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In the Appeal of ST Corporation, Inc.; OPA-PA-20-008

Claire Pollard <cpollard@rwtguam.com>

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To: Jerrick Hernandez <jhernandez@guamopa.com>

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Dear Mr. Hernandez:

Please see attached documents to be filed in the above-referenced matter. Please feel free to contact our if you have any questions. Thank you.

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Best,
Claire Pollard

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3 attachments**Witness List.pdf**

42K

**Exhibit List.pdf**

3724K

**Hearing Brief.pdf**

456K

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

PART I.

In the Appeal of

ST Corporation, Inc.,

Appellant.

DOCKET NO. OPA-PA-20-008

HEARING BRIEF

1. INTRODUCTION

Appellant ST Corporation, Inc. (“ST” or “Appellant”) has appealed the denial of ST’s protest of General Services Agency Invitation for Bid (“IFB”) GSA-047-20. ST asserts that the IFB contains impermissibly restrictive specifications that negatively impacts competition, and that its Protest of those specifications was timely presented to the Agency. In accordance with the Order of the Office of the Public Accountability (“OPA”) issued on December 30, 2020, ST submits its Hearing brief to assist the OPA in resolving the following issues in this appeal:

1. Whether GSA's denial of ST's protest on the basis of timeliness was in error;

2. Whether the restrictive specifications of the IFB calling for particular package sizes and pricing for those packages conform with Guam law; and

3. Whether the procurement record kept by the agency for this IFB is flawed and unable to provide the justifications required for the products sought by the IFB.

2. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.

General Services Agency Invitation for Bid GSA-047-20 seeks a variety of janitorial and cleaning supplies, and in relaying the product descriptions for those supplies, the General Services Agency ("Agency" or "GSA") included additional very specific size specifications for many of the products sought. The IFB was issued on September 14, 2020. ST sent questions regarding the IFB three days later. On September 24, 2020, ST again wrote to GSA about the narrow specifications that GSA included, and sought clarification from GSA inquiring whether pricing could be submitted for similarly sized products and in such a way so that GSA could obtain the best value for the various supplies requested. When GSA did not provide answers in a timeframe that would have been useful for offerors to use in shaping their bids, ST initiated an agency level protest on October 8, 2020. That protest was sustained by GSA on the same day, with the promise that the answers sought should have been provided in a timely manner, were not, and would be provided as ST had requested.

On October 14, 2020, ST finally received GSA's responses to the questions previously posed. ST requested clarification on whether GSA would accept a price per unit that nonetheless supplied the total product amount requested by GSA in the IFB, but was not quoted in the particular product amounts specified by GSA. For example, ST asked whether GSA in GSA-047-20 would accept a price per ounce as opposed to "price per can" for item no. 2.1. GSA responded with "per specifications per can[.]" For every question posed, GSA informed ST that it would not deviate from the listed specification, even though ST could provide prices for the quantities needed in a manner that would allow GSA to determine the best value amongst various bidders for the types of products sought.

ST also asked whether GSA would accept a can or bottle in different amounts than the particular bottle sizes that were narrowly specified. For example, ST asked whether GSA would accept a 12 oz. bottle for item no. 8.1. GSA responded with "24oz or equal[.]" This answer provided no justification for the exact size specification and provided no clarity into whether two 12 oz. bottles would be considered "equal" to the 24 oz. bottle size specified. GSA responded in this way for every other similar question posed by ST. GSA also failed to respond to Question Number 19 submitted on September 24, 2020. Question Number 19 asked whether GSA would "accept products in metric units as opposed to imperial units?" GSA did not provide a response to this question and has provided no explanation for the decision to refuse to respond.

GSA's responses provided on October 14, 2020, served as the basis for ST's agency level protest filed on October 21, 2020. On November 10, 2020, the Department of Administration, General Services Agency, issued a "memorandum" denying the protest as "untimely." That protest decision was signed by Procurement Officer Claudia S. Acfalle as the Chief Procurement Officer. The Decision was attached to an email sent "per Mr. Robert Kono..." ST Appealed that Decision to the OPA on November 24, 2020. A procurement record was submitted to the appellant and the OPA on December 3, 2020, and amended later that day. The procurement record was further amended on December 7, 2020.

On January 5, 2021, ST filed a Motion seeking the missing log of communications mandated by 5 G.C.A. § 5429(b), as well as any written determination regarding restrictive specifications mandated by 2 G.A.R. § 4106(a); 5 G.C.A. § 5268(b). On January 15, 2021, GSA provided a communication log, along with some additional correspondence not originally included in the record. The GSA also confirmed that the record does not contain a written determination justifying the narrow product specifications contained in the IFB, since, in the view of the GSA, the restrictions were standard and appropriate. *See*, Opposition to Motion to Compel. In response, ST asked for the GSA to provide, as an alternative the written determination mandated for restrictive specifications, the information mandated by 2 G.A.R. § 4108 requiring disclosure of "The specifications contained in any invitation for bids or request for proposals, and any amendment thereto, for the procurement of supplies shall identify the person responsible for drafting the

specifications and any persons, technical literature or manufacturer's brochures relied upon by the responsible person in drafting the specifications." Reply to GSA's Opposition to Motion to Compel, 3. As of the date of the Hearing Brief, the GSA has not yet supplemented the procurement record to include either the late coming communication log, or the documents and information required by 2 G.A.R. § 4108.

3. ST'S THEORY OF THE CASE ON APPEAL

3.1. ST's Protest was timely.

At the center of this case is the GSA's determination that that ST's protest window in this procurement began to run on August 7, 2020, and expired 14 days later. *See*, Agency report, tab 1, pg.2.¹ The GSA provides absolutely no response or explanation on how its reliance upon correspondence that predates the issuance of the IFB on appeal here has any support under the law.

To be certain, the IFB was issued on September 14, 2020 — a date that comes 24 days *after* when GSA argues that ST's protest should have been filed. ST sought clarifications and answers to questions about the specifications on September 17, 2020, and again on September 24, 2020. Its first protest regarding the lack of responses to those questions— the same questions at issue in this Appeal— was sustained by the GSA, and the GSA found no issue with timeliness in that first protest determination. When the responses did eventually come on October 14, 2020, ST reviewed the answers and determined that it needed to protest. That protest was filed on October 21, 2020 — well before the fourteen-day statutory

¹ Neither GSA's agency Report or Procurement Record are batestameped, or otherwise marked to allow individual page identification.

deadline for action lapsed. 5 G.C.A. § 5425 (a). GSA's position is, simply put, untenable. GSA would have the OPA adopt an interpretation of timeliness that would require a prospective bidder to bring a bid protest and appeal even before there was a solicitation to bid on. The OPA should reject such an invitation.

3.2. GSA's reliance upon a previous IFB to declare that ST was untimely in the protest of this IFB has no factual or legal support.

The GSA argues that, since it has used a specification in the past, it is entitled to use that specification in future procurements without question. GSA explains that "The Government was looking to provide **the same supplies with the same specifications as it had in two (2) previous bids (GSA 0119-12 and GSA-118-16) (See Tab 6)**. As you are aware, you bid and won several items on GSA Bid 118-16." Agency report, 2 (emphasis in original). The agency provides no legal support for its proposition that participation in a past procurement can operate as a timeliness bar to a protest or a future procurement where the specifications in the that latter procurement have not been released. The agency also provides no legal support for its chosen tack to simply attach, without comment, a prior IFB to the procurement record of a current IFB as some attempted explanation for the development of specifications used in the current procurement vehicle. Worse, even if such legal propositions existed, the GSA is simply wrong about the prior procurement it hangs its arguments upon.

First, ST did not bid on any of the products in the past procurement (GSA Bid 118-16) that triggered the questions ST had in the current procurement (GSA-

047-20).² ST had no intention to bid on the products in the former procurement that GSA points toward as supporting its untimeliness argument, the fact remains that ST did not even gain standing to bring a protest until the current procurement was issued, ST became a prospective bidder for the items at issue here, and ST became aggrieved when GSA did not address the unduly restrictive specifications that ST sought clarifications about.

Second, even if the law could somehow be contorted to allow the specifications issued in one procurement to cut off protests of a subsequent procurement issued four years later, GSA is simply wrong in informing the OPA that the “same specifications” are at issue. For instance, Specification 26.1 for GSA 118-16 seeks Detergent Powder in boxes that have 42 loads, whereas the current procurement seeks boxes of 180 loads. *Compare* p. 35 of 45, Tab 6, Agency Report *with* p. 37 of 40, Tab 4, Agency Report. And again, in 2016 GSA sought “Air Freshener” without specifying a particular can size, but for some reason chose to limit the specification in 2020 to only that supplier who could provide a 10 oz. can of “Air Freshener.” *Compare* p. 30 of 45, Tab 6, Agency Report *with* p. 35 of 40, Tab 4. Yet again, in 2016 GSA sought a “cleaner degreaser,” but chose to limit the suppliers in 2020 to only that supplier that could provide a specific 24 oz bottle of “cleaner degreaser.” *Compare* p. 33 of 45, Tab 6, Agency Report *with* p. 36 of 40, Tab 4, Agency Report.

GSA has added, in violation of 5 G.C.A §5265(a), unduly restrictive specifications that include “requirements, such as but not limited to restrictive

² ST’s bids in GSA Bid 118-16 were for foam cups, paper towels, plastic bags, and toilet tissue.

dimensions, weights or materials, which unnecessarily restrict competition,” and has done so without any citation in the procurement record indicating why these restrictive dimensions are necessary for the Territory. By requiring prospective bidders to meet these specifications, GSA is unduly restricting competition and preventing the Territory from obtaining the best price. GSA’s agency report doubles down on these unfair restrictions by its complete failure to address whether product dimensions can be marked in either metric or imperial units, so long as a price comparison can be made to allow the Territory to obtain the best pricing for the products it seeks.

It appears as if GSA may be driving the procurement to only a particular offeror(s) that can provide the unique item size requested, even though that particular item size is not material to the efficacy or usefulness of the product being procured, and may in fact cause the territory to pay more for the product. Such restrictive specifications cannot be used unless a written determination has been made that the restrictive specification must be used. *See*, 2 G.A.R. § 4106(a); 5 G.C.A. § 5268(b). No such determination exists here. The lack of such written determinations invalidates the IFB’s use of unduly restrictive and unjustified specifications altogether.

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3.3. GSA's procurement record is flawed and cannot support the restrictive specifications it has provided.

Guam law is clear that, in order to protect the integrity of the bidding process, a procurement record must be kept and maintained. 5 G.C.A. § 5252(a). That record must include the papers, including "drafts... and other papers or materials used in the development of specifications." 5 G.C.A. § 5249(d). It must also include, in accordance with 2 G.A.R. § 4108, disclosure of "The specifications contained in any invitation for bids or request for proposals, and any amendment thereto, for the procurement of supplies shall identify the person responsible for drafting the specifications and any persons, technical literature or manufacturer's brochures relied upon by the responsible person in drafting the specifications." GSA's Opposition to the Motion to Compel admits that this procurement is based upon "market research" last conducted in 2012 and destroyed. Opposition, 3. As such, the GSA has no legal justification for the restrictive specification it defends in this Appeal.

4. ANTICIPATED EVIDENTIARY ISSUES

It is anticipated that the following evidentiary issues may arise:

4.1. Objections regarding the GSA's reliance upon documents and specifications not contained in the procurement record, or the attempt to use prior procurement records as justifications for this IFB.

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5. ABANDONED ISSUES

ST has abandoned seeking an order compelling the GSA to provide the written determination justifying the narrow product specifications contained in the IFB. No such documents exist, and therefore cannot be compelled to be produced.

6. CONCLUSION

GSA issued an IFB for janitorial supplies that, by including unduly restrictive product dimensions and sizes, violates procurement law and limits competition between bidders in such a manner as to prejudice the taxpayers of Guam who must ultimately pay for these janitorial supplies. Rather than confront the merits of the appeal, the GSA's Agency report stands upon a contorted timeliness argument that would make untimely an offeror's protest even before the IFB being protested was issued. Such a position cannot be adopted, and GSA should be held to account for creating a procurement that would materially prejudice the people of Guam. Based on the foregoing, ST respectfully requests that its protest appeal be sustained, and the following relief be provided by the OPA:

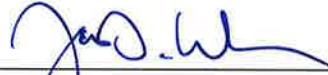
1. Issue a Determination that Appellant's protest was timely submitted to the Agency;
2. Issue a Determination that the specifications identified in GSA-047-20 and clarified in its responses calling for specific item package size are unduly Restrictive, and must be amended to allow for reasonable deviation in package or container size;

3. Order the Agency to amend the IFB to allow prospective bidders to submit prices in such a manner to allow comparison between products of different size, and to allow price submission based on the total amount of product requested; and

4. Determine that the agency's failure to answer Question Number 19 violated procurement law, and Order the Agency allow bidders to provide products marked in either metric or imperial units, so long as a price comparison can be made between price offers.

Respectfully submitted this 25th day of January, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

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