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PROCUREMENT APPEALS

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**THE OFFICE OF PUBLIC ACCOUNTABILITY**

IN THE MATTER OF APPEAL	)	<b>APPEAL NO. OPA-PA-14-009</b>
	)	
OF	)	<b>OPPOSITION TO MOTION TO SET</b>
	)	<b>ASIDE ORDER DISMISSING APPEAL</b>
TRIPLE J ENTERPRISES, INC.,	)	<b>WITH PREJUDICE; CROSS-MOTION</b>
	)	<b>FOR RATIFICATION AND</b>
	)	<b>AFFIRMANCE OF CONTRACT</b>
Appellant	)	
_____	)	

COMES NOW Triple J Enterprises, Inc. (“Triple J” or “Appellant”), by and through undersigned counsel of record, and hereby files its Opposition to Motion to Set Aside Order Dismissing Appeal with Prejudice and Cross-Motion for Ratification and Affirmance of Contract, pursuant to the Order of the Office of Public Accountability (“OPA”) dated and filed in the above-captioned appeal on November 20, 2014.<sup>1</sup>

**I. Factual and Procedural Background**

On or about September 9, 2014 both Triple J and Morrico Equipment, LLC (“Morrico”) received their respective bid statuses from the General Services Agency (“GSA”) in connection with Bid Invitation No. GSA-065-14 for the procurement of 60-

<sup>1</sup> Triple J reserves its right to object to the OPA’s jurisdiction over this appeal at this point in time, given that this matter was dismissed with prejudice by the OPA’s Order on November 10, 2014. To that end, Triple J files this motion by way of a special appearance in an effort to comply with the OPA’s Order of November 20, 2014 and to respond to issues raised concerning, among other things, the OPA’s jurisdiction to entertain the Motion to Set Aside Order Dismissing Appeal with Prejudice that was filed subsequent to dismissal with prejudice of the above-captioned appeal.

**ORIGINAL**

passenger school buses (“IFB” or “the Bid”). At bid opening on August 12, 2014, it had been revealed that Triple J’s bid price was substantially lower than Morrigo’s bid price. Triple J’s Bid Status indicated that its bid was rejected due to non-conformance with the specifications, and the Remarks on its Bid Status indicated that Triple J’s bid was rejected due to its failure to submit with its bid package the drawings/seating plans for the buses as part of the descriptive literature requested by GSA in the “Generals” for the IFB. On September 23, 2014, Triple J filed three (3) timely, formal protests to GSA of its Bid Status and GSA’s apparent decision to cancel and re-bid the underlying procurement, which protests were subsequently denied. Within fifteen (15) days of receiving GSA’s decision on its protests, Triple J filed a timely Notice of Appeal with the OPA in the above-captioned matter.

Like Triple J, Morrigo received a Bid Status on or about September 9, 2014, indicating that GSA had rejected Morrigo’s bid due to non-conformance with the specifications. The Remarks of Morrigo’s Bid Status state: “Non-Compliance with the following[:] ‘All exterior body panels, skirts, and rub rails shall be fastened with Anti-Corrosive Rivets.’”<sup>2</sup> But unlike Triple J, Morrigo chose not to file a protest of GSA’s decision to reject Morrigo’s bid for non-conformance with the specifications, and instead Morrigo merely picked up its original bid status and Bid Bond/Cashier’s Check from GSA. To date, Morrigo has not filed a protest of GSA’s decision to reject Morrigo’s bid on the grounds stated in its Bid Status.

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<sup>2</sup> Through a response to a Sunshine Act Request, Triple J later learned that GSA had sought clarification from Morrigo as to whether its bid would comply with this particular specification, but Morrigo’s response to GSA failed to provide such assurances, prompting GSA to reject Morrigo’s bid.

Following a series of persistent and good-faith efforts to informally resolve its protests economically, efficiently, and expeditiously, and to avoid protracted litigation and undue delay of a vital procurement need for the Territory, Triple J reached out the Attorney General's Office ("AGO") after filing its Notice of Appeal in the OPA, and prior to the commencement of an action in court, to explore the possibility of settlement. After meaningful discussions with the AGO, Triple J and GSA were able to reach a mutual agreement, and thereafter executed a Settlement Agreement on November 7, 2014 that was filed with the OPA on the same day. The Settlement Agreement was signed by GSA and Triple J, as well as their respective counsel of record in this matter.

On or before 9:17am on November 10, 2014, the OPA signed an Order dismissing with prejudice Triple J's Appeal pursuant the agreement and request of the parties in their Settlement Agreement, thereby avoiding substantial costs to both Triple J and the Territory, and avoiding an unnecessary, protracted delay to a vital procurement need. Triple J submits that this good-faith, arms-length Settlement Agreement reflects and effectuates the purposes and policies underlying Guam's procurement law and serves the best interests of the Territory of Guam, its schoolchildren, and its community.

It appears Morrigo does not share the same sentiment. After the Settlement Agreement was executed and filed, and after the OPA issued an Order dismissing Triple J's Appeal with prejudice as a result of the Settlement Agreement reached in this matter, Morrigo has filed a Motion to Set Aside Order Dismissing Appeal with Prejudice. In its Motion to Set Aside, Morrigo expresses its desire to "be heard with respect to the merits of the Triple J appeal."

On November 20, 2014, the OPA issued an Order establishing a briefing schedule with respect to the Motion to Set Aside, and requesting a written discussion in the briefs of “the OPA’s jurisdiction and authority to grant the relief requested by Morrico, and the standing of Morrico to make the request for relief.”

Triple J submits this Opposition and Cross-Motion in accordance with the OPA’s November 20, 2014 Order.

## II. Argument

### A. The OPA lacks jurisdiction to grant the relief requested by Morrico in its Motion to Set Aside.

#### 1. This Appeal was resolved and dismissed with prejudice by all parties to the Appeal before the Motion to Set Aside was filed.

Triple J submits that the OPA no longer has jurisdiction to grant the relief requested by Morrico in its Motion to Set Aside. The OPA made a decision to dismiss this Appeal with prejudice before Morrico requested to intervene in this matter or otherwise “be heard” on the merits of Triple J’s appeal.

Whether an administrative agency has the power to reopen administrative proceedings with a view toward reconsidering its earlier adjudicative order is a “question to be determined by an interpretation of the statute that vests the agency with administrative power.” *Sexton v. Mount Olivet Cemetery Ass’n*, 720 S.W.2d 129, 138 (Tex. App. 1986), *writ refused* NRE (Jan. 28, 1987).

Title 5 Guam Code Annotated (“GCA”) § 5703 provides, in pertinent part:

The Public Auditor shall have the power to review and determine *de novo* any matter **properly submitted** to her or him. . . . The Public Auditor **may** consider testimony and evidence submitted by any **competing** bidder,



offeror or contractor of the protestant. The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.

5 GCA § 5703 (emphases added).

Morrice's Motion to Set Aside is not "properly submitted" to the Public Auditor because she has already dismissed this matter with prejudice, thereby divesting the OPA of jurisdiction. *Id.* Moreover, the Public Auditor "may," but is not required to, consider testimony and evidence of a competing bidder.<sup>3</sup> *Id.*; see also 5 GCA § 5030(m) ("May denotes the permissive."). Therefore, a strict and plain interpretation of the statute that must be reviewed in order to determine whether the OPA is vested with the power to reopen administrative proceedings, namely, 5 GCA § 5703, clearly does not provide the OPA with jurisdiction over Morrice's Motion to Set Aside.

Additionally, the power of administrative agencies to reopen proceedings following dismissal with prejudice, where allowed, "must be sparingly used." See *Malone v. Civil Serv. Comm'n*, 646 N.E.2d 150, 154 (Mass. Ct. App. 1995) (citation and internal quotation marks omitted). It is not necessary for the agency to reopen administrative proceedings "merely because some new piece of evidence has come to light that was not before the agency at the time it made its decision." *Am. Min. Cong. v. Marshall*, 671 F.2d 1251, 1257 (10th Cir. 1982). Otherwise, "if every new circumstance or fact were to be the basis of a reopening of the administrative proceeding, there would be little hope that the administrative process would ever be consummated." *Wilson &*

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<sup>3</sup> Triple J submits that once Morrice failed to file a timely protest to challenge GSA's rejection of its bid, Morrice was no longer a "competing" bidder.

*Co. v. United States*, 335 F.2d 788, 799 (7th Cir. 1964) (citation and internal quotation marks omitted).

Because the OPA no longer retains jurisdiction over this Appeal, Morrico is not entitled to “be heard” on the merits of the Appeal. Likewise, due to Morrico’s lack of standing, as explained in greater detail below, the OPA is jurisdictionally precluded from granting the relief sought by Morrico in its Motion to Set Aside, particularly at this stage in the proceedings.

The OPA’s decision to sign the Settlement Agreement and dismiss Triple J’s Appeal with prejudice is an issue that was finally and conclusively determined in this Appeal and cannot be reopened now at the administrative level; instead, appeals of decisions made by the Public Auditor must be taken to the Superior Court of Guam. See 5 GCA § 5707; see also *id.*, § 5425(f) (“A decision of the Public Auditor is final unless a person adversely affected by the decision commences an action in the Superior Court in accordance with Subsection (a) of § 5480 of this Chapter.”); *id.*, § 5704 (“Any determination of an issue . . . by the Public Auditor shall be final and conclusive unless arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law.”); *id.* (“Any decision of the Public Auditor . . . shall entitle to great weight and the benefit of reasonable doubt.”).

Because the OPA lacks jurisdiction to grant the relief sought in Morrico’s Motion to Set Aside, the Motion to Set Aside must be denied.

**2. Morrico lacks standing to request the relief sought in its Motion to Set Aside because it is not an Interested Party and was not a party to the proceedings of the Appeal before the Appeal was resolved and dismissed.**

Morrigo's lack of standing is another reason why the OPA lacks jurisdiction to grant the relief requested in Morrigo's Motion to Set Aside. Triple J submits that Morrigo did not and cannot establish standing to request the relief sought in its Motion to Set Aside, and on these independent grounds alone, Morrigo's Motion to Set Aside must be denied.

Morrigo's lack of standing can be traced back to its failure to file a protest—let alone a timely protest—of GSA's decision to reject its bid for non-compliance with the specifications of the IFB. Under 5 GCA § 5425, due process rights are afforded to actual bidders "who may be aggrieved" in connection with the award of a contract, by allowing aggrieved bidders to protest to the Chief Procurement Officer "within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto." 5 GCA § 5425(a); *see also* 2 Guam Administrative Rules and Regulations ("GARR"), Div. 4, § 9101(c)(1) ("Protests filed after the 14 day period shall not be considered.").

In its Motion to Set Aside, Morrigo refers to itself as an "Interested Party" in the above-captioned appeal. *See, e.g.,* Motion to Set Aside, p. 1 (capital letters in original). Despite Morrigo's attempt to label itself as an Interested Party, Guam's procurement law provides otherwise. *See* 2 GAR, Div. 4 § 9101(a) ("Interested Party means an actual or prospective bidder, offeror, or contractor **that may be aggrieved** by the solicitation or award of a contract **and who filed a protest.**" (emphases added)); *see also* 2 GAR,

Div. 4. § 12102(b) (“Interested Party means an actual or prospective bidder, offeror, or contractor who appears to have a substantial and reasonable prospect of receiving an award if the Appeal is denied.”).

Based on a clear and plain reading of this language, Morrico was not an Interested Party under either definition, not when GSA was still considering Triple J protest, nor when Triple J’s protest found its way to the OPA on appeal. Again, Morrico failed to file a protest, so it does not qualify as an Interested Party under 2 GAR, Div. 4, § 9101. In turn, Morrico’s failure to protest GSA’s decision to reject its bid for non-conformance with the specifications of the IFB left Morrico with a zero-percent (0%) prospect of receiving an award under the IFB if Triple J’s Appeal were denied by the OPA. Accordingly, Morrico’s zero-percent (0%) prospect translated into a zero-percent (0%) interest, so Morrico does not qualify as an Interested Party under 2 GAR, Div. 4, § 12102(b).

In its Motion to Set Aside, Morrico complains that “[t]he Chief Procurement Officer of the GSA did not give notice to Morrico of the Triple J appeal.” But GSA was not required to do so. See 2 GAR, Div. 4, § 12104(c)(2) (“The Chief Procurement Officer . . . shall give notice of the Appeal to the contractor if award has been made or, if no award has been made, to all **Interested Parties.**” (emphasis added)). Because an award was made, and because Morrico was not and is not an “Interested Party” in the above-captioned Appeal, Morrico was not entitled to notice of Triple J’s appeal.

Morrigo also lacks standing because it is not “aggrieved” in connection with the award of Triple J’s contract (i.e., the Settlement Agreement). Under a traditional

standing analysis, once Morrico decided to forego its opportunity and due process right to protest GSA's decision to reject Morrico's bid as non-responsive to the IFB, Morrico lacked standing to challenge the Settlement Agreement. See John Thomas Brown, *Procurement Primer*, v. 2.1 (2011) (citing *U.S. v. IBM*, 892 F.2d 1006, 1012 (Fed. Cir. 1989)):

If a bid is not responsive, the protester has no more right to invoke the office of the board than the proverbial man on the street. A nonresponsive bidder is the epitome of one who lacks a direct economic interest. This is not a mere technicality; it is the predicate for the board's right to intervene in governmental procurements.

"A bidder's standing to protest a contract given to another cannot be divorced from the responsiveness of its offer." *CHE Consulting, Inc. v. U.S.*, 47 Fed. Cl. 331 (Fed. Cl. 2000) (quoting *U.S. v. IBM*, 892 F.2d at 1012). Morrico's failure to submit a responsive bid and to challenge GSA's rejection of its bid in this IFB results in Morrico's failure to establish a sufficiently direct economic interest, or nexus, to the outcome of Triple J's Appeal. See *Dismas Charities, Inc. v. U.S.*, 75 Fed. Cl. 59, 60 (Fed. Cl. 2007) (limiting standing of actual bidder to protest decision of agency to award contract only if the actual bidder's "direct economic interest" would be affected by the award of the contract or by failure to award the contract).

In order to meet the "direct economic interest" prong of the standing analysis, the actual bidder must show "not only some significant error in the procurement process, but also that there was a substantial chance that it would have received the contract but for that error." *Id.* (citation and internal quotation marks omitted); see also *id.*, at 60 ("This Court has held that a bidder submitting a nonresponsive bid has no standing to

protest an award, because it has no chance of receiving the award.” (citation and internal quotation marks omitted)).

Because Morrigo did not protest GSA’s determination that its bid was non-responsive to the IFB, and because Morrigo cannot be considered “aggrieved” or otherwise legally interested in the outcome of Triple J’s Appeal, Morrigo lacks standing to request the relief it seeks in its Motion to Set Aside. For the same reasons, Morrigo is not entitled “to be heard”; neither Morrigo’s opinions on the merits of Triple J’s Appeal, nor Morrigo’s opinion on its own failure to comply with the specifications of the IFB, are properly before the OPA, and any due process rights Morrigo would have been entitled to in the event of a timely protest have been voluntarily waived by Morrigo. See Procurement Primer, p. 243 (“OPA does not have jurisdiction of matters merely incidental to procurement”); *id.*, p. 315-316 (noting that Guam’s procurement law and regulations do not require the presence of anyone other than the agency and the protest at the protest level or the OPA appellate level in determining either the protest or the appeal). For the same reasons, Morrigo should be estopped from asserting a right to challenge the merits of or otherwise be heard on Triple J’s appeal at the administrative level. Accordingly, the OPA must deny Morrigo’s Motion to Set Aside for lack of jurisdictional standing.

### III. Cross-Motion for Ratification and Affirmance of Contract

#### A. If the OPA determines that it does have jurisdiction to grant the relief requested by Morrico in its Motion to Set Aside, Triple J respectfully requests that the Settlement Agreement be ratified and affirmed in the best interests of the Territory.

In the alternative, Triple J respectfully requests that if the OPA determines that it has jurisdiction to grant Morrico's requested relief, that the OPA exercise its jurisdiction to deny Morrico's Motion, and to ratify and affirm the Settlement Agreement in the best interests of the Territory.

The established purposes and policies of Guam's procurement law include a provision for the "increased economy in territorial activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Territory." 5 GCA § 5001(b)(5). They also provide for a construction and application of Guam's procurement law "to provide for the expeditious resolution of controversies . . . ."). 2 GAR, Div. 4, § 12101; see also 5 GCA § 5701 ("The Public Auditor shall adopt rules of procedure, which, to the fullest extent possible, will provide for the expeditious resolution of controversies . . . .").

Under the Settlement Agreement, Triple J was awarded the sale of nine (9) buses, as well as three-fourths (3/4) of any additional buses procured under available funding. By definition, the Settlement Agreement constitutes Triple J's contract for the sale of nine (9) buses now, and the sale of additional buses later in the above-specified ratio. A "contract" is defined in Guam's procurement law as "all types of territorial agreements, regardless of what they may be called, for the procurement or disposal of supplies, services or construction." 5 GCA § 5030(d). With a few limited exceptions not

applicable here, “any type of contract which will promote the best interest of the Territory may be used.” *Id.*, § 5235.

In selecting a contract type, the focus of the Territory is to “obtain the best value in needed supplies, services or construction in the time required and at the lowest cost or price to the territory.” 2 GAR, Div. 4, § 3119(b)(1). Factors to be considered includes “the administrative costs to both parties,” “the effect of the choice of the type of contract on the amount of competition to be expected,” and “the urgency of the requirement.” It is clear to Triple J that GSA chose to enter into a Settlement Agreement with Triple J when bearing all of these factors in mind. Upon information and belief, the procurement of these school buses is urgent, and the failure to settle these matters would have come at great administrative cost to both parties. In the same vein, Triple J was informed by GSA that the funding for this IDIQ contract has a limited window for availability, furnishing the parties with another sound reason to select a contract in the form of a Settlement Agreement.

Triple J submits that the Settlement Agreement was entered into freely and voluntarily, and upon independent advice of counsel that was or could have been received by the contracting parties, and the plain language of the Settlement Agreement reflects this. The parties to the Settlement Agreement had full authority to resolve Triple J’s protests while they were awaiting OPA appellate review. See 5 GCA § 5425(b) (“The Chief Procurement Officer . . . or a designee of one of these officers shall have the authority, **prior to the commencement of an action in court concerning the controversy**, to settle and resolve a protest . . . .” (emphasis added)); see also 2 GAR,



Div. 4, § 12109(a) (“The Hearing Officer has the power, among others, to . . . [h]old informal conferences to settle, simplify, or fix the issues in a proceeding . . . either by consent of the parties or upon the officer’s own motion.”).

So, too, did the parties to the Settlement Agreement have the authority to enter into this procurement contract. See 5 GCA § 5121(c) (“The Chief Procurement Officer, or [her] designee . . . , shall execute all contracts for the government of Guam.”). The Chief Procurement Officer of GSA entered into this contract upon the advice of its legal counsel, the AGO. See 5 GCA § 5118 (“The Procurement Counsel shall assist and advise the Chief Procurement Officer on all civil matters in which [GSA] is legally interested, providing that the [AGO] shall represent [GSA]”); see also *id.*, § 5150 (“Attorneys General shall, in addition, when he approves contracts, determine not only the correctness of their form, but their legality.”). Deference should be afforded to both GSA’s and the OPA’s decisions to sign the Settlement Agreement as a “full and final settlement of OPA-PA-14-009,” because “absent fraud, collusion, or the like . . . [trial judges] should be hesitant to substitute their judgment for that of experienced counsel.” *Maeda Pacific Corp. v. Gov’t of Guam, et al.*, CV0135-04, p. 4 (Dec. & Order, Jan. 6, 2012) (citing *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977)).

The determination made by GSA and the OPA to approve the form and legality of the Settlement Agreement, to sign the Settlement Agreement, and to thereby allow Triple J to correct its bid, are deemed “final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law.” See 5 GCA § 5245; see also Procurement Primer, p. 301-302 (“The traditional deferential standard is usually said to

be applicable to all administrative determinations across the board.”). Morrico has failed to present any evidence of “cogent and compelling reasons” that the IFB at issue should be cancelled rather than awarding the contract to Triple J pursuant to its Settlement Agreement with GSA. See 2 GAR, Div. 4, § 3115(b).

After an award is made, even where it is determined that award of a contract is in violation of law, if the person awarded the contract has not acted fraudulently or in bad faith, then “the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Territory.” 5 GCA § 5452(a)(1)(A).

Accordingly, if the OPA finds that it is not divested of jurisdiction in the above-captioned appeal, Triple J respectfully requests that the OPA deny Morrico’s Motion to Set Aside, and ratify and affirm the Settlement Agreement, in advancing the interests of administrative economy and in the best interests of the Territory, pursuant to the OPA’s jurisdictional mandate “to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.” See 5 GCA § 5703.

**B. If the OPA determines that it does have jurisdiction to grant the relief requested by Morrico in its Motion to Set Aside, Triple J respectfully requests that the Settlement Agreement be modified by striking any clauses that offend public policy or Guam’s procurement laws and upholding the validity of the remaining provisions of the Settlement Agreement.**

Again, in the alternative, if OPA determines that it does have jurisdiction over Morrico’s Motion to Set Aside, Triple J respectfully requests that certain provisions of the Settlement Agreement be severally stricken or otherwise modified to the extent they violate public policy or Guam’s procurement law, and that the OPA uphold the validity of the remaining provisions.

In its Motion to Set Aside, Morrico states that it was “not a party to the settlement agreement, did not sign the settlement agreement and does not approve the terms of the settlement agreement.” The Uniform Commercial Code of Guam and the law relative to capacity to contract supplement the provisions of Guam’s procurement code. 5 GCA § 5002. Because Triple J has now learned that Morrico does not accept the contract, the Settlement Agreement should be modified such that Morrico will not be awarded the sale of three (3) buses, nor any subsequent buses on the IDIQ contract and available funding therefor. Otherwise, Morrico could argue that GSA and Triple J are forcing a contract on Morrico without Morrico’s approval.

Triple J also requests that the Settlement Agreement be modified to provide the award of all buses to Triple J, on the basis that a multiple award may not be appropriate under the facts and circumstances surrounding this Settlement Agreement, particularly where it has been determined and Morrico’s buses would not comply with the specifications of the IFB and may place the schoolchildren of Guam at risk. See 2 GAR, Div. 4, § 3122(1) (“An incremental award may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery.”); see *also* Procurement Primer, p. 169 (citing § 3122) (“To avoid the facilitation of collusion, multiple awards cannot be made when a single award can be made to meet the territory’s needs without sacrificing economy or service, nor for dividing business or settling low tie bids.”). Because Morrico will not be able to, and is apparently not willing, to provide buses under this IFB that will satisfy the IFB specification requirements, and because Triple J is ready, willing, and able to

provide all of the buses, Triple J submits that it is in the best interest of the Territory to modify the Settlement Agreement to provide for a total award of all of the buses to Triple J. See Specifications of IFB No. GSA-065-14, item 22 (“The Government reserves the right to increase or decrease the quantity of the items for award and make additional awards for the same type items and the vendor agrees to such modifications and additional awards . . .”).

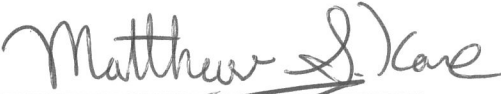
#### **IV. Conclusion**

Based on the foregoing, Triple J respectfully requests for the OPA to DENY Morricono’s Motion to Set Aside for lack of jurisdiction, and to GRANT Triple J’s Cross-Motion for Ratification and Affirmance of its contract with GSA in the best interests of the Territory.

Respectfully submitted this 1st day of December, 2014.

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By:

  
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