



Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

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**[eFile] In the Appeal of JJ Global Services - Appeal Case No. OPA-PA-21-013**

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Dear Mr. Hernandez,

Please see the attached documents for filing in the above-referenced matter, as follows:

- JJ Global's Opposition to Purchasing Agency's Motion to Dismiss for Lack of Jurisdiction
- JJ Global's Comments to Agency Report

Sincerely,

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**2 attachments** **2021.11.29 Opposition to Motion to Dismiss.pdf**  
228K **2021.11.29 Comments to Agency.pdf**  
206K

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**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

**PROCUREMENT APPEAL**

In the Appeal of ) DOCKET NO. OPA-PA-21-013

JJ GLOBAL SERVICES,

Appellant,

and

GUAM COMMUNITY COLLEGE,

Purchasing Agency.)

**OPPOSITION TO  
MOTION TO DISMISS**

**INTRODUCTION**

COMES NOW, Appellant JJ Global Services (“JJ Global”), by and through its counsel of record, Vanessa L. Williams of the Law Office of Vanessa L. Williams, and hereby submits its Opposition to Guam Community College’s (“GCC”) Motion to Dismiss for OPA-PA-12-013. See Mot. Dismiss (Nov. 9, 2021).

**BACKGROUND**

On May 13, 2021, GCC issued an Invitation for Bid (IFB No. GCC-FB-21-009) for the replacement of GCC’s Building 900 metal awning structure. The authority cited by GCC’s IFB (page 6) stated that the IFB shall be governed by Guam’s Procurement Laws in 5 Guam Code Annotated (“GCA”) Chapter 5, and 2 GAR Div. 4. *See* Notice of Appeal, Ex. 1 (Oct. 27, 2021). On July 2, 2021, GCC provided JJ Global with a Notice of Intent to Award letter for the IFB. The letter provided in pertinent part: “Prior to providing you with the contract, JJ Global Services will need to submit the following documents: ... 7. Updated CPM Chart....” *See id.* at Ex. 2. On July 6, 2021, JJ Global responded to the GCC’s Notice of Intent to Award, consistent with the June

1 25, 2021 clarification letter, that the completion timeline of 90-days did not include delays due to  
2 weather or delay in materials if not on island, and that JJ Global should receive at least 36-hours  
3 notice before the Notice to Proceed Date to allow for mobilization. *See id.* at Ex. 3. On July 27,  
4 2021, GCC provided a July 26, 2021 Notice of Bid Award letter and a proposed contract to JJ  
5 Global for the IFB. The Bid Award letter also stated the Notice to Proceed date was July 27, 2021  
6 and that based on the 90 days calendar days “upon the issuance of the purchase order/contract,  
7 the deadline to complete this project is October 24, 2021.” *See id.* at Ex. 4. On July 28, 2021, a  
8 Purchase Order was signed off by the President of GCC on July 28, 2021 and issued to JJ Global.  
9 *See id.* at Ex. 5. On August 6, 2021, JJ Global submitted a request to GCC seeking an extension  
10 of the project completion timeline. The request was submitted following an email from GCC  
11 stating, “JJ Global may submit a request in writing asking for an extension because of the time it  
12 took to obtain a permit.” *See id.* at Ex. 6. On August 9, 2021, JJ Global followed up with GCC,  
13 asking for the status of their request for an extension. *See id.* at Ex. 7. On August 26, 2021, JJ  
14 Global sent a letter to GCC stating the proposed contract did not reflect JJ Global’s bid term  
15 regarding unanticipated delays outside its control, specifically: “Completion Date may be  
16 extended forward in allotment to the number of days needed for any/all the following: delay of  
17 permits(s); delay due to weather conditions, *i.e.* natural disasters, storms, etc.; or delay due to the  
18 COVID-19 pandemic, including, but not limited to, materials not on island.” *See id.* at Ex. 8. On  
19 September 22, 2021, GCC canceled the award and purchase order for IFB No. GCC-FB-21-009.  
20 *See id.* at Ex. 9. On October 5, 2021, JJ Global protested the cancellation of the award and  
21 purchase order for IFB No. GCC-FB-21-009. *See id.* at Ex. 10. Paragraph 29 of the Instructions  
22 of GCC-BF-21-009 states in pertinent part:

23 Award shall be made to the lowest responsible and responsive bidder, whose  
24 bid is determined to be the most advantageous to the Government, taking into  
25 consideration the evaluation factors set forth in this solicitation. No other  
26 factors or criteria shall be used in the evaluation. Award issued to the lowest  
27 responsible bidder within the specified time for acceptance as indicated in the  
28 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).

1 *See id.* at Ex. 1. On October 12, 2021, GCC denied JJ Global’s protest. *See id.* at Ex. 11. On  
2 October 12, 2021, GCC denied JJ Global’s protest. *See id.* at Ex. 11. On October 27, 2021, JJ  
3 Global filed a Notice of Appeal for the instant matter, which was docketed as OPA-PA-21-013.  
4 Notice of Appeal (Oct. 27, 2021). On November 9, 2021, GCC filed a Motion to Dismiss for Lack  
5 of Jurisdiction. Mot. Dismiss (Nov. 9, 2021). On November 15, 2021, GCC filed its Agency  
6 Report. JJ Global now files its Comments to GCC’s Agency Report on November 26, 2021.

### 7 **ARGUMENT**

8 JJ Global’s appeal is properly before the Public Auditor because the underlying protest  
9 was in connection with the award of a contract. JJ Global’s protest was timely because no  
10 misconduct occurred or could be protested until GCC cancelled the award in violation of the  
11 terms of the IFB and the law. Thus, OPA has proper jurisdiction over this appeal and GCC’s  
12 Motion to Dismiss should be denied.

#### 13 **I. The Public Auditor has jurisdiction over the appeal because JJ Global’s protest in** 14 **connection with the award of a contract.**

15 Section 5425(a) of Guam procurement law provides in pertinent part that any “[a]ny  
16 contractor who may be aggrieved in connection with...a contract...” may protest under 5 GCA §  
17 5425(a). The Public Auditor has jurisdiction over the appeals of decisions rendered by the head  
18 of the purchasing agency on such protests. 5 GCA § 5425(e). Protesters may protest any phase  
19 of the solicitation or award and protests are not limited to those specifically enumerated in 2 GAR  
20 Div. 4 § 9101(c)(2). This includes even those instances where contracts have already been  
21 awarded, as evidenced by the form of protests required in 2 GAR Div. § 9101(c)(3) (“The written  
22 protest shall include as a minimum the following: ... appropriate identification of the  
23 procurement, and if a contract has been awarded, its number...[.]”) This is further proven by the  
24 fact that protests may be filed by contractors, which are defined as “any person *having a contract*  
25 with a governmental body.” 5 GCA § 5030(f) (emphasis added); *see* 5 GCA § 5425 (“Any actual  
26 or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method  
27 of source selection, solicitation or award of a contract, may protest...[.]”)

28 GCC argues the Public Auditor lacks jurisdiction because JJ Global’s protest involves a

1 contract and not the award of a contract. GCC Agency Rpt. at 8-9. However, the closely bound  
2 issues of the award of a contract and a contract on its own is the fault of GCC itself. It is by GCC's  
3 own terms and conditions that the award of the IFB automatically formed a binding contract  
4 without further action by the parties. Automatic contract formation without further action does  
5 not exist in Guam Procurement Law, but is a unique term and condition added by GCC itself in  
6 IFB No. GCC-FB-21-009. *See* Notice of Appeal, Ex. 1. Because under GCC's terms a contract is  
7 automatically formed when a bid is awarded, any winner of a GCC bid would be precluded from  
8 filing any protest under § 5 GCA § 5425 by virtue of the automatic contract formation. Winners  
9 would then be forced to appeal only under other statutes and unable to protest the award at all. JJ  
10 Global should not be punished for attempting to cover all its bases by filing this appeal when  
11 GCC is the one to cause the vague circumstances in the first place.

12 GCC cites the decision in *Mega United Corp. v. Gaum Econ. Develop. Auth.* as support  
13 for its contention. OPA-PA-17-007 Dec. (Aug. 2, 2017). However, the issue in *Mega United*  
14 *Corp.* concerned whether the appeal was filed within the 60-day deadline for decisions regarding  
15 contracts or breaches of contracts. *Id.* at 2. The decision did not concern whether the appeal fell  
16 within protests involving the award of a contract or disputes of contractual controversies. *Id.* Thus,  
17 the decision in *Mega United Corp.* is irrelevant to the matter at hand.

18 JJ Global's protest is proper because it involves the "method of source selection,  
19 solicitation or award of a contract" under 5 GCA § 5425(a). The vagueness of whether the  
20 controversy involves an award of contract or a contract dispute is created by GCC itself. JJ Global  
21 should not be punished for attempting to cover all its bases by filing this appeal. Therefore, the  
22 Public Auditor has jurisdiction over this appeal.

23 **II. The Public Auditor has jurisdiction over the appeal because JJ Global's protest is**  
24 **timely.**

25 JJ Global's protest is not untimely because it was not aware GCC would cancel the award  
26 and purchase order until it had actually done so on September 22, 2021. "Where the question of  
27 when the statute of limitations begins to run turns on what a reasonable person should have  
28 known, a mixed question of law and facts is presented." *DFS Guam L.P. v. A.B. Won Pat Int'l*

1 *Airport Auth., Guam*, 2020 Guam 20 ¶ 88 (citations omitted). Therefore, in order to determine the  
2 date of which the 14-day window of section 5425(a) begins to run, the court must conduct an  
3 analysis examining what facts are necessary to establish a protest claim and when the protester  
4 knew, or should have known, facts establishing the essential elements of that protest claim.” *Id.*  
5 (citations omitted). “[A]s a general proposition, when alleged misconduct forms the basis of a  
6 procurement protest, the time runs from the date on which the protesting party first learned of the  
7 purported misconduct.” *Id.* (citations omitted).

8 GCC argues there are several instances purporting that JJ Global knew of the grounds for  
9 protest prior to the 14-day statute of limitations for filing of protests, such as (1) the existence of  
10 Paragraph 29 of the IFB’s terms and conditions; (2) GCC’s Notice of Intent to Award and  
11 corresponding email received by JJ Global on July 29, 2021; and (3) correspondence between JJ  
12 Global and GCC occurring during the month of August 2021. GCC Agency Rpt. 9-12.

13 However, JJ Global was not on notice that GCC could or would renege or “cancel” the  
14 award of JJ Global’s contract until GCC did so. Despite had actually cancelled the award of IFB  
15 and purchase order. JJ Global was operating under the knowledge that a contract had already  
16 been formed between the parties because the award of the IFB created a binding agreement that  
17 did not require further action by either party. See Paragraph 29 (“Award issued to the lowest  
18 responsible bidder within the specified time for acceptance as indicated in the solicitation, result  
19 in a binding contract without further action by either party.”) Accordingly, because a binding  
20 contract between the parties already existed, the further action of signing a formal contract would  
21 not adversely affect its existence. No misconduct to protest occurred until GCC cancelled the  
22 award of the IFB. Because GCC did not cancel the award and purchase order until September 22,  
23 2021, the grounds for this protest did not arise until that date. Therefore, JJ Global’s October 5,  
24 2021 protest is timely because it is within 14 days of GCC’s misconduct that occurred on  
25 September 22, 2021.

26 GCC argues its mere Notice of Intent to Award and corresponding email, sent on July 27,  
27 2021, was sufficient notice of grounds for the instant protest because JJ Global knew “that GCC  
28 wanted a signed format contract since the end of July 2021...[.]” GCC Agency Rpt. at 11.

1 However, merely knowing GCC wanted a signed formal contract is a wholly different issue from  
2 actually terminating the award of said IFB and purchase. Under the IFB's terms and conditions,  
3 further action - such as the signing of a contract - did not affect whether a binding contract was  
4 formed. Thus, even if JJ Global knew GCC wanted a formal contract signed since July 2021, it  
5 had no reason to believe that its lack of signature as a contract formality would lead to the  
6 termination of the award and purchase order. By the terms and conditions of the IFB, whether the  
7 contract was signed or not should have no bearing on whether a binding contract was formed  
8 between the parties.

9 Throughout the multiple correspondence in August 2021, not once did GCC ever indicate  
10 that they believed signature on a formal contract was a condition of award. GCC points to JJ  
11 Global asking for an extension for the project as proof of notice for grounds of protest, however  
12 asking for an extension was suggested and permitted by GCC itself in its July 29, 2021 and August  
13 4, 2021 emails. *See* GCC Agency Rpt. Tab 5, AR040, 043 ("JJ Global may submit a request in  
14 writing asking for an extension because of the time it took to obtain a permit.") Not once in any  
15 of its correspondence did GCC ever indicate it would cancel the IFB award if JJ Global did not  
16 sign the contract. *See* GCC Rpt. Tab 5, AR020, AR024, AR035, AR040, AR043.

17 JJ Global's protest is timely because the grounds for protest did not arise until GCC had  
18 terminated the IFB award and purchase order on September 22, 2021. Therefore, because JJ  
19 Global's protest was filed on October 5, 2021, the Public Auditor has jurisdiction over the instant  
20 appeal because it was timely filed within 14-days of September 22, 2021.

### 21 CONCLUSION

22 For the foregoing reasons, JJ Global respectfully requests the Public Auditor denies  
23 GCC's Motion to Dismiss.

24  
25 Respectfully submitted this 29<sup>th</sup> day of November 2021.

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VANESSA L. WILLIAMS, ESQ.  
*Attorney for Appellant JJ Global Services*