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

In the Appeal of)	APPEAL NO. OPA-PA-19-001
)	
JJ GLOBAL, INC.,)	LANDSCAPE MANAGEMENT
)	SYSTEMS, INC.'S MEMORANDUM
Appellant.)	RE REMEDIES
_____)	

Interested Party Landscape Management Systems, Inc. ("LMS") submits this memorandum as to its position as to appropriate remedies herein.

**I. AWARD OF ATTORNEYS' FEES FOR FRAUDULENT/
 FRIVOLOUS PROTEST**

Under Guam procurement law, the Office of Public Accountability ("OPA") has the power to assess reasonable costs, including reasonable attorneys' fees, incurred by a governmental agency against a protesting bidder when the protest was made fraudulently, frivolously or solely to disrupt the procurement process. 5 G.C.A. § 5425(h)(2).

In this case, there was credible evidence that Appellant JJ Global, Inc.'s ("JJ Global") protest was based on a false or fraudulent receipt for the notice of non-responsibility. As such, JJ Global's protest, made when it knew or should have known that

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such protest was untimely, should be deemed fraudulent or frivolous. Under these circumstances, the OPA should assess reasonable costs, including reasonable attorneys' fees, against JJ Global and in favor of the Guam Visitors Bureau ("GVB").

II. EVEN IF GVB'S NOTICE OF NON-RESPONSIBILITY WAS AN ABUSE OF DISCRETION, TERMINATION OF THE AWARDED CONTRACT IS NOT APPROPRIATE

For the reasons set out previously, JJ Global's protest was untimely, and in any event, JJ Global failed to establish that GVB's determination of non-responsibility was an abuse of discretion. However, even if JJ Global's protest had been timely, and its appeal successful, that would be no basis to terminate the contract awarded to LMS.

The remedies available under Guam procurement law depend on whether or not the contract has been awarded. Fleet Services, Inc. v. Dept. of Administration, 2006 Guam 6, ¶ 36, n.13. If, after the award of a contract, it is determined that the award was in violation of law, and the person awarded the contract has not acted fraudulently, or in bad faith, the contract may be ratified and affirmed, provided that doing so is in the best interest of the Territory. 5 G.C.A. § 5452(a)(1)(i).

Reaffirmation and affirmation of a contract is the preferred action when the violation can be waived without prejudice. 2 GARR Div 4 § 9106(c)(1). Even when the violation cannot be waived without prejudice, the contract can still be affirmed. 2 GARR Div 4 § 9106(c)(3).

In this case, there was not even a scintilla of evidence to suggest that LMS had acted fraudulently or in bad faith. The purported violation (failure to maintain a complete procurement log) by GVB is the type of violation which can be waived without prejudice.

Further, it is certainly in the best interest of the Territory that the contract awarded to LMS not be terminated, due to the need for landscaping and tree trimming services in Tumon to continue uninterrupted. *See* Declaration of Jon Nathan Denight (Feb. 13, 2019). Under these circumstances, even if JJ Global had met its burden in this case, it would still not be appropriate to terminate the contract awarded to LMS.

It is also important to note that, even if GVB had not determined that JJ Global was non-responsible due to poor past performance, there were other serious concerns with its bid. As set out in the Bid Analysis prepared by Christine Lizama dated August 30, 2018 [Exhibit 8, Appellant's Exhibit List], p.1, JJ Global significantly underbid the estimated cost of pruning for both palm trees and non-fruit trees, such that JJ Global would be operating at a loss. Under those circumstances, the project would be negatively affected. *Ibid.* It is not in the interest of the Territory that a contract be awarded to a bidder such as JJ Global, which has significantly underbid a project, as it increases the likelihood of default or poor performance.

III. CONCLUSION

Even if JJ Global had established its case, which it failed to do, there is still no valid basis to terminate the contract awarded to LMS.

Dated this 2nd day of April, 2019.

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By: _____

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