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In the Appeal of Morrigo Equipment, LLC; OPA-PA-24-002

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Dear Mr. Hernandez:

Please see the attached document submitted for filing:

1. Opposition to Motion to Dismiss

Should you have any questions or concerns, please feel free to contact our office. Thank you.

Regards,
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**PROCUREMENT APPEAL OF DENIAL OF PROCUREMENT PROTEST
IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

PART I.

In the Appeal of

MORRICO EQUIPMENT, LLC,

Appellant.

DOCKET NO. OPA-PA-24-002

**OPPOSITION TO MOTION TO
DISMISS**

I. INTRODUCTION.

On September 23, 2024, the Port Authority of Guam (“PAG”) submitted a Motion to Dismiss seeking to short circuit these proceedings and avoid further administrative review of its procurement of a 180’ Telescopic Boom Lift. This Opposition is submitted to address the legal and factual infirmities relied upon by the PAG in its Motion.

II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.

On January 26, 2024, the PAG issued IFB-PAG-004-24, seeking a 180’ Telescopic Boom Lift. Morrico was the lowest priced responsive bidder for that tender,

but when Morrigo refused to unilaterally drop its quoted price, PAG cancelled the IFB. The Port then issued IFB-PAG-013-24 on April 23, 2024, seeking the exact same item. IFB p. 3, Morrigo Notice of Appeal, Exhibit A; Procurement Record (“PR”) Tab 8A. On May 7, 2024, Morrigo submitted its bid. The Bid Abstract assembled by the Port’s procurement team on that day confirmed that bidder Federal Contracts Corp (“FCC”) failed to provide the bid security necessary for a responsive bid, and also failed to have the necessary business and other licenses needed to make sales to the Port.

On May 20, 2024, the Port informed Morrigo that, despite being the only fully responsive bidder to the IFB, the Port instead intended to enter into a contract with FCC. Notice of Award, Morrigo Notice of Appeal, Exhibit B, PR Tab 8A. The Port’s notice on May 20, 2024, meant that the Port not only selected a non-responsive offeror to perform the work of the IFB, but also selected a party that could not responsibly perform under the laws of Guam the way that Morrigo can. Morrigo submitted its Bid Protest to the PAG on June 3, 2024. Bid Protest 1, attached to Morrigo’s Notice of Appeal as Exhibit C; PR Tab 7A.

Morrigo personnel were subsequently able to review procurement documents made available by PAG staff, and that review showed that not only did FCC both fail to provide the bid security necessary for a responsive bid and fail to have the licenses necessary to do the work, but their bid submission was also non-responsive and did not comport with the IFB’s plain requirements for multiple other reasons.¹ These additional non-conforming issues compelled Morrigo to submit a second Bid Protest on these issues on June 20, 2024. Bid Protest 2, attached the Notice of Appeal as Exhibit D; PR Tab 7C. PAG Denied the Bid Protests on July 31, 2024. Decision on

¹ The failings were numerous: 1. FCC failed to execute and provide the required Special Reminder to Prospective Bidders; 2.FCC failed execute and provide the Bid Bond form; 3.FCC was explicitly non-responsive in refusing to provide training as described and required on page 32 of the IFB; 4.FCC refused to offer and provide the warranty required by the IFB; 5.FCC refused to offer and provide technical assistance as sought on page 33 of the IFB; 6.FCC refused to offer and provide service as required on page 33 of the IFB; 7.FCC does not have a local authorized dealer as required on page 33 of the IFB; and 8.FCC refused to provide complete familiarization training as required on page 33 of the IFB.

Protest, attached as Exhibit E to the Notice of Appeal; PR Tab 7F. This appeal to the OPA followed.

III. MORRICO'S PROTEST WAS TIMELY.

PAG seeks dismissal of Morrico's appeal since, in the view of the Port, Morrico needed to advance its procurement protest earlier than it did. The basis for PAG's motion is that Morrico knew, since the public bid opening of May 8, 2024, that FCC's bid submissions may have been lacking responsive documents including "bid bond, business licensing, and the Special Reminders form...." Motion to Dismiss, 4-5. The Port is wrong, and both misstates and misapplies the law of when a procurement action ripens into an event that triggers a protest. In examining timeliness, a court must analyze what facts are necessary to establish a protest claim and when the protester knew or should have known of facts establishing the essential elements of that protest claim. *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20, ¶ 88; 5 GCA § 5425(a). This inquiry is a mixed question of law and fact, for which the Court may examine outside evidence. *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20, ¶ 88; *Osborn v. United States*. 918 F.2d 724. 728 n.4 (8th Cir. 1990) (*cited in Linsangan v. Government of Guam*, 2020 Guam 27 38 n.6).

The Superior Court of Guam dispatched a similar "untimeliness" argument raised before it in an appeal involving the Airport's procurement of a baggage conveyor project. *Johndel International, inc. dba JMI-Edison v. Office of Public Accountability, et. al.* CV 0095-22, Decision and Order Denying Guam International Airport Authority's Motion to Dismiss, (Superior Court of Guam, September 22, 2022). In that case, the Agency declared that the protesting party knew of the bid winner well before the protest. The Superior Court rejected the argument, as the protesting party did not acquire the knowledge of the reason for its protest — the selection of an unlicensed offeror— until later. The Airport claimed that the protestant's protest was untimely, since it knew about the awardee being designated

for contract performance more than 14 days before the initial protest was made. In a decision and order that the OPA was a party to, the Superior Court rejected such a narrow view of timeliness and confirmed that the clock did not begin to run simply because non-responsive party was bidding or selected for performance. The confluence of those two events gave rise to the protest right. The Court concluded that “As explained in *Teleguam Holdings II*, to be ‘aggrieved,’ a bidder must become aware of a violation of the procurement law. *Johndel Int’l, Inc. dba JMI-Edison v. Office of Pub. Accountability*, CV 0095-22, Decision and Order Denying GIAA’s Mot. to Dismiss, 7 (Sup. Ct. Guam Sept. 22, 2022). In the Airport case, the selection of a bidder did not trigger the protest clock until it was learned that the selected bidder was also non-responsive. Here Morrico is not simply protesting the participation in the bid process of a non-responsive bidder. Morrico is instead protesting the Port’s failure to properly assess its bids, and the resulting selection of a non-responsive bidder. Morrico raised its protest to PAG on June 3, 2024— 13 days after learning of PAG’s intent to select for award an unlicensed company that had submitted a non-responsive bid for consideration. Therefore, Morrico’s agency level protest meets the timeliness standards required by applicable law and regulation. This appeal must proceed to its merits.

The timeframe indicates that Morrico acted timely. PAG claims that Morrico had knowledge that FCC’s bid package was lacking responsive material when bids were opened. However, Morrico did not become “aggrieved” on this date. As explained in *Teleguam Holdings II*, to be “aggrieved,” a bidder must become aware of a violation of the procurement law. Morrico did not have knowledge that PAG was going to select a non-responsive offeror until receiving that information on May 20, 2024. The Office of Public Accountability has explained that there may be multiple events in any given stage of a procurement that could legitimately trigger protests. *In the Appeal of Johndel International, Inc. dba JMI-Edison*, Appellant. OPA-PA-23-002 (Decision on Motions to Dismiss and Motion for Summary Judgment, July 27, 2023). We also know that “A solicitation or award may be in violation of the law due to actions of territorial employees, bidders, offerors, contractors, or other persons.” *Id.*, at 5. Here,

Morrigo is protesting the action of the PAG procurement officials in selecting for award a bidder who has materially failed to respond to the IFB. Morrigo became aggrieved at each instance that it could be charged with knowledge that PAG's conduct, or actions violated the substantive procurement law or the terms of the disputed procurement. *See*, 2020 Guam 20 ¶ 84. Morrigo would have 14 days from acquisition of such knowledge to protest to PAG's purchasing head and 15 days of receipt of PAG's protest decision to appeal to the Public Auditor. 5 GCA § 5425 (a), (e). The record shows that only 13 days passed between the time Morrigo knew of the key facts giving rise to the protest. Morrigo, therefore, filed a timely protest.

IV. THIS IS A PROCUREMENT APPEAL, AND THE OPA HAS SUBJECT MATTER JURISDICTION OVER SUCH APPEALS.

Even though this matter is before the OPA on an appeal from an agency protest denial, PAG argues that the matter must be dismissed "for lack of subject matter jurisdiction" since, in the view of PAG, Morrigo's agency level protest was untimely. Motion, 18. This position ignores the fundamental jurisdictional ambit of the OPA to review appeals over agency protest decisions, 5 G.C.A. § 5425(e), and ignores the key tenets of procurement law that require only responsible and responsive offerors to receive awards from the Government. *See, e.g.*, 2 GAR § 3109(n)(1); *See also*, 2 GAR § 3116 (b)(4) (mandating that "Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.").

To be certain, Morrigo is appealing an agency decision on a procurement protest. PAG called Morrigo's agency protest untimely. *See*, Decision on protest, attached as Exhibit E to the Notice of Appel; PR Tab 7f. PAG ignored fundamental procurement rules regarding contractor responsibility and the rubrics PAG itself set down for a responsive bid. In now urging dismissal based upon a "lack of subject matter jurisdiction," PAG ignores the very clear statutory role the OPA has in the appellate review of the territory's procurement regime. Morrigo's OPA Appeal came well within the fifteen-day protest appeal period set by 5 GCA § 5425(e). PAG is

simply wrong about the lack of jurisdiction, and wrong in claiming that an agency's determination of untimeliness is dispositive and would cut off the OPA's jurisdiction to perform such review.²

V. MORRICO IS PROCEEDING IN THE REGULAR COURSE THROUGH THE ADMINISTRATIVE APPEAL PROCESS.

PAG argues that Morrico's appeal must be dismissed since it "failed to exhaust its administrative remedies with respect to its claims." Motion, 9. First, PAG ignores the fact that Morrico has not exhausted its administrative remedies, as the OPA itself is an Administrative remedy. Setting this reality aside, PAG's argument is rooted in excerpted language of the procurement regulations that "Complainants *should* seek resolution of their complaints initially with the Procurement Officer or the office that issued the Solicitation." Motion, 9, *citing* 2 GAR Div 4. §9101(b) (emphasis added). PAG claims that such resolution must first be sought through "informal resolution." Motion, 10. PAG can point to no administrative law or court precedent that supports such a position, since no reported law stands for this proposition.³

² PAG's position on the OPA's jurisdiction flips review by the OPA on its head. If, as PAG determined in its protest decision, Morrico's protest was untimely, then the OPA should exercise its jurisdiction in upholding the agency decision. No understanding of jurisdiction beyond the one in PAG's mind's eye would prevent the OPA from reaching the question of whether or not the underlying protest was timely. Certainly, no jurisdictional concept would allow the OPA to make findings in a case — an administrative case where a record must be developed for eventual judicial review — where it had no subject matter jurisdiction, since "without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, (1998) *citing Ex parte McCardle*, 7 Wall. 506, 514 (1868).

³ PAG points the OPA to *DFS v. GIAA*, 2020 Guam 20 ¶¶50-51 and *Carlson v. Perez*, 2007 Guam 6, ¶ 69, and *Limitaco v. Guam Fire Department*, 2007 Guam 10 ¶ 27, for the proposition that Morrico's claims should be dismissed since the "alleged procurement violations... could have been handled at the informal agency administrative level." Motion, 10. None of these citations stand for the proposition requiring supposed "informal" agency action on a protest. To the contrary, *DFS* makes it plain that the submission of an "informal complaint" without a protest could not salvage what would have been an untimely protest. *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20, ¶ 94.

More, in order to claim an informal complaint prerequisite, PAG impermissibly tortures the reading of the 2 GAR Div 4. §9101(b). On Guam,” ...statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Aguon v. Gutierrez*, 2002 Guam 14, ¶ 6; *see also Sumitomo Const., Co. v. Gov't of Guam*, 2001 Guam 23, ¶ 17 (“Moreover, in determining legislative intent, a statute should be read as a whole, and therefore, courts should construe each section in conjunction with other sections.”) The most basic statutory interpretation standards do not reveal a hidden informal protest resolution obligation. 2 GAR Div 4. §9101(b) is contained in the section on “protest resolution,” is sandwiched between provision (a) that describes the authority to resolve “*Protested Solicitations and Awards*” and (c), the “filing of *protest*.” (emphasis added). Nothing in the provision required Morrico to seek informal resolution with the procurement officer prior to the filing of a Protest. ⁴

VI. MORRICO IS AN AGGRIEVED PARTY, AND HAS STANDING TO PROSECUTE ITS PROCUREMENT PROTEST AND APPEAL.

PAG, proceeding with a law clerk’s summary of the relief afforded parties under the procurement code, then claims that Morrico has not sought remedies and therefore somehow lacks standing to pursue its claim. PAG is wrong. Morrico’s Notice of Appeal to the OPA, like its protest at the agency level, seeks an order of the OPA declaring that “Morrico, as the lowest priced responsive and responsible bidder under the IFB, be named for award of the IFB.” Notice of Appeal, B(4).

Morrigo had the right to protest the Award under 5 GCA § 5425(a), since Morrico was an actual bidder and was aggrieved in connection with the noticed award of a contract to FCC. *See* 5 GCA § 5425(a). A party becomes “aggrieved” when they become aware of a violation of one of the procurement law’s substantive provisions or

⁴ PAG makes this argument, despite the plain fact that if an unaware offeror followed such a course of action, PAG would surely decry any eventual protest as being untimely. The reality is that the constant drumbeat raised by agencies of the government of Guam to claim that protests are “untimely” vitiates any attempt at resolving a procurement complaint informally without a protest.

the terms of the IFB. *See DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 84. On May 20, 2024, Morrico became aware that PAG had selected for award an unlicensed offeror — FCC — that did not provide a submission that met the plain requirements of the IFB. Morrico made its protest to the head of PAG, the purchasing agency within fourteen (14) days after Morrico learned of the facts giving rise to the protest. 5 GCA § 5425(a); *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 77 citing *Guam Imaging*, 2004 Guam 14 ¶ 25. Morrico brought a proper and timely protest that automatically triggered a stay under 5425(g).

While Morrico has clearly articulated the remedy it seeks from its aggrievement, it appears that PAG has contorted itself into a belief that this is a post-award protest, and that Morrico should instead be seeking post-award styled protest relief. PAG is wrong. Morrico filed a timely, pre-award protest pursuant to 5 GCA § 5425(a). This timely protest automatically triggered the stay provision of 5 GCA § 5425(g). This provision prohibited PAG, the purchasing agency of the Territory of Guam in this matter, from proceeding further with the award and voids any such further action. *See* 5 GCA § 5425(g). Despite this, it appears that PAG has proceeded further with the award of the contract by continuing with contract negotiations of the award and acquiring signatures for the issuance of a purchase order. Morrico submitted its Protest to PAG on June 3, 2024. PR Tab 7(a). Despite this, PAG proceeded to then contact FCC, transmit a contract, and seek further signatures on an agreement. PR Tab 10a (June 6, 2024, Correspondence from PAG Procurement Buyer Supervisor Mark A. Cabrera to FCC seeking contract execution.) PAG's conduct violated the law, and all of its conduct in this procurement after June 3, 2024, is void.

Here, it is undisputed that Morrico's protest came *before* PAG made attempts to enter into a contract with the intended awardee. All of this activity constitutes a violation of law and renders any resulting contract void. *See, In the Appeal of G4S Security Systems (GUAM), Inc.*, OPA-PA-13-013, Decision and Order re Appellant's Motion to Declare Automatic Stay in Effect, November 12, 2013, p.2 (explaining that

“Generally, in the event of a timely protest, the purchasing agency shall not proceed further with the solicitation or award of the contract prior to final resolution of such protest, and any such further action is void unless the head of the purchasing agency and the Attorney General of Guam, make written determinations that award of the contract without delay is necessary to protect substantial interests of the Government of Guam, and the protestant is given at least two (2) days prior notice.”) There is no doubt that the drafted contract contained in the procurement record shows signatures that would all come after Morrigo’s June 3, 2024, protest.

VII. FEDERAL LAW ONLY?

Morrigo does not contest that a Guam Agency, utilizing federal funds, can incorporate the requirements for the use of those funds into a Guam procurement vehicle. However, no area of law supports PAG’s newly found belief that federal funding somehow obviates the need to comply with Guam procurement law. More, no aspect of the procurement record supports PAG’s newly articulated position that, despite setting out specific requirements patterned under Guam law for its IFB, PAG can ignore the responsiveness rubrics the agency itself set down for bidders in that IFB.

VIII. CONCLUSION.

PAG seeks to have the OPA declare that it does not have jurisdiction over an appeal that timely made it from the Agency to the OPA. The Port’s efforts to avoid a review of the merits of Morrigo’s protest, and examination of the Port’s seemingly oblivious deviation from the Guam procurement Code, should be rejected. The motion to dismiss should be denied, and this matter moved on to a hearing on the merits.

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Respectfully submitted this 30th day of September 2024

RAZZANO WALSH & TORRES, P.C.

By: 

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