



Jerrick Hernandez <jhernandez@guamopa.com>

In Appeal of JJ Global Services - Appeal Case No. OPA-PA-21-013

Anissa Senior <as@cmlaw.us>

Tue, Nov 9, 2021 at 2:18 PM

To: "jhernandez@guamopa.com" <jhernandez@guamopa.com>

Cc: Vanessa Williams <vlw@vlwilliamsllaw.com>, Service LOVW <service@vlwilliamsllaw.com>, Rebecca Wrightson <rw@cmlaw.us>

Dear Mr. Hernandez:

Pursuant to the Letter dated October 28, 2021 Re: Notice of Receipt of Appeal – OPA-PA-21-013, please find attached the following document for filing in the above-referenced matter:

1. Purchasing Agency's Motion to Dismiss for Lack of Jurisdiction

Thank you for your cooperation and assistance.

Sincerely,

Anissa-Valene Senior

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Attorney for Purchasing Agency Guam Community College

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

In the Matter of)	Appeal No. OPA-PA-21-013
)	
JJ Global Services,)	
)	
Appellant,)	PURCHASING AGENCY’S MOTION TO DISMISS FOR LACK OF JURISDICTION
)	
and)	
)	
Guam Community College)	
)	
Purchasing Agency.)	

Pursuant to 5 GCA § 5703, 2 GAR 4 § 12103(a) and 2 GAR 4 § 12104(c)(9), Purchasing Agency Guam Community College (“GCC”) requests that the Public Auditor dismiss the instant matter for lack of jurisdiction. As explained below, this Appeal is not properly before the Public Auditor because (1) Appellant JJ Global Services’ (“JJ Global”) Protest complained it had a contract that could not be terminated, which is not valid subject matter for a protest as contract controversies are resolved through a different procedure that has not been exhausted, and (2) even if valid subject matter, JJ Global’s Protest was untimely as JJ Global was aware of the grounds far more than fourteen days before submitting its Protest.

BACKGROUND

On May 13, 2021, GCC issued Bid Invitation No. GCC-FB-21-009 (“IFB”) for a design-build concept for replacing Building 900’s metal awning structure (the “Project”) that required a completion time of ninety days inclusive of the building permit processing and material lead time, and pricing for two options for the material: Option 1 being black iron and Option 2 being galvanized iron. (See Procurement Record [cited “PR”], Tab 3 at 014, 056-60.) At the Bid Opening on the morning of June 3, two bidders submitted bid packets for the Solicitation: JJ Global, and Clayarch, Inc. (See PR, Tab 7 at 089.) That evening about 6:00 p.m., JJ Global sent a letter to GCC requesting to “correct an error” in the pricing offered in its bid packet.¹ (See PR, Tab 9 at 268-70.) The next day, GCC advised JJ Global that its bid prices could not be changed (*see id.* at 266), in accordance with the law, *see* 5 GCA § 5211(f); 2 GAR 4 § 3109(m).

After evaluation of the bid packets, on July 2, 2021, GCC sent a Notice of Intent to Award to JJ Global that contained a list of items required prior to awarding the contract for Option 2 galvanized iron in the amount of \$163,263.84. (See PR, Tab 10 at 276-78.) JJ Global provided these items via email on July 16 and hand-delivery on July 19. (See PR, Tab 11 at 355-87.)

On July 27, 2021, GCC emailed to JJ Global a bid award letter advising that the date for both the contract award and notice to proceed is July 27, 2021 and attached the formal contract for JJ Global’s signature — it was already signed by GCC. (See PR, Tab 11 at 345-47

¹ JJ Global’s bid packet offered a total price of \$179,590.24 for Option 1 black iron, and a total price of \$163,263.84 for Option 2 galvanized iron. (See PR, Tab 8 at 141-42.) JJ Global’s letter indicated that it wanted for these prices to be the other way around with the galvanized iron price being the higher price. (See PR, Tab 9 at 269.)

& 315-22.) On July 28, GCC emailed to JJ Global the purchase order for the Project. (*See id.*) Although JJ Global received the award letter, formal contract and purchase order (*see id.* at 330-31 & 344-45), JJ Global did not sign and return the formal contract. Instead, for the next several weeks, JJ Global questioned items and requirements clearly set forth in the IFB (*see id.* at 341-45), requested extensions of the Project's completion date (*see id.* at 338-40) and requested to add language to the formal contract regarding an extension of the Project's completion date (*see id.* at 309-13). The below timeline shows communications between GCC and JJ Global from the date GCC informed JJ Global of the award.

July 27, 2021	<ul style="list-style-type: none"> • GCC emailed to JJ Global the award letter dated July 26 and the formal contract already signed by GCC to take effect on July 27, 2021, stating that JJ Global needed to sign and return the formal contract; the letter further advised that the notice to proceed date is also July 27 with a 90-day completion date of October 24 (<i>see PR, Tab 11 at 345-47 & 315-22</i>)
July 28, 2021	<ul style="list-style-type: none"> • GCC emailed to JJ Global the purchase order for the Project (<i>see PR, Tab 11 at 347</i>)
July 29, 2021	<ul style="list-style-type: none"> • JJ Global via email acknowledged receipt of the award letter and formal contract and attached a letter requesting that the notice to proceed date should not be until after the building permit is received from GCC and noting that 2 days have already passed since the notice to proceed (<i>see PR, Tab 11 at 344-45</i>) • GCC via email granted a 2-day extension to coincide with JJ Global's acknowledgment of receipt; advised that the IFB's Scope of Work ("SOW") states that the 90-day completion time includes the permit process; noted that an extension can be requested if the permit process takes longer than JJ Global anticipated when it submitted its bid; reminded to pick up the original award letter, formal contract and purchase order; and asked if JJ Global will be able to comply and perform the work required for the Project (<i>see PR, Tab 11 at 330²</i>)

² Undersigned counsel apologizes for inadvertently overlooking that this email did not appear in chronological order prior to the Procurement Record being printed and bound.

Aug. 3, 2021	<ul style="list-style-type: none"> • JJ Global emailed GCC a letter stating “JJ Global will be complying and is qualified to perform the work required as stipulated in the Original Bid Offering” and asking where to find “specifications” about the building permit in the IFB’s SOW³ (see PR, Tab 11 at 342-43)
Aug. 4, 2021	<ul style="list-style-type: none"> • GCC emailed JJ Global advising that page 3 of the SOW states “Contractor’s timeline to complete the project within ninety (90) consecutive calendar days upon receipt of a purchase order and inclusive of the building permit process and material lead time” and noting that an extension can be requested if the permit process takes longer than JJ Global anticipated when it submitted its bid (see PR, Tab 11 at 341) • JJ Global picked up from GCC the originals of the award letter, formal contract and purchase order (see PR, Tab 11 at 280, 336)
Aug. 6, 2021	<ul style="list-style-type: none"> • JJ Global emailed GCC a letter requesting a 15-day extension of the completion date, stating that the drawings/designs for the Project will take 2 weeks to complete⁴ and thereafter will be provided to GCC (see PR, Tab 11 at 338-40) • GCC replied acknowledging receipt and following-up on JJ Global signing and returning formal contract (see PR, Tab 11 at 336)
Aug. 9, 2021	<ul style="list-style-type: none"> • JJ Global emailed GCC advising that the formal contract will be expedited via the postal service to JJ Global’s President/CEO Luis E. Bustamante because he was currently off-island (see PR, Tab 11 at 332) • JJ Global emailed GCC asking if the request for an extension was approved (see PR, Tab 11 at 334) — GCC did not approve the extension⁵ (see <i>id.</i> at 280)
Aug. 11, 2021	<ul style="list-style-type: none"> • JJ Global’s President/CEO Mr. Bustamante attended an on-site meeting at GCC with JJ Global’s employees but did not submit the signed formal contract (see PR, Tab 11 at 328)

³ Notably, the CPM chart in JJ Global’s bid packet provided 14 days for “Application for Building Permit & other licenses.” (PR, Tab 8 at 166.)

⁴ Notably, the CPM chart in JJ Global’s bid packet provided 7 days for the “Design Phase.” (PR, Tab 8 at 166.)

⁵ The IFB’s Scope of Work (“SOW”) included the drawings/design in the required 90-day completion time for the Project. (See PR, Tab 3 at 058.)

Aug. 25, 2021	<ul style="list-style-type: none"> • GCC emailed JJ Global following-up on return of the signed formal contract and the drawings/designs for the Project that should have been submitted by August 23, and asking again if JJ Global is able to carry out the required work as stated in the IFB and complete the Project (<i>see PR, Tab 11 at 328</i>)
Aug. 26, 2021	<ul style="list-style-type: none"> • JJ Global requested to add terms to the formal contract regarding extending the completion date for delays due to building permits, weather and the pandemic “including but not limited to, materials not on island” and informed: “Once the contract reflects this understanding, we can execute” (<i>see PR, Tab 11 at 323-24</i>)
Aug. 30, 2021	<ul style="list-style-type: none"> • GCC replied to JJ Global that the request to add terms to the formal contract was not approved and the signed formal contract must be received by GCC no later than 5:00 p.m. on August 31, and noted that GCC still had not received the drawings/designs for the Project (<i>see PR, Tab 11 at 305</i>)
Sep. 10, 2021	<ul style="list-style-type: none"> • GCC received an email from JJ Global that included the drawings/designs for the Project (<i>see PR, Tab 11 at 301-04</i>)
Sep. 22, 2021	<ul style="list-style-type: none"> • GCC emailed JJ Global advising “since JJ Global has not submitted the signed contract, the purchase order is cancelled” (<i>see PR, Tab 11 at 290</i>)
Oct. 5, 2021	<ul style="list-style-type: none"> • JJ Global submitted its Protest Letter arguing that it did not need to sign the formal contract because, according to the IFB, “the July 27, 2021 award to JJ Global resulted in a binding contract without further action by either GCC or JJ Global” (<i>see PR, Tab 13 at 413.</i>)
Oct. 12, 2021	<ul style="list-style-type: none"> • GCC emailed, and attempted to hand-deliver, to JJ Global its Response denying the Protest (<i>see PR, Tab 13 at 402-03.</i>)
Oct. 27, 2021	<ul style="list-style-type: none"> • JJ Global filed the instant Appeal

GCC forwarded the formal contract to JJ Global on July 27, 2021, requesting JJ Global to sign and return. (*See PR, Tab 11 at 345.*) After enduring eight weeks of JJ Global’s delays and evasion (*see above timeline*), on September 22, GCC cancelled the purchase order since

JJ Global still had not signed and returned the formal contract. (*See* PR, Tab 11 at 290.) On October 5, 2021, JJ Global submitted a “Protest Letter” to GCC that states:

JJ Global protests GCC’s September 22, 2021 cancellation of the award and purchase order for IFB No. GCC-FB-21-009. JJ Global’s signature of [sic] the proposed contract referenced in your email is not grounds to cancel or terminate the award. Paragraph 29 of the Instructions of the GCC-FB-21-009 states in pertinent part:

“Award shall be made to the lowest responsible and responsive bidder, whose bid is determined to be the most advantageous to the Government, taking into consideration the evaluation factors set forth in this solicitation. No other factors or criteria shall be used in the evaluation. Award issued to the lowest responsible bidder within the specified time for acceptance as indicated in the solicitation. result in a binding contract without further action by either party. The right is reserved as the interest of the Government and may require to waive any minor irregularity in the bid received pursuant to 2 GAR, Div. 4 §3109(m)(4)(B).”

Therefore, pursuant to the terms of the IFB, the July 27, 2021 award to JJ Global resulted in a binding contract without further action by either GCC or JJ Global. Moreover, GCC may not terminate the contract entered with JJ Global in violation of the terms of the IFB.

(PR, Tab 13, at 413 (emphasis in original; bold emphasis omitted).)

On October 12, 2021, GCC denied the protest because (1) “termination of a contract is not valid grounds for a protest under Guam’s procurement laws,” *see* 5 GCA § 5425(a); 2 GAR 4 § 9101(c), as “[c]ontract disputes are resolved through a different procedure,” *see* 5 GCA § 5427, and (2) assuming *arguendo* that “JJ Global could protest termination of its contract,” JJ Global’s protest was untimely under 5 GCA § 5425(a) because JJ Global knew of the facts giving rise to the issues far more than 14 days prior as GCC first provided the formal contract to JJ Global for signature and return on July 27 and finally required return of the signed contract by August 31 — respectively, 70 and 35 days before JJ Global submitted its protest on October 5. (*See* PR, Tab 13 at 403.) On October 27, JJ Global filed its Notice of Appeal with the Public Auditor. (*See* Appeal.)

In its Appeal, JJ Global does not address, let alone dispute, the reasons that GCC denied its Protest. (*See* Appeal at 4.) Nor does JJ Global's Appeal explain how the Public Auditor has jurisdiction over this matter in light of why GCC denied its Protest.

As explained below, JJ Global's Appeal should be dismissed for lack of jurisdiction.

LEGAL STANDARDS

The Procurement Code mandates that the "Public Auditor shall have the power to review and determine de novo any matter properly submitted to him." 5 GCA § 5703; 2 GAR 4 § 12103(a). JJ Global's Protest argued a contract dispute. A contract controversy appeal is properly before the Public Auditor after exhaustion of the contract dispute resolution procedure set forth in 5 GCA § 5427 and 2 GAR 4 § 9103, which has not happened here. *See, e.g., Mega United Corp. v. Guam Econ. Develop. Auth. ("GEDA")*, OPA-PA-17-007, Dec. re Mot. to Dismiss (Aug. 1, 2017) (concluding lack of jurisdiction over appeal because appellant failed to meet time periods within procedure for contract controversy resolution); 2 GAR 4 § 12103 (title of section includes "Exhaustion of Remedies").

And assuming arguendo that JJ Global's Protest falls under the purview of 5 GCA § 5425 as a protest, the Public Auditor has determined that issues not timely protested to the purchasing agency are not properly before him; therefore, he lacks jurisdiction to hear such issues on appeal. *See, e.g., Pacific Data Sys. v. Guam Housing and Urban Renewal Auth. ("GHURA")*, OPA-PA-21-001, Dec. & Order re Mot. to Dismiss for Lack of Juris. (July 16, 2021); *PTI Pacifica dba IT&E ("IT&E") v. Guam Power Auth. ("GPA")*, OPA-PA-19-008, Dec. (Sep. 26, 2019); *Flame Tree Freedom Ctr. v. GHURA*, OPA-PA-19-006, Dec. & Order re Mot. to Dismiss for Lack of Juris. (Aug. 6, 2019); *see also DFS Guam L.P. v. The A.B. Won Pat Int'l Auth. Guam ("GIAA")*, 2020 Guam 20 ¶¶ 84-89.

ARGUMENT

The Public Auditor lacks jurisdiction over this Appeal. JJ Global's Protest is not a valid protest as it argues a contract dispute; contract controversies are resolved by a different procedure that JJ Global has not even commenced, let alone exhausted. And, even if valid, JJ Global's Protest is untimely because the grounds were known to JJ Global almost two months before it submitted its Protest to GCC. Accordingly, the Public Auditor should dismiss this Appeal for lack of jurisdiction because the instant matter is not properly submitted to him. *See* 5 GCA § 5703; 2 GAR 4 § 12103(a).

A. This Matter Is Not Properly Before the Public Auditor Because JJ Global's Protest Argued a Contract Controversy, Which Is Resolved Through a Procedure that Was Never Commenced

As detailed above, after enduring eight weeks of delay instigated by JJ Global, GCC cancelled the purchase order issued to JJ Global since JJ Global had not signed and returned the formal contract. In its "Protest Letter," JJ Global argued that it did not need to sign the formal contract because "pursuant to the terms of the IFB," a contract resulted from GCC issuing the award to JJ Global. (PR, Tab 13 at 413.) Thus, according to JJ Global, it had a contract with GCC. And in its "Protest Letter," JJ Global complained that "GCC may not terminate the contract . . . in violation of the terms of the IFB."⁶ (*Id.*) In short, JJ Global's "Protest Letter" complained of a dispute regarding a contract that JJ Global insisted arose by virtue of the award. Such is not valid subject matter for a protest.

⁶ Ironically, JJ Global seemed destined to be in substantial breach of the contract it contends resulted from the award as JJ Global did not submit the drawings/designs until almost halfway through the required 90-day completion time for the Project. (*See supra* at 3-5.)

Protests are governed by 5 GCA § 5425 and involve “the method of source selection, solicitation or award of a contract.” 5 GCA § 5425(a). After the award, 5 GCA § 5427 “applies to controversies between the Territory and a contractor and which arise under, or by virtue of, a contract between them.” 5 GCA § 5427(a).

Here, GCC emailed to JJ Global a bid award letter advising that the date for both the contract award and notice to proceed is July 27, 2021 and attached the formal contract for JJ Global’s signature — it was already signed by GCC. (See PR, Tab 11 at 345-47 & 315-22.) JJ Global contends that “pursuant to the terms of the IFB,” a binding contract automatically resulted from the award that “GCC may not terminate.” (See PR, Tab 13 at 413.) Thus, JJ Global contends that there is a contract between it and GCC. Contract controversies are resolved pursuant to 5 GCA § 5427 and the accompanying regulation 2 GAR 4 § 9103. Contract controversies are not resolved by filing a protest, which is what JJ Global did. In other words, JJ Global complained of contract dispute but did not follow the procedure for resolution of contract controversies.

Because JJ Global’s Protest Letter argued a contract controversy and JJ Global did not exhaust the procedure for resolving contract controversies, this matter is not properly submitted to the Public Auditor under 5 GCA § 5703 and 2 GAR 4 § 12103(a). *See, e.g., Mega United v. GEDA*, OPA-PA-17-007, Dec. & Order re Mot. to Dismiss at 4-5 (Aug. 1, 2017); 2 GAR 4 § 12103 (section titled: “Jurisdiction of the Public Auditor; *Exhaustion of Remedies*” (emphasis added)).

Accordingly, the Public Auditor should dismiss this Appeal for lack of jurisdiction.

B. Even If Valid Subject Matter for a Protest, the Public Auditor Lacks Jurisdiction to Consider the Instant Appeal Because, Without Question, JJ Global's Protest Was Untimely

Assuming arguendo the validity of the subject matter for a protest, GCC denied JJ Global's Protest as untimely because JJ Global knew of the issue argued therein for several weeks longer than the 14-day limitation period mandated by law. (*See* PR, Tab 13 at 403.) In its Appeal, JJ Global does not address timeliness. (*See* Appeal at 4.)

The statute governing protests mandates: "The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto." 5 GCA § 5425(a). Regarding when the 14-day limitation period begins to run, the Public Auditor, quoting Guam's Supreme Court, recently held that

"when alleged misconduct forms the basis of a procurement protest, the time runs from the date on which the protesting party first learned of the purported misconduct." *Id.* ¶ 89. *A protest filed more than 14 days after the disappointed offeror or bidder had notice of the grounds for the protest is barred as untimely. This is true "even if no contract has yet been awarded, even if the protest was filed within 14 days of the agency's selection of bidders or offerors, and even if the protestant did not subjectively understand or appreciate the ground of protest."* *Id.* ¶ 87

Pacific Data Sys. v. GHURA, OPA-PA-21-001, Dec. & Order re Mot. to Dismiss for Lack of Juris. at 3-4 (July 16, 2021) (quoting *DFS Guam v. GIAA*, 2020 Guam 14) (emphasis added). In other words, the 14-day clock begins to run when the protestor had notice of grounds for the issues argued in its protest. *See id.*

Here, even if a valid protest, there is no question that the sole issue in JJ Global's Protest was untimely. Relying on language in Paragraph 29 of the IFB's General Terms and Conditions, JJ Global's Protest argues that "JJ Global's signature of [sic] the proposed [formal] contract . . . is not grounds to cancel or terminate the award" because "pursuant to the terms

of the IFB, the July 27, 2021 award to JJ Global resulted in a binding contract without further action by either GCC or JJ Global.” (PR, Tab 13 at 413.) Without question, JJ Global was on notice of these grounds nearly ten weeks before submitting its Protest on October 5, 2021.

In the very same July 27, 2021 email to JJ Global attaching the award letter, GCC also provided the formal contract already signed by GCC and requested that JJ Global sign and return it. (See PR, Tab 11 at 345-46.) JJ Global acknowledged receipt via email on July 29 (see *id.* at 344-45) and, on August 4, picked up from GCC the original of the formal contract (see *id.* at 280, 336). August 6 was the first of several times that GCC followed up on JJ Global signing and returning the formal contract. (See *id.* at 336.) On August 26, JJ Global emailed a letter to GCC requesting to add language to the formal contract regarding extensions of the completion date.⁷ (See *id.* at 323-24.) And on August 30, GCC replied to JJ Global advising that its request to add language was not approved and that JJ Global must sign and return the formal contract to GCC by 5:00 p.m. on August 31. (See *id.* at 305.)

Thus, JJ Global has known that GCC wanted a signed formal contract *since the end of July 2021* and therefrom its 14-day protest clock started to run. JJ Global, however, did not file its Protest *until October 5, 2021* — *more than two months* after JJ Global “had notice of the grounds for the protest.” *Pacific Data Sys. v. GHURA*, OPA-PA-21-001, Dec. & Order re Mot. to Dismiss for Lack of Juris. at 4 (July 16, 2021).

Accordingly, JJ Global’s Protest was untimely, and the Public Auditor lacks jurisdiction over the instant Appeal. See *id.*; *IT&E v. GPA.*, OPA-PA-19-008, Dec. (Sep. 26, 2019); *Flame Tree v. GHURA*, OPA-PA-19-006, Dec. re Mot. to Dismiss for Lack of Juris. (Aug. 6, 2019).

⁷ JJ Global’s letter informed: “Once the contract reflects this understanding, we can execute.” (PR, Tab 11 at 323.)

CONCLUSION

For the foregoing reasons, GCC submits that the Public Auditor should dismiss the instant Appeal for lack of jurisdiction.

Respectfully submitted November 9, 2021.

CABOT MANTANONA LLP
Attorneys for Purchasing Agency
Guam Community College

By: 

REBECCA J. WRIGHTSON