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FILE NO OPA-PA: 19-001

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

In the Appeal of

JJ Global Services,

Appellant.

Docket No. OPA-PA-19-001

**COMMENTS ON
AGENCY STATEMENT**

I. INTRODUCTION

Pursuant to 2 GAR §§ 12104(c)(4) and 12108(a), Appellant JJ Global Services (“JJ/Appellant”) submits its Comments on the Agency Statement submitted by the Guam Visitors Bureau (“GVB” or the “Agency”) to the Office of Public Accountability on January 17, 2019. These comments are submitted to address the Agency Statements regarding the procurement appeal of GVB IFB 2018-001 regarding Tumon Landscape Maintenance (the “IFB”).

II. COMMENTS TO AGENCY STATEMENT

A. GVB’s Statement was untimely and should be disregarded.

JJ filed its Notice of Appeal on January 2, 2019. By law, the Procurement Record needed to be submitted by January 7, 2019. 2 GAR § 12104(c)(3). GVB ignored the law and submitted the record on January 11, 2019. By law, the Agency Report was to be submitted to the OPA by Monday, January 14, 2019. GVB again ignored the law and submitted its Report on January 17, 2019. GVB ignored the law when it rejected JJ’s bid, and it has ignored the law with regard to this procurement protest appeal.

B. The OPA must investigate GVB's claim that it provided notice to JJ Global about its disqualification on November 1, rather than November 7, 2018.

Despite itself being untimely, GVB's Agency Report declares that JJ's protest was untimely since, according to GVB, the agency served notice on JJ Global about its determination of non-responsibility on November 1, 2018, and not November 7, 2018, as JJ's records indicate. Despite these claims, the reality is that JJ received notice of its disqualification from selection on November 7, 2018. Simply put, GVB's record showing a November 1 service is false.

The fabricated GVB record adds further credit to the merits of JJ's second procurement protest that continues to be ignored by GVB. JJ filed its second protest on December 27, 2018, after reviewing sunshine act documents received from GVB. Those documents show that GVB, nearly one week before even informing JJ that it had been disqualified, had informed competing bidder LMS of that fact. The Procurement Record submitted by GVB in this appeal confirms this. See Procurement Record 137 (October 31, 2018, Notice of Award to LMS); The record also shows that on October 31, 2018, GVB transmitted a contract for execution to LMS, and issued to LMS a Notice to Proceed on November 1, 2018. Procurement Record 174 (November 1, 2018, Notice to Proceed to LMS). These interactions with LMS came a full week before JJ was even informed on November 7, 2018, that any selection or determinations had been made. See Notice of Appeal, Attachment B. JJ did not receive any written notification that LMS was selected until December 14, 2018, when GVB finally responded to JJ's sunshine request.

GVB, faced with the blatant unfair treatment of hiding information from JJ during the IFB selection process so as to aid interested party and eventual awardee LMS, has decided to put forward statements that JJ was served on November 1, 2018 as opposed to November 7, 2018. Worse, the procurement record at pages 175 and 176 contains correspondence with JJ that has been altered to make it appear that JJ received notice sooner than it actually did of its disqualification. This factual dispute must be resolved through discovery in this case and investigation by the OPA.

B. GVBs determination that JJ was non-responsible was a sham and bears no resemblance to how such determinations are supposed to be made.

GVB maintains in its answer to JJ's OPA appeal that it "received reliable information that JJ Global did not perform a contract.... to the satisfaction of that Agency." This is cut and pasted four times by GVB to declare that JJ was non-responsible given its past work with GPA, GWA DPR, and GIAA. GVB provides no actual testimony, agency memoranda, affidavits, or evidentiary documents to support this finding. Instead, GVB relies upon circular logic and says JJ was non-responsible since its protest response letter to JJ of December 18, 2018, says that JJ was non-responsible. Simply put, GVB is using itself and a claim of anonymous sources to declare that JJ was non-responsible bidder.

GVB's statement to the OPA provides no-substantive counter to the fact that JJ has been a responsible contractor in its past performance for the Government of Guam. To the contrary, the record shows the following to be the truth and uncontroverted by the procurement record:

The GPA Contract.

GVB's earlier claim that JJ's contract with GPA was terminated 3 months prior to expiration is false and is no longer being advanced by the agency since GVB now recognizes such a claim as unsupportable. The contract was not terminated. The contract was put on hold 3 months prior the expiration due to funding issues and pending amendments that JJ later received. No letter of termination was ever issued by GPA. GVB's statement to the OPA also does not contest the fact that GVB failed to consult with the project point of contact at GPA for the project, and also does not contest that purchase orders continued to be issued by GPA under the contract, and JJ Global Services was fully paid on the GPA contract.

GWA Contract

GVB's claims that JJ provided unsatisfactory work to GWA still has no support in the procurement record beyond GVB's citation to itself. GWA never made an expression of displeasure to JJ Global Services,

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and the company was fully paid on the GWA Contract. GVB does not contest in the OPA statement that it also failed to consult with the project point of contact at GWA regarding JJ's performance for the agency.

DPR Contract

GVB provides no evidentiary support or citation to the procurement record of any individual with direct oversight over JJ who expressed concern or transmitted any such concern to JJ over its DPR work. To the contrary, GVB does not contest in its statement to the OPA that JJ was also fully paid on the DPR contract, and that GVB failed to consult with the project point of contact at DPR.

GIAA Contract

GVB, despite continuing to claim that GIAA found discrepancies with JJ's performance, can point to no previous expression of concern from GIAA. GVB does not contest that GIAA had not previously relayed significant concern over contracting issues to JJ. GVB also does not contest that it failed to consult with the project point of contact at GIAA, and does not contest that JJ was fully paid by the Government as full satisfaction for its contract performance.

A Responsible Bidder "means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." (5 GCA § 5201(f).) One of the key elements of responsibility is "a satisfactory record of performance." JJ previously worked on Government contracts and received full payment for them without any expressions of displeasure from the agencies that procured JJ's services. This is a satisfactory record of performance that GVB ignored without support, and GVB has failed to point to any place in the procurement record that challenges this reality.

C. GVB's post award invitation to JJ Global to dispute the finding of non- responsibility is a sham.

Guam's procurement law allows for the agency to request additional information in connection with an inquiry about an offeror's responsibility. The failure to provide such information may be grounds to a determination of non-responsibility. 2 GAR §3116. That is not what occurred here. GVB claims that JJ somehow rendered itself non-responsible by failing to provide additional information to GVB about the finding of non-responsibility despite being "invited" to do so. GVB is ignoring when that invitation came. Responsibility determinations are made on the basis of all information that may be submitted or available **up to the time of award**. In the Appeal of J&G Construction, OPA-PA- 07-005.

GVB obscures from the OPA the fact that its "invitation" to JJ global to address the non-responsibility determination came well after that determination and the resulting award to LMS. GVB also ignores that the invitation comes only in response to JJ's agency level protest. The invitation came nearly a month an half **after** JJ was disqualified and the secret contract with LMS was negotiated and executed. The law does not allow such a determination to occur after contract award.

If GVB truly wanted to serve the purposes of the procurement code an make a *bona fide* inquiry into JJ's responsibility, the invitation for such additional information would have been made prior to award and certainly prior to the non-responsibility determination JJ received on November 7, 2018. Instead, GVB concocted a determination that JJ was not responsible, entered in a secret contract with LMS, then informed JJ of its non-responsibility. GVB then "invited" JJ to address the non-responsibility determination a month after JJ protested and well after contract award determination had been made.¹

¹ It should also be noted that GVB's invitation to JJ to provide further information, if followed by JJ, would have put JJ Global beyond the timeframe to appeal to the OPA the protest decision it received from the agency.

D. The OPA should not provide its blessing to GVB's attempt to circumvent the automatic stay that would prevent contract formation between GVB and LMS.

GVB believes that the procurement stay has been successfully avoided since "the contract was awarded prior to receipt of protest." GVB completely ignores the fact that, in an effort to circumvent the §5425(g) stay, GVB colluded with LMS to negotiate, award and execute a contract before informing other bidders that a selection had been made. 2GAR, Division 4, §3109 (q) requires that "Written notice of award shall be sent to the successful bidder. In procurement over \$25,000, each unsuccessful bidder shall be notified of the award. Notice of award shall be made available to the public." Since GVB transmitted the contract to LMS before informing JJ that it had been deemed non-responsible, GVB believes that JJ's first protest was filed post award. GVB also appears to be taking the position that no stay of procurement is in effect, thus making it clear that the entire scheme to award LMS its contract prior to informing JJ of the responsibility decision was made to avoid the stay of procurement and ram a contract through to LMS before the change in government administration. The unfair notice procedures deprived JJ of its rights and effective remedies under the procurement law. The OPA should not allow such a scheme to remain in place, since it is a clear deviation from the intent of the procurement code.²

² This specific issue of the avoidance of the automatic stay has also been raised in JJ's second procurement protest over this IFB lodged with the Agency. The second protest also raises other issues. JJ's review of the procurement record revealed that interested party LMS was non-responsive in bid submission due its failure to provide wage determination information as required by section II(5) of the IFB package. Furthermore, the procurement record fails to meet the standards of 5 G.C.A. § 5249 regarding accuracy and completeness. The record contains no formal written determination of non-responsibility as required by law, and the record appears to be completely devoid of a log of all communications with GVB about the procurement, including the communications JJ made to GVB while JJ attempted to learn more about the status of its lowest bid. Finally, the record also reflects no GVB Board minutes or resolutions that authorize entering into a contract with LMS, or authorize entering into a contract with the more expensive contractor. That protest continues to be ignored by GVB, and the OPA should compel GVB to decide that protest so that its issues can come before the OPA.

III. CONCLUSION

Based on the foregoing, JJ requests the following:

- (1) That the OPA declare the automatic statutory stay of procurement in effect;
- (2) That GVB be compelled to provide a response to JJ's Second Procurement Protest regarding this IFB filed on December 27, 2018;
- (3) That the protest matters be combined into one Appeal before the OPA if GVB's response to JJ's second protest is not resolved in JJ's favor;
- (4) That the OPA initiate and allow an investigation and discovery into the facts surrounding the award to LMS, including the apparent doctoring of documents
- (5) That its protest be sustained, and, as the lowest responsive bidder, the Agency be ordered to award it GVB IFB 2018-001 regarding Tumon Landscape Maintenance.
- (6) That JJ be awarded its reasonable costs of appeal, including any attorney's fees that may be incurred moving forward;
- (7) That the OPA set a hearing on the appeal pursuant to 2 GAR § 12108(a);
- (8) For such other just relief that the OPA deems appropriate.

Submitted this 28th day of January, 2019.

By:  _____
LUIS E. BUSTAMANTE