury and (2) likelihood of success on the merits.” *HongKong & Shanghai Banking Corp., 2005*  
25 *Guam 13 ¶ 18.* More specifically, the movant must demonstrate either: “a combination of  
26 probable success on the merits and the possibility of irreparable harm; or ... that serious questions  
27 are raised and the balance of hardships tips in its favor.” *A & M Records, Inc. v. Napster, Inc.,*  
28 *239 F.3d 1004, 1013 (9th Cir.2001).*

1                   **1. JJ Global will be Irreparably Injured if GVB and is not Enjoined from**  
2                   **Moving Forward with Contract Performance.**

3                   Guam law provides that if Appellant is successful in its protest, it “shall be entitled to the  
4 reasonable costs incurred in connection with the solicitation and protest, including bid preparation  
5 costs, excluding attorney’s fees...” 5 GCA §5425(h). GVB’s pushing forward with the  
6 procurement award and performance of LMS hampers any remedy JJ Global may have to become  
7 an awardee of the IFB, since the Territory may be able to merely ratify and affirm LMS’s contract  
8 regardless of the outcome of the instant appeal. 5 GCA § 5425(g)(1); (2). As more work is  
9 performed by LMS, Appellant becomes less and less likely of having a meaningful outcome to  
10 its appeal.

11                   Since JJ Global may not recover anticipated profits if the stay is not honored and its protest  
12 appeal is sustained by the OPA, JJ Global will be irreparably injured. Irreparable injury is defined  
13 as injury for which there is no adequate remedy at law. *Shin v. Fujita Kanko Guam, Inc.*, CVA  
14 07-002, 2007 WL 4348300 (Guam Dec. 6, 2007); *Reilly's Wholesale Produce v. United States*,  
15 73 Fed. Cl. 705, 716-17 (Fed. Cl. 2006). The Federal Claims court has held that where an  
16 aggrieved offeror can only gain the costs of bid preparation in a suit for damages, and not  
17 anticipated profits, such a bid protester is irreparably harmed. *See Bannum, Inc. v. United States*,  
18 60 Fed. Cl. 718, 730 (Fed. Cl. 2004) *citing Essex Electro Eng'rs, Inc. v. United States*, 3 Cl.Ct.  
19 277, 287 (1983), *aff'd*, 757 F.2d 247 (Fed.Cir.1985). This is the exact situation faced by JJ Global,  
20 and necessitates the injunctive relief of a stay.

21  
22                   **2. JJ Global Will Likely Succeed on the Merits.**

23                   JJ Global’s November 19 Protest— the protest that is the focus of the instant appeal—  
24 was brought because GVB improperly determined that JJ Global was Non-Responsible. This  
25 determination was not factually supported and nor made in good faith. Although GVB’s Agency  
26 Report alleges they “received reliable information that JJ Global did not perform a contract...”  
27 (Agency Report, p.81, Jan. 17, 2019). The Procurement Record is devoid of any factual support  
28 for GVB’s Notice of Non-Responsibility to JJ Global. As there is absolutely no basis for GVB’s

1 determination of non-responsibility in the procurement record, JJ Global is extremely likely to  
2 succeed on the merits.

3  
4 **B. THE PUBLIC AUDITOR SHOULD ORDER GVB TO ISSUE A FINAL**  
5 **AGENCY DECISION ON PROTEST 2.**

6 The authority of the Public Auditor to promote the integrity of the procurement process is  
7 broad and virtually unfettered. The Public Auditor, as arbiter of procurement appeals is  
8 empowered to “promote the integrity of the procurement process and the purposes 5 GCA Chapter  
9 5 [Guam’s Procurement laws].” *See*, 5 GCA § 5703. As the Public Auditor, he has the power to  
10 review and determine “any matter properly submitted” to him and reviews *de novo*, denials of  
11 protest in connection with the solicitation or award, or an award of a contract. *See*, 5 G.C.A. §  
12 5703 & 5 G.C.A. § 5425(e). The Guam Legislature intended these powers of the OPA to be  
13 construed broadly when it established the Public Auditor’s jurisdiction as follows: “[t]he Public  
14 Auditor’s jurisdiction shall be utilized to promote the integrity of the procurement process and  
15 the purposes of 5 G.C.A. Chapter 5.” 5 G.C.A. § 5703. The broad interpretation of these powers  
16 are bolstered by the procurement regulations which provide that hearing officers appointed by the  
17 Public Auditor have “power, among others, to ... Rule on motions, and other procedural items on  
18 matters pending before such officer.” 2 G.A.R. § 12109.

19 The Public Auditor is also specifically charged with reviewing Agency decision and  
20 actions involving the automatic stay imposed by Guam Law. Title 2 GAR § 12501(b) expressly  
21 states the “Public Auditor *shall* review and confirm or reject any determination by the Chief  
22 Procurement Officer or the Director of Public Works that award of a contract without delay  
23 pending Appeal is necessary to protect the interest of the government.” 2 G.A.R. §  
24 12501(b)(emphasis added).

25 JJ Global requests that the Public Auditor order GVB to render a decision on Protest 2 so  
26 that all protest matters related to the GVB IFB No. 2018-001 can be timely and efficiently  
27 resolved by the OPA. The Procurement Law is also clear in that the Public Auditor has the power  
28 to order an Agency to issue a final decision on a protest. *See, In the Appeal of Town House*

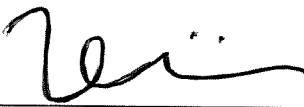
1 *Department Stores, Inc. dba Island Business Systems and Supplies, OPA-PA-08-003, Decision*  
2 *and Order, July 14, 2008. (Public auditor ordered Agency to render a protest decision...).*

3  
4 **III. CONCLUSION**

5 JJ Global will be irreparably injured if GVB continues to move forward with contract  
6 performance, and this irreparable injury will come despite the likelihood that JJ Global will  
7 prevail on the merits of its appeal. The OPA should preserve the integrity of the procurement  
8 process and enjoin any further contract performance by GVB and LMS until JJ GLOBAL 's  
9 Protest 1 and 2 are finally resolved.

10 Submitted this 6<sup>th</sup> day of February, 2019.

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12  
13 By:

  
\_\_\_\_\_  
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