



Jerrick Hernandez <jhernandez@guamopa.com>

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

Anissa Senior <as@cmlaw.us>

Wed, Dec 29, 2021 at 2:58 PM

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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(s) for filing in the above-referenced matter:

1. **Purchasing Agency's Motion to Vacate Hearing Because Neither Party Filed a Written Request as Mandated by 2 GAR 4 §12108 (a) and Decide Appeal on the Record.**

Sincerely,

Anissa-Valene Senior

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2021.12-29 - GCC's Motion to Vacate Hearing and Decide Appeal on Record.signed final.pdf
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Date	Docket Item — Description
Oct. 27, 2021	JJ Global's Notice of Appeal
Oct. 28, 2021	Notice of Receipt of Appeal
Oct. 29, 2021	CM Law's Entry of Appearance for GCC
Nov. 5, 2021	GCC's Procurement Record
Nov. 9, 2021	GCC's Motion to Dismiss for Lack of Jurisdiction
Nov. 15, 2021	GCC's Agency Report
Nov. 15, 2021	GCC's Waiver of Right to Hearing
Nov. 15, 2021	GCC's Notice to Bidder
Nov. 17, 2021	Recusal of Public Auditor & Order Appointing Hearing Officer
Nov. 19, 2021	Notice of Status Hearing
Nov. 23, 2021	GCC's Response to Appointment of Hearing Officer
Nov. 29, 2021	Zoom Status Hearing at 10:00 am
Nov. 29, 2021	Scheduling Order for GCC's Motion to Dismiss for Lack of Juris.
Nov. 29, 2021	JJ Global's Opposition to GCC's Motion to Dismiss for Lack of Juris.
Nov. 29, 2021	JJ Global's Comments on Agency Report
Dec. 2, 2021	Scheduling Order
Dec. 2, 2021	Notice of Hearing re Appeal
Dec. 6, 2021	GCC's Reply re Motion to Dismiss for Lack of Juris.
Dec. 6, 2021	GCC's Rebuttal to JJ Global's Comments on Agency Report
Dec. 6, 2021	Decl. J.Evangelista re GCC's Reply/Rebuttal
Dec. 7, 2021	Amended Sched'g Order for Motion to Dismiss for Lack of Juris.
Dec. 22, 2021	Zoom Hearing at 10:00am re GCC's Motion to Dismiss for Lack of Juris.

As shown on the docket, GCC filed its Waiver of Right to Hearing on November 15 and JJ Global never filed a written request for a hearing. Therefore, as explained below, the law requires that the Public Auditor must vacate the scheduled hearing for this matter because a written request for a hearing was not timely submitted by either party.

ARGUMENT

The Procurement Regulations governing the instant Appeal mandate that a party must file a written request for a hearing on this Appeal or else the matter must be decided on the record.

(a) Request for Hearing. In all Appeals to the Public Auditor of suspension or debarment, a hearing shall be conducted. *In all other Appeals, including Appeals of protests or contract disputes, the parties shall either request a hearing in writing or waive their right to a hearing and submit the case on the record without a hearing. Request for a hearing shall be made prior to the expiration of the time period allowed for filing comments on the agency report, and shall be in a form substantially similar to Appendix D to this Chapter. Except in unusual circumstances, requests for a hearing received after such time will not be honored.*

2 GAR 4 § 12108(a) (emphasis added). The Procurement Regulations instruct that “*Shall* denotes the imperative.” 2 GAR 4 § 1106(20) (emphasis in original).

Here, the Public Auditor must vacate the hearing on this Appeal because neither party filed a written request for a hearing “prior to expiration of the time period allowed for filing comments on the agency report,” 2 GAR 4 § 12108(a), which was November 29, 2021. Indeed, GCC expressly waived its right to a hearing on November 15. *See supra* at 2.

Accordingly, as explained below, the Public Auditor must vacate the hearing on this Appeal scheduled for January 25, 2022 and the instant matter must be decided on the record — unless, of course, the Public Auditor first grants GCC’s Motion to Dismiss for Lack of Jurisdiction which has been fully briefed and argued, *see supra* at 2, and should be granted. Additionally, there is no question that this Appeal easily can and should be decided on the record. And there is no question that this Appeal lacks merit.

A. The Public Auditor Must Vacate the Hearing on this Appeal Because Neither Party Filed a Written Request for a Hearing as Mandated by 2 GAR 4 § 12108(a)

The Regulations governing this matter clearly mandate “a hearing shall be conducted” in “all Appeals to the Public Auditor of suspension or debarment.” 2 GAR 4 § 12108(a). Thus, hearings are automatic and mandatory in “Appeals . . . of suspension or debarment.” *Id.* Contrastingly, however, the Regulations mandate that for the Public Auditor to conduct a hearing “[i]n all other Appeals, including appeals of protests or contract disputes,” a party “shall” file a written request for a hearing “prior to the expiration of the time period allowed for filing comments on the agency report.” 2 GAR 4 § 12108(a). And the Regulations instruct that the term “*Shall* denotes the imperative.” 2 GAR 4 § 1106(20) (emphasis in original) — i.e., the use of “shall” denotes something “absolutely necessary or required,” *see* <https://www.dictionary.com/browse/imperative>. Consequently, for the Public Auditor to conduct a hearing on the instant Appeal, a party must have filed a written request for a hearing by November 29, 2021, which was the filing deadline for JJ Global’s Comments on the Agency Report. Such did not happen here.

Here, as mandated by 2 GAR 4 § 12108(a), GCC filed its Waiver of Right to a Hearing on November 15 “in a form substantially similar to Appendix D” of the Regulations, *id.*, which is also posted on the Public Auditor’s website, *see* <https://www.opaguam.org/procurement-appeals/rules-procedure>. However, although JJ Global filed its Comments on the Agency Report on November 29, JJ Global never filed a written request for a hearing. Therefore, neither party “request[ed] a hearing in writing . . . prior to the expiration of the time period allowed for filing comments on the agency report” as mandated by 2 GAR 4 § 12108(a) and the Public Auditor must vacate the hearing scheduled for this Appeal.

Furthermore, there are no “unusual circumstances” associated with the instant Appeal that would permit the Public Auditor to “honor” a belated hearing request if JJ Global desired to file one. *See* 2 GAR 4 § 12108(a) (“Request for a hearing shall be made prior to the expiration of the time period allowed for filing comments on the agency report Except in unusual circumstances, requests for a hearing received after such time will not be honored.”) The Regulations and corresponding Appendices are readily accessible on the Public Auditor’s website — noticeably, JJ Global’s Notice of Appeal is strikingly similar to the Notice of Appeal Form located at the link for Appendix A.¹ And when JJ Global filed its Notice of Appeal on October 27, 2021, it could have also filed a written request for a hearing similar to the form located at the website’s link for Appendix D.² Indeed, in a previous appeal, JJ Global filed a Hearing Request using Appendix D. *See JJ Global v. Guam Visitors Bureau*, OPA-PA-19-001. And even if JJ Global overlooked § 12108(a)’s requirement for a written hearing request when it filed its Notice of Appeal on October 27, JJ Global was alerted of this requirement on November 15 when GCC served its Waiver of Right to Hearing citing § 12108(a). Thus, at the very least, JJ Global was on notice of the written hearing request requirement in § 12108(a) fourteen days before the November 29 deadline for JJ Global’s Comments closed the window for filing a written request for a hearing, a window that was open for more than a month.

Accordingly, because the instant matter is not an appeal from a suspension or debarment and neither party filed a written request for a hearing on this Appeal as mandated by 2 GAR 4 § 12108(a), the Public Auditor must vacate the hearing scheduled for January 25, 2022 and decide this Appeal on the record.

¹ *See* https://www.opaguam.org/sites/default/files/appendix_a_notice_of_appeal_form.pdf.

² *See* https://www.opaguam.org/sites/default/files/appendix_d_-_hearing_request_waiver_form.pdf.

B. While the Public Auditor Should Dismiss this Appeal for Lack of Jurisdiction and Must Vacate the Hearing Because Neither Party Requested One in Writing as Mandated by 2 GAR 4 § 12108(a), There Also Is No Question that this Appeal Easily Can and Should be Decided on the Record

As mentioned above, the Public Auditor should grant GCC's Motion to Dismiss this Appeal for Lack of Jurisdiction, which is fully briefed and argued, and the hearing on this Appeal must be vacated because neither party filed a written request for a hearing as mandated by 2 GAR 4 § 12108(a). On another note, there also is no question this Appeal easily can and should be decided on the record. And there is no question that JJ Global's Appeal lacks merit.

During the Zoom hearing on GCC's Motion to Dismiss, everyone agreed that the contract had been awarded to JJ Global; thus, JJ Global was improperly attempting to protest the termination of that contract. If this Appeal is not dismissed for lack of jurisdiction (which it should be), the only questions to be addressed are matters of law.

Although JJ Global did not mention any violations of law in its Protest, its Appeal now complains that GCC violated 5 GCA § 5225, 2 GAR 4 § 3115(b) and 5 GCA § 5211(f). (*See* Appeal at 4.) JJ Global is wrong. These laws are not applicable to the instant matter.

Both 5 GCA § 5225 and 2 GAR 4 § 3115(b) apply to the cancellation of *solicitations*. *See* 5 GCA § 5225 (“[a]n Invitation for Bids, a Request for Proposals, or other solicitation may be cancelled”); 2 GAR 4 § 3115(a) (“[t]he provisions of this Section shall govern the cancellation of any solicitations”). Indeed, both sections are titled “Cancellations of Invitations for Bids or Requests for Proposals.” *See id.*

Here, GCC did not cancel a solicitation. After enduring eight weeks of JJ Global's delays and evasion regarding the contract it was awarded and the work required thereunder, GCC

cancelled *the purchase order* issued to JJ Global since JJ Global still had not signed and returned the formal contract. (See Agency Report [cited “AR”], Tab 1 (Statement Answering Allegations of Appeal) at 1-5 (detailing factual background with timeline of communications between the parties); AR, Tab 5 at 011.) And at the Zoom hearing on GCC’s Motion to Dismiss, everyone agreed that GCC awarded the contract to JJ Global; thus, the instant matter certainly does not involve the cancellation of a solicitation. Consequently, because GCC did not cancel a solicitation, 5 GCA § 5225 and 2 GAR 4 § 3115(b) are inapposite to this matter.

Likewise, 5 GCA § 5211(f) is inapposite by its language. This law applies to “[c]orrection or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts *based on such bid mistakes*” and instructs that “all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts *based on bid mistakes*, shall be supported by a written determination.” 5 GCA § 5211(f) (emphasis added). In other words, this law applies when a bidder or contractor made a mistake in its bid and requests to correct that mistake, withdraw its bid or not enter a contract based on its mistake. Such did not happen here.³

Here, as mentioned, after enduring eight weeks of JJ Global’s delays and evasion regarding the contract it was awarded and the work required thereunder, GCC cancelled *the purchase order* issued to JJ Global since JJ Global had not signed and returned the formal contract. (See AR, Tab 1 at 1-5; AR, Tab 5 at 011.) Thus, contrary to JJ Global’s allegation (see Appeal at 4) and continued insistence (see Cmts. at 6), a written determination was not

³ In the evening after the Bid Opening, JJ Global did attempt to “correct an error” in the pricing offered in its bid packet. (See AR, Tab 7, 024-25.) GCC “advised that the bid prices received from JJ Global cannot be changed after the Bid Opening.” (*Id.* at 022). Thus, GCC followed the law regarding changes in prices after the bid opening. See 2 GAR 4 § 3109(m)(4); 5 GCA § 5211(f).

required pursuant to 5 GCA § 5211(f) as GCC unequivocally did not cancel anything because of mistakes in a bid. Simply put, as explained above and in GCC's Statement (*see* AR, Tab 1 at 12-13), 5 GCA § 5211(f) only applies when a bidder seeks relief from a mistake in its bid, which is not the case here.

Most notably, JJ Global's inability to point to any law that GCC actually violated by cancelling the purchase order underscores that JJ Global's Protest is actually a contract controversy, which is matter of contract administration and not proper subject matter for a protest (*see* GCC's Mot. to Dismiss at 8-9; GCC's Reply re Mot. to Dismiss at 5-8).

Accordingly, if this Appeal is not dismissed for lack of jurisdiction (which it should be), the only questions to be addressed are matters of law that easily can and should be decided on the record. JJ Global's Appeal unequivocally lacks merit. Without question, 5 GCA § 5225, 2 GAR 4 § 3115(b) and 5 GCA § 5211(f) do not apply to the instant matter. Thus, JJ Global fails to present any laws that GCC violated by cancelling the purchase order — which reinforces that the Protest is actually a contract dispute that must first be resolved pursuant to the procedure set forth in 5 GCA § 5427 and its corresponding regulation 2 GAR 4 § 9103, a procedure that JJ Global never commenced, let alone exhausted.

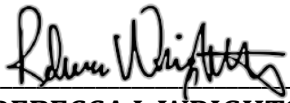
Furthermore, JJ Global's Protest did not present violations of any laws. (*See* AR, Tab 4 at 008.) Issues not timely protested to the agency are not properly before the Public Auditor on Appeal. *See Pacific Data Sys. v. GHURA*, OPA-PA-21-001, Dec. & Order re Mot. to Dismiss for Lack of Juris. (July 16, 2021); *accord DFS Guam v. GIAA*, 2020 Guam 20 ¶ 60 ("It would be logically inconsistent for us to find that a party must timely protest each individual claim or be jurisdictionally barred from bringing it, but also find that a party need not exhaust its protest rights with respect to that same claim.").

CONCLUSION

For the foregoing reasons, GCC submits that if the Public Auditor does not dismiss this Appeal for lack of jurisdiction (which he should), he must vacate the hearing scheduled for the instant Appeal because no party filed a written request for a hearing as mandated by 2 GAR 4 § 12108(a) and this Appeal must be decided on the record. And there is no question that this Appeal easily can and should be decided on the record, which unequivocally shows that JJ Global's Appeal lacks merit.

Respectfully submitted December 29, 2021.

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By: 
REBECCA J. WRIGHTSON