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Landscape Management Systems, Inc.

PROCUREMENT APPEAL

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of	)	**DOCKET NO. OPA-PA-19-001**
	)	
JJ GLOBAL, INC.,	)	**LANDSCAPE MANAGEMENT SYSTEMS, INC.'S OPPOSITION TO MOTION FOR INJUNCTIVE RELIEF AND STAY**
	)	
Appellant.	)	
	)	
	)	

Interested Party Landscape Management Systems, Inc. ("LMS") submits its opposition to Appellant JJ Global, Inc.'s Motion for Injunctive Relief and Stay filed herein on February 6, 2019. Unfortunately, Appellant's Motion overlooks inconvenient facts and ignores applicable law. The Hearing Officer should reject Appellant's shotgun approach to motion practice.

I. THE AUTOMATIC STAY DOES NOT APPLY AS APPELLANT'S PROTEST WAS UNTIMELY AND MADE AFTER AWARD

Under Guam law, the automatic stay is only triggered when the protest is both factually timely and filed before the award is made. Guam Imaging Consultants, Inc. v. GMHA, 2004 Guam 15, ¶ 24. In this matter, Appellant's appeal to the OPA was *both* untimely and made *after* award, such that the automatic stay is inapplicable.

A. The Protest Was Untimely

To be timely, a protest must be submitted within 14 days of notice of the Agency's decision on the protest. 5 G.C.A. § 5425(a). An untimely protest does not trigger the automatic stay. *See* Mobil Oil Guam Inc. v Guam Power Authority, Superior Court of Guam Civil Case No. CV0080-16, Decision and Order, p. 4 (Mar. 3, 2017).

As set forth in the Guam Visitors Bureau's ("GVB") Motion to Dismiss Appeal, notice of GVB's Determination of Non-Responsibility was made on October 31, 2018. Procurement Record 175-77. Notice of this determination was served on Appellant on November 1, 2018. Agency Report, at 83-84 (Affidavits of Lisa Linek and Garrett Aguon). However, Appellant did not submit its protest of that determination until November 19, 2018, outside the 14 day period in which to timely file such protest. As Appellant's appeal was untimely filed, the automatic stay does not apply.

B. The Protest Was Made After Award

In order for the automatic stay to be triggered, the protest must also be made before the award. Even if Appellant's protest had been timely, it is undisputed that it was not made until *after* the award.

The Superior Court recently rejected a claim regarding the automatic stay similar to that made by Appellant. *See* TLK Marketing Co., Ltd. v. Guam Visitors Bureau, Superior Court of Guam Civil Case No. CV0914-16, Decision and Order, p. 10 (Nov. 13, 2018) (automatic stay not triggered, even when protest is timely, if protest is made after award).

In this matter, the award was made on October 31, 2018. Procurement Record 137. Appellant did not file its protest until November 19, 2018, almost three weeks *after* the

award had been made. As such, the automatic stay was not triggered, and the Hearing Officer should reject Appellant's claim otherwise.

II. INJUNCTIVE RELEF IS NEITHER AUTHORIZED NOR WARRANTED

A. No Authority to Enjoin When Automatic Stay Not Triggered

As discussed above, Guam procurement law expressly authorizes the stay of the award of a contract only as long as two certain conditions are met. Otherwise, there is no statutory authority for the OPA to stay or enjoin the performance of a contract which has been already been awarded.

The Supreme Court of Guam has recognized the legal maxim expression *unius est excusio alterius*, which means that if an option is expressed in law, all other options not expressed were intentionally excluded. Rinehart v. Rinehart, 2000 Guam 14, ¶ 9 (When Legislature only authorized use of telephonic testimony in child support proceedings, it had to be presumed that the Legislature had rejected the use of such testimony in other proceedings); EIE Guam Corp. v. Long-term Credit Bank of Japan, 1998 Guam 6, ¶ 10 (omission of certain activity from statutory list of activities requiring license evidences legislative intent to exempt such activity from licensing requirement).

In this matter, the Legislature has only authorized a stay of a government procurement if a protest is timely filed and made *before* the award of the contract. Applying the maxim in question, it must be presumed that the Legislature only intended a government procurement to be stayed, or enjoined, if those two specific conditions were met. Otherwise, the Legislature could have expressly granted to the OPA the authority to order such a discretionary stay. The lack of any such express authority speaks volumes.

The Hearing Officer should reject Appellant's assertion that performance of a contract which has already been awarded may be enjoined. The Legislature has not authorized such a drastic interference with government operations.

B. Even if Authorized, Appellant Has Failed to Establish that Injunctive Relief is Warranted

Even if the Legislature had authorized a discretionary stay of the performance of an awarded contract, there is no justification for such a stay in this matter.

The Federal Claims Court follows a four-part test in determining whether injunctive relief in government procurement matters is appropriate.[1] The four elements are:

> (1) Whether there is a likelihood that the plaintiff will succeed on the merits;
> (2) Whether the plaintiff will suffer irreparable injury if the injunctive relief is not granted;
> (3) Whether the threatened injury to the plaintiff outweighs the harm to the defendant and other third parties; and,
> (4) Whether granting relief is in the public interest.
>
> Bean Dredging Corp. v. U.S., 22 Ct. Cl. 519, 522 (1991).

That court has also determined that, as injunctive relief is so drastic in nature, the plaintiff must demonstrate its right to injunctive relief by clear and convincing evidence. *Ibid.*

Applying these four factors to this matter, Appellant has clearly failed its burden, and the Hearing Officer should reject Appellant's contention in this regard.

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[1] In discussing the standard for injunctive relief, Appellant initially cites to Guam authority interpreting Rule 65 of the Guam Rules of Civil Procedure. LMS submits that federal procurement authority on this issue is more pertinent, and Appellant tacitly acknowledges this point by relying on such authority itself. *See* Appellant's Motion for Injunctive Relief and Stay, p. 6 (Feb. 6, 2019).

1. Appellant Not likely to Succeed

As noted in LMS' Comments to the Agency Report, agency determinations of non-responsibility are subject to a very deferential review. The agency has discretion in making a determination of responsibility or non-responsibility. In re Appeal of Jones & Guerrero Co., Inc. dba J&G Construction, OPA Procurement Appeal OPA-PA-07-005, Final Decision, p. 12 (Dec. 12, 2008).

Under analogous federal law, it is well-established that contracting officers have substantial discretion in making responsibility determinations. John C. Grimberg Co., Inc. v. United States, 185 F.3d 1297, 1303 (Fed. Cir. 1999); Trilon Educ. Corp. v. United States, 578 F.2d 1356, 1358, 217 Ct. Cl. 266 (1978). This is because such determinations are practical, not legal, determinations, which are not readily susceptible to judicial review. Colonial Press Int'l, Inc. v. United States, 113 Fed. Cl. 497, 514-15 (2013).

In this matter, GVB, in its Notice of Determination of Non-Responsibility, cited numerous reports of inadequate performance on the part of Appellant. Procurement Record 175. Further, GVB found that contact information for references provided by Appellant was either inaccurate or non-existent. Procurement Record 132-133.

In its Motion, Appellant cannot be bothered to cite any authority in support of its claim that GVB's determination of non-responsibility was somehow inadequate. Appellant has failed its heavy burden of establishing that GVB's determination of non-responsibility was arbitrary and capricious. As such, Appellant has failed to show that it is likely to succeed on the merits.

2. Irreparable Injury to Appellant

Appellant cites to federal procurement authority which supports its claim that a bid protester may suffer irreparable injury as it cannot recover lost profit. LMS acknowledges that authority, but notes that even if Appellant is deemed to meet the second of the four-element test, Appellant has failed to establish any of the other three elements.

3. Harm to GVB and LMS Outweighs Any Harm to Appellant

The third element requires balancing the alleged harm to the plaintiff against the harm to the defendant and third parties. In this matter, both GVB and LMS would suffer greatly should the injunctive relief be granted.

As a result of the award, LMS has mobilized a number of employees and a significant amount of equipment to perform work under the contract. *See* Declaration of Robert P. Salas, ¶ 4 (Feb. 13, 2019) ("Salas Decl."). If the contract work is enjoined, LMS would greatly suffer, as it would either have to continue to pay those employees, even though there is now no such work for them, or lay them off. Salas Decl., ¶ 5. If LMS was forced to lay those employees off, it would be a great hardship for them, and it might be difficult for LMS to re-hire them if and when the instant appeal is resolved. Salas Decl., ¶ 5.

In addition, LMS has purchased certain specialized pieces of equipment, including a sweeper and a bucket-truck, which are used in performing the work under the contract. Salas Decl., ¶ 6. If the work under the contract is put on hold pending this appeal, that equipment may be rendered idle. Salas Decl., ¶ 6. These uncertainties could continue for some time, as in the event that the Hearing Officer rules against the Appellant, Appellant could then seek judicial review, which could take months or years to resolve.

Similarly, GVB would suffer as its role is to encourage the growth of tourism, as well as protect our local and tourist populations as they use facilities and places in the village of Tumon. *See* Declaration of Jon Nathan Denight, ¶ 4 (Feb. 13, 2019) ("Denight Decl."). Specifically, the scope of work under the contract includes mowing and edging grass, trimming trees and other vegetation in and along roads, medians and shoulders, collecting trash, and other landscaping work in Tumon. Denight Decl., ¶ 3. The lack of maintenance in Tumon would diminish Guam's appeal to tourists, and potentially endanger those who use the area since falling tree limbs and coconuts are common in Tumon and specifically at locations frequented by tourists. Denight Decl., ¶ 4.

In this matter, LMS had been performing the work under the contract for over three months before Appellant got around to asking the OPA for injunctive relief. The fact that the contract term is now more than twenty-five percent (25%) completed underscores the drastic nature of the relief sought by Appellant. Ironically, Appellant's own authority acknowledges that, in determining the appropriateness of injunctive relief, the fact that the protest is pressed well into contract performance tips the scale against injunctive relief. *See* Bannum, Inc. v. U.S., 60 Fed. Cl. 718, 730 (Fed. Cl. 2004). Under these circumstances, the harm to LMS and GVB far outweighs any harm to Appellant.

4. Public Interest Harmed by Injunctive Relief

Finally, the public interest would not be benefited if the contract work was enjoined. Lack of maintenance in Tumon also affects local residents who use the parks and facilities in Tumon. It is not in the public's interest to have trash go uncollected, or trees and bushes go untrimmed for months or years while Appellant's claim proceeds through the appeal process.

In particular, there is a safety concern should trees remain untrimmed. *See* Lujan v. Estate of Rosario, 2016 Guam 28, ¶ 46 (public policy requires that property owners maintain their property; owner liable when tree branch fell and killed person watching parade on public sidewalk).

The public interest is strongly against the stay of LMS' performance of its work under the contract. The interests of LMS, GVB and the public require that Appellant's demand for a discretionary stay of the performance of the work under the contract be denied.

III. NO BASIS FOR CONSOLIDATION OF PROTESTS

In its Motion, Appellant also requests that a protest which has not yet been determined by the agency should be "consolidated" with the instant appeal. It is unclear why Appellant added this additional request to its Motion, given that it is unrelated to Appellant's request for a discretionary stay. In any event, these two matters should not be "consolidated."

As noted above, there is sworn testimony which establishes that Appellant's protest of the determination of non-responsibility was untimely. *See* Agency Report, at 83-84 (Affidavits of Lisa Linek and Garrett Aguon). GVB has moved to dismiss this appeal on that basis. This is a threshold issue which should be resolved prior to proceeding to a hearing on the merits.

On the other hand, Appellant's protest submitted to GVB on December 28, 2018 has not yet been determined by GVB. Appellant has not filed an appeal with the OPA, as there is not yet any decision from which to appeal. It is unclear how the OPA could assert jurisdiction over an appeal which has not yet been made.

In Mobil Oil Guam Inc. v Guam Power Authority, Superior Court of Guam Civil Case No. CV0080-16, Decision and Order (Mar. 3, 2017), the court reversed the OPA for considering the "appeal" of a prior protest through another untimely appeal. In this matter, Appellant's appeal of the determination of non-responsibility is untimely. Once that issue is resolved, there will be no appeals to "consolidate." The Hearing Officer should reject Appellant's request that these two matters be "consolidated."

IV. CONCLUSION

Based on the foregoing, the Hearing Officer should deny Appellant's Motion for Injunctive Relief and Stay.

Dated this 13th day of February, 2019.

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