Suite 401 DNA Building
238 Archbishop Flores St.
Hagåtña, Guam 96910

FAX

To:	**Ms. Claudia S. Acfalle** **Chief Procurement Officer** **General Services Agency** Department of Administration 148 Route 1 Marine Drive Piti, Guam 96915 Phone: (671) 475-1707 Fax: (671) 475-1727	**From:**	**Benjamin J.F. Cruz** **Public Auditor** Office of Public Accountability
		Pages:	14 (including cover page)
CC:	**Mr. Joshua D. Walsh, Esq.** **Attorney for Appellant ST Corp.** Razano Walsh & Torres, P.C. 139 Murrary Blvd. Hagåtña, Guam 96910 Phone: (671) 989-3009 Email: jdwalsh@rwtguam.com	**Date:**	November 25, 2020
		Phone: **Fax:**	(671) 475-0390 x. 208 (671) 472-7951

Re: OPA-PA-20-008 Notice of Receipt of Appeal

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Thank you,
Jerrick Hernandez, Auditor
jhernandez@guamopa.com

OFFICE OF PUBLIC ACCOUNTABILTY
Suite 401 Pacific News Building, 238 Archbishop Flores St., Hagåtña, Guam 96910
Phone: (671) 475-0390 / FAX: (671) 472-7951

November 25, 2020

Ms. Claudia S. Acfalle
Chief Procurement Officer
General Services Agency
Department of Administration
148 Route 1 Marine Drive
Piti, Guam 96915

VIA FACSIMILE: (671) 475-1727

Re: Notice of Receipt of Appeal – OPA-PA-20-008

Dear Ms. Acfalle,

Please be advised that ST Corporation, Inc. (hereinafter referred to as "ST Corp." filed an appeal with the Office of Public Accountability (OPA) on November 24, 2020, regarding the General Services Agency's response to ST Corp.'s protest of the procurement award for Janitorial Supplies, Invitation for bid No. GSA-047-20. OPA has assigned this appeal case number OPA-PA-20-008.

Immediate action is required of GSA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA's office and on its website at www.opaguam.org. The first six pages of the notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), the submission of one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated is required no later than **Thursday, December 3, 2020**, five work days following this Notice of Receipt of Appeal. We also request one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Friday, December 11, 2020**, ten work days following receipt of this notice.

When filing all other required documents with our office, please provide one original and one electronic copy to OPA, and serve a copy to ST Corp. Although the Guam Procurement Law and Regulations require only one copy of the procurement record, OPA respectfully asks that GSA

provide one original and one electronic file of the said record, which will be distributed as follows: Copy-1: Master File; and Copy-2: Public Auditor and/or Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208 or jhernandez@guamopa.com should you have any questions regarding this notice.

Sincerely,

Benjamin J.F. Cruz
Public Auditor

Enclosure: First eleven Pages of the Notice of Appeal – OPA-PA-20-008

Cc: Joshua D. Walsh, Esq., Counsel for Appellant ST Corp.

JOSHUA D. WALSH
EDWIN J. TORRES
RAZZANO WALSH & TORRES, P.C.
139 MURRAY BLVD.
HAGATNA, GUAM 96910
TEL: (671) 989-3009
jdwalsh@rwtguam.com
etorres@rwtguam.com

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 **NOTICE OF APPEAL**

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 11-24-2020
TIME: 4:15 ☐AM ☑PM BY: MO
FILE NO OPA-PA: 20-008

PART II: APPELLANT INFORMATION

Appellant's Name	ST Corporation, Inc.
Appellant's Mailing Address	Lej Teodosio
Appellant's Business Address	147 Frank G. Benavente St. South, Barrigada, Guam 96913
Appellant Representative's Direct Email Address	671-637-7101

Appellant is represented by legal counsel in this appeal. For purposes of this appeal, please direct correspondence to ST Corporation, Inc's ("ST") counsels, Joshua D. Walsh and Edwin J. Torres of Razzano Walsh & Torres, P.C.

Counsel's Mailing Address	139 Murray Blvd. Suite 100, Hagatna, Guam 96910
Counsel's Telephone	671-989-3009
Counsel's Facsimile	671-989-8750
Counsel's Direct Email Address	jdwalsh@rwtguam.com

PART III: APPEAL INFORMATION

A. Purchasing Agency: General Services Agency, Department of Administration.

B. Solicitation Number: GSA-047-20 Janitorial Supplies.

C. The Decision being appealed was provided to the Appellant on the evening of Wednesday, November 10, 2020. The Decision—sent with unattributed suggested redline edits included — 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...."

D. Appeal is made from a Decision on Protest of an Award.

E. The names of competing offerors known to Appellant are as follow:

1. There are currently no competing offerors currently known to Appellant.

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PART IV: STATEMENT OF GROUNDS FOR APPEAL

A. THE GROUNDS FOR APPEAL

1. Relevant Procedural and Factual History.

General Services Agency Invitation for Bid ("IFB") 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 Corporation, Inc. ("ST" or "Appellant") 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 offers 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.[1] 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.[2]

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[1] ST's protest was of both GSA-047-20 for Janitorial Supplies, as well as the companion procurement GSA -046-20 for Office Supplies. ST's Protest of October 8, 2020, is attached to this Notice of Appeal as **Exhibit A.**

[2] GSA's Decision sustaining ST's protest was issued on October 8, 2020, and is attached to this Notice of Appeal as **Exhibit B.**

On October 14, 2020, ST finally received GSA's responses to the questions previously posed.[3] 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.

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[3] GSA's delayed answers are attached to this notice of appeal at **Exhibit C.**

GSA's responses provided on October 14, 2020, served as the basis for ST's agency level protest filed on October 21, 2020.[4] 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 Caludia S. Acfalle as the Chief Procurement Officer. The Decision was attached to an email sent "per Mr. Robert Kono...."[5]

2. GSA's declaration that ST's Protest was untimely is in error.

ST filed its Agency level protest just 7 days after receiving GSA's answers to the various questions posed by ST and other bidders regarding the product specifications. Its protest was made necessary by the answers that the GSA provided to ST about offering quantities and prices for requested products that would both allow the GSA to meaningfully compare the value offered by various bidders, and to avoid holding to unnecessarily narrow specifications. GSA's belief that ST was untimely in its protest is premised upon a legal position that is absurd on its face, *i.e.*, that an offeror may be out of time to bring a protest about the specifications contained in an IFB even before the IFB is issued and can be responded to. This position is unsupported by law and must be rejected.

GSA's untimeliness determination is contained within a memorandum that appears to be inchoate; it contains unformatted redline edits, as well as text

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[4] ST's Bid Protest received by the GSA on October 21, 2020, is attached to this Notice of Appeal as **Exhibit D.**

[5] The November 10, 2020, protest decision that serves as the basis for this appeal, and its covering email, are attached to this Notice of appeal as **Exhibit E.**

suggested for deletion that, despite being struck, remains within the memorandum.[6] GSA's decision also references two dates that seem to form the basis for claiming that ST's protest comes more than 14 days after it should have. The GSA claims that on May 1, 2020, ST's undersigned counsel was contacted for "market research." It remains unclear in GSA's protest denial why a request for "market research" would have precluded as untimely ST's instant protest, especially since the claimed request for "market research" in May 1, 2020, comes *four months before* the tender from GSA for this procurement was even issued.[7]

The GSA also indicates that ST[8] was aware on August 7, 2020, that the government intended to move forward with the procurement using the narrow specifications that ST now questions. This claim is made because ST—according to the GSA— responded on that date to another bid "without indicating any concerns about the specifications." The GSA is incorrect, and its reliance upon correspondence that predates the issuance of the IFB being protested here to make a claim of untimeliness strains credulity. Here, the IFB was issued on September 14, 2020. ST sought clarifications and answers to questions about the specifications on September 17, 2020, and again on September 24, 2020. Its first protest regarding

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[6] ST is unable to determine if the language that contains the marks for deletion should either be included or excluded from the final agency decision. Because of this, ST specifically reserves all its rights to address the Decision accordingly if ever GSA clarifies itself.

[7] ST did receive an email inquiry on May 1, 2020, about "market research" for another procurement, and did inform GSA on August 1, 2020, that ST would consider being an offeror on future supply procurements.

[8] GSA's protest decision is directed and addressed to ST's counsel but appears to be meant for ST directly.

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.[9] 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 deadline for action lapsed. 5 G.C.A. § 5425 (a).

3. GSA, in declaring ST's protest as untimely, is seeking to avoid Public Auditor review of a procurement process that stifles competition.

The GSA Decision, in resting entirely on the timeliness of ST's protest, fails to engage in the merits of a procurement that stifles competition and prevents the territory from comparing the best value offered for the janitorial products sought. Guam's procurement code mandates that all specifications "shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the Territory's needs and shall not be unduly restrictive." 5 G.C.A. § 5265. Moreover, the specifications "shall not include requirements, such as but not limited to restrictive dimensions, weights or materials, which unnecessarily restrict competition, and shall include only the essential physical characteristics and functions required to meet the Territory's minimum needs." *Id.* at 5268(a). GSA's October 14, 2020, responses that prospective bidders may not deviate or provide pricing that allows for comparison between different product weights and measures

[9] GSA's decision to sustain ST's first protest is attached to this Notice of Appeal as **Exhibit B.**

show this procurement to be plagued by unduly restrictive specifications that limit value to the territory. This is especially true given the fact that Guam law requires that the territory should endeavor to procure "Standard commercial products whenever practicable" and avoid unique requirements. 2 G.A.R. § 4102(a)(3)). A cursory review of standard commercially available spray can air freshener, for instance, shows the products widely available in sizes ranging from 3 oz. to 15 oz. Despite, this, GSA's answers restrict the procurement to only a 10 oz. can. This falsely restricted series of specifications is repeated time and again throughout the IFB. Laundry detergent powder, for instance, is specified by GSA to be provided in the size of 180 loads/box, while boxes are commonly commercially available in sizes from 50 to 200 loads.

By requiring prospective bidders to meet these specifications, GSA is unduly restricting competition and preventing the Territory from obtaining the best price. More, 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 specifications.[10]

The IFB is fundamentally flawed so long as GSA holds to restrictive product sizing, and this is especially true if GSA, as relayed in its answers to bidder questions, will not permit pricing that can allow for comparison across different sized products. A price per ounce, for instance, will supply the Territory the total amount of product it is requesting, and the Territory can obtain the best price. Allowing bidders to submit a price per ounce will also ensure all bidders are competing on an equal basis. Finally, allowing bidders to provide products marked in either metric or imperial units, so long as a price comparison can be made, would further allow for the Territory to obtain the best pricing for the products it seeks. GSA failed to answer Question Number 19 from ST about measuring units, and GSA's failure to answer the question violates procurement law.

B. RULING REQUESTED

ST respectfully requests that the Office of Public Accountability provide the following relief:

(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;

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[10] ST reserves its right to protest such a determination if one is ultimately provided.

(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.

C. SUPPORTING EXHIBITS, EVIDENCE OR DOCUMENTS

Submitted with this appeal are the following supporting exhibits, evidence, and documents:

(1) ST's Protest of October 8, 2020, is attached to this Notice of Appeal as Exhibit A.

(2) GSA's Decision sustaining ST's protest on October 8, 2020 is attached to this Notice of Appeal as Exhibit B.

(3) GSA's answers to ST's questions are attached to this notice of appeal at Exhibit C.

(4) ST's Bid Protest received by the GSA on October 21, 2020 is attached to this Notice of Appeal as Exhibit D.

(5) The November 10, 2020 protest decision, and its covering email, are attached to this Notice of appeal as Exhibit E.

PART V: DECLARATION RE COURT ACTION

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his knowledge,

no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to, and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Respectfully Submitted this 24 day of November, 2020.

RAZZANO WALSH & TORRES, P.C.

By: _____

JOSHUA D. WALSH
EDWIN J.TORRES
Attorneys for Appellant
ST Corporation, Inc.

Gmail **Jerrick Hernandez <jhernandez@guamopa.com>**

OPA-PA-20-008 Notice of Receipt of Appeal

Jerrick Hernandez <jhernandez@guamopa.com> Wed, Nov 25, 2020 at 10:49 AM
To: Robert Kono <robert.kono@gsa.guam.gov>, Claudia Acfalle <Claudia.Acfalle@gsadoa.guam.gov>
Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, etorres@rwtguam.com

Hafa Adai,

Please see attached Notice of Receipt of Appeal for OPA-PA-20-008. This email will serve as an official notice in lieu of a transmittal via Fax.

Please confirm receipt of this email and the attached document. Thank you.

Notice Regarding PCOR1 Closure
The Office of Public Accountability will remain closed for the duration of Governor Lourdes Leon Guerrero's declaration of Pandemic Condition of Readiness (PCOR) 1 for Guam.

In lieu of hand-delivering documents to the office, we will allow documents to be transmitted electronically to admin@guamopa.com and my email jhernandez@guamopa.com. If a document needs to be hand-delivered, please make arrangements with me to receive them at the office. Thank you.

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Regards,

Jerrick J.J.G. Hernandez, MA, CGAP, CICA
Auditor
Office of Public Accountability – Guam
www.opaguam.org
Tel. (671) 475-0390 ext. 208
Fax (671) 472-7951

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