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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

SEP 19 2011

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FILE NO. OPA/PA. 11-016

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY PROCUREMENT APPEAL

IN THE MATTER OF)	
APM: GUAM MEDICAL)	
REFERRAL SERVICES)	
APPELLANT)	
v.)	
GENERAL SERVICES AGENCY;)	
GOVERNOR'S OFFICE)	
_____ RESPONDENT)	

CASE NUMBER:
OPA-PA-11-016

MOTION TO EXCLUDE
APPELLANT'S COMMENTS
ON AGENCY'S REPORT

A. Appellant raises arguments not raised in the protest and therefore inappropriate for review

5 GCA Section 5425(e) states in pertinent part:

Appeal. A decision under Subsection (c) of this Section ... may be appealed by the protestant, to the Public Auditor within fifteen (15) days after receipt by the protestant of the notice of decision.

Here, the appellant filed a protest regarding the procurement process on August 3, 2011.

The General Services Agency responded on August 4, 2011, addressing the specific issues raised in the protest. The appellant filed an appeal with the Office of Public Accountability on August 19, 2011. The General Services Agency filed its procurement record on August 26, 2011. The General Services Agency filed its agency report on September 2, 2011. On September 12, 2011, the appellant filed an appellant's response to the agency report raising several other items not specifically addressed in the protest.

As noted in 5 GCA Section 5425(e), the appellant must first exhaust his administrative remedies before filing an appeal. The Office of the Public Accountability is not the proper channel for issues that were not raised in the protest. As noted in Appeal No. OPA-PA-08-009, the appeal of Captain Hutapea, and Associates v. Guam Housing and Urban Renewal Authority, the Public Auditor ruled:

CHA raises an entirely new allegation for the first time on appeal. CHA argues that the RFP specifications and requirements were flawed because they did not require a comprehensive source of complete and accurate real estate market data. This argument is not part of CHA's May 12, 2008 Decision denying CHA's protest. **The Public Auditor's jurisdiction is limited to reviewing GHURA's May 21, 2008 Decision denying CHA's May 12, 2008 protest. 5 GCA Section 5425(e).** The issue of whether the RFP specifications and requirements were flawed because they did not require a comprehensive source of complete and accurate real estate market data was not raised in CHA's May 12, 2008 protest or GHURA's May 21, 2008 Decision denying the protest. As a result, there is simply no decision concerning this issue for the Public Auditor to review. **Thus, the Public Auditor does not have jurisdiction to hear this issue because it is not properly before her.** (Emphasis added).

See also In the Appeal of Latte Treatment Center, Inc. (page 8) Appeal No. OPA-PA-08-008

When the protestor filed his appeal on August 19, 2011, the basis for the appeal was the decision made by the Chief Procurement Officer's denial of the protest dated August 4, 2011, as noted in the form that the appellant filed with the Office of the Public Accountability. Clearly, the appellant was aware that he is disputing the determination of the Chief Procurement Officer. The appellant's response adds items that were not raised by the appellant when he had the opportunity to do so before filing his appeal, and cannot be addressed by the Public Auditor under the prevailing case law.

Here, appellant did not provide any substantial evidence of impropriety in the awarding of the contract. Conclusory and unsupported allegations of impropriety in awarding a contract are insufficient to raise triable issues of fact on appeal and such a protest must be dismissed. In re Application of Eugene Lovine 620 N.Y.S.2d 398 (A.D. 2 Dept. 1994).

Where petitioner's allegations that award of contract was unlawful and in violation of General Municipal Law were unsupported by factual allegations which would overcome presumption that county purchasing agent acted properly, determination that contract was properly awarded after competitive bidding would not be disturbed. Theodore J. Burke and Son, Inc. v The County of Dutchess et al 50 A.D. 2d, 918, 377 N.Y. S. 2d, 585, 1975.

An unsuccessful bidder on contract to manage billboard advertising for New Jersey Transit Corporation failed to rebut the presumption that government officials act in good faith in the unsuccessful bidder's appeal. Viacom Outdoor Group, Inc. v. New Jersey Transit Corporation and All Vision, LLC 2006 WL 2192008 (N.J. Super A.D.)

B. A knowingly baseless protest unjustifiably disrupts the procurement process and an appeal based thereon should be disallowed.

Filing of a formal appeal has serious consequences. To interrupt the procurement process by the filing of a speculative protest still mandates a stay of the protest under GARR Div. 4 Section 9101(4)(e). A conjectural protest filed as a tactic is not proceeding in good faith. The Procurement Rules and Regulations require good faith

In 2 GARR Division 4, section 1105, it states:

Requirement of Good Faith. These regulations require all parties involved in the negotiation, performance or administration of territorial contracts to act in good faith.

In instances where a baseless protest made in bad faith, "fraudulently, frivolously or solely to disrupt the procurement process", the protestor can be required by the government to pay costs incurred thereby by the Government 2 GARR Section 9101(g)(2). A review of the appeal clearly points out that there is no good faith on the part of the protestor, rather, a complaining attitude of why was this not included. These questions should have been raised at the pre-bid conference. As indicated in his own statements, the appellant admitted that he did not raise many of the questions during the pre-bid conference. The protestor did raise other questions that were answered.

As noted in the Appellant's own comments of September 12, 2011:

On Tuesday, September 6th, I delivered to OPA, GSA and the Governor's Office additional information which I thought were pertinent to the appeal. However, on the 9th of September, I returned to these agencies to retrieve this documents which will be incorporated into the Appellant's Response.

Clearly, the Appellant was aware that the September 6th memorandum was inappropriate, by his action of withdrawing the memorandum. The reintroduction of this memorandum is nothing more than an attempt to include allegations that were not raised in his initial protest. It is inappropriate to use the Office of the Public Accountability to address those concerns now. Here, the Chief Procurement Officer reserves the right to make such an assessment and suggest that the unnecessary and extremely costly cessation of the procurement process occasioned by the filling of an appeal does not have any merit and clearly warrants a rejection of the appellant's response to the agency's statement.

In this case, the only issue was the failure of the government to obtain the review of the Attorney General's Office as the total of this contract was over \$500,000. However, this matter could be easily resolved. The Attorney General's office was conducting an investigation into this procurement prior to the appeal. Once the appeal was filed, they stopped all action on this until the resolution of the appeal. If the Attorney General's office approved the process, or felt that there was a minimal failure on the part of the General Services Agency, then they will sign off on the award by authorizing the use of the "Remedies After Award" section of 5 GCA Section 5452. If they believe an error occurred that cannot be remedied, they will not, thereby forcing the government to come into compliance. However, with the appeal pending, all action on this procurement has stopped.

Further as stated in the Agency Report, the General Services Agency has taken steps to force the automated procurement system (AS400) to automatically forward any request for over \$500,000 and above to the Attorney General's Office to avoid any oversight relevant to Public Law 30-157 (now codified as 5 GCA Section 5150).

CONCLUSION

No governmental or public purpose is served by consideration of this appeal by the Office of Public Accountability. The Office should decline to exercise its jurisdiction over this appeal in that the Protest being defective on its face does (a) not raise matters threatening the integrity of the government process and (b) does not constitute a properly

submitted matter to the Office of Public Accountability's attention. The speculative, conjectural nature of the appeal did not cite any direct or indirect violation to the procurement process. Consequently, the appeal herein should be rejected and denied.

Respectfully submitted this 19th day of September, 2011.


ROBERT H. KONO