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 PROCUREMENT APPEALS

DATE: 11-16-17
 TIME: 9:30 AM PM BY: [Signature]
 FILE NO OPA-PA: 17-011

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

IN THE APPEAL OF)
)
 J&B Modern Tech,)
 Appellant,)
)
 and)
)
 Guam Community College)
)
 Purchasing Agency.)
)

APPEAL NO. OPA-PA-17-011

**PURCHASING AGENCY'S
 MOTION TO DISMISS FOR LACK OF
 JURISDICTION OR, ALTERNATIVELY, FOR
 EXPEDITIOUS DISPOSITION**

Pursuant to 5 GCA § 5703 and 2 GAR § 12109(a), Purchasing Agency Guam Community College (“GCC”) requests that the Public Auditor dismiss the instant matter for lack of jurisdiction or, alternatively, that the Hearing Officer find there are no material facts in dispute and, therefore, an expeditious disposition of the instant case is warranted. For the reasons articulated below, the instant matter should be dismissed for lack of jurisdiction or, alternatively, expeditiously dismissed because the undisputed facts in the record reveal that J&B Modern Tech’s (“J&B”) Appeal is unavailing.

BACKGROUND

On June 7, 2017, GCC issued Bid Invitation No. GCC-FB-17-105 (“IFB” or “Solicitation”) for the construction of a Forensic DNA Lab. (See Procurement Record [cited “PR”], Tab 2 at 0002; see also GCC’s Agency Report [cited “AR”], Tab 6 (pertinent pages of IFB).) At the Bid Opening on July 19, 2017,¹ two bidders submitted bid packets for the Solicitation: (1) J&B Modern Tech, and (2) Propacific Builder Corporation (“PBC”). (See AR, Tab 10 at 003-04.)

On July 20, 2017 — the day after the Bid Opening — J&B “submitted a Sunshine Act request to GCC for a copy of PBC’s bid documents.” (Appeal at 2; see AR, Tab 5 at 001-02.) “J&B received a copy of [PBC’s bid] documents on July 27, 2017.” (Appeal at 2; see AR, Tab 5 at 003-06.)

On July 24, 2017, GCC forwarded the bid packets to its architect, Takio Ruth Makio Architects (“Architect”), for evaluation. (See AR, Tab 9 at 025.) Noting that both bidders’ packets had “issues,” on August 4, the Architect recommended that GCC seek clarification for three items in J&B’s bid packet and two items in PBC’s bid packet. (See *id.* at 018-20.) By August 18, GCC had sought, and received, clarification for the items noted by the Architect. (See *id.* at 003-11.) The Architect reviewed both J&B’s and PBC’s clarifications and, on August 25, recommended that contract be awarded to PBC because it was the lowest responsive and responsible bidder. (See *id.* at 002.) GCC approved the Architect’s recommendation on September 1. (See *id.* at 001.)

¹ Through Amendment No. 2, the Bid Opening was extended from June 28 to July 19. (See PR, Tab 5 at 0011.)

On September 7, 2017, GCC issued a notice of intent to award to PBC and a notice non-award to J&B. (*See* PR, Tab 12 at 0346-50.) Four days later, J&B sent GCC a complaint regarding four items in PBC's bid packet. (*See* PR, Tab 12 at 0352-54; *see also* PR, Tab 13 at 1544-47.) On September 20, GCC received a protest ("Protest") from J&B based on four items in PBC's bid packet. (*See* AR, Tab 4.) On October 18, GCC issued its decision on the Protest. (*See* AR, Tab 3.) Because J&B had received a copy of PBC's bid packet in July and a bid protest must be filed within fourteen days after the protestor knows or should know of the facts underlying its protest, GCC denied J&B's September 20 Protest as untimely. (*See* AR, Tab 3 at 002-04.) Nonetheless, GCC addressed the issues raised by J&B and also denied the Protest on its merits. (*See id.*)

On October 30, 2017, J&B filed its Notice of Appeal with the Office of Public Accountability ("OPA"). (*See* Appeal.) In its Appeal, J&B reiterates its allegations that PBC's bid packet contained errors and therefore PBC should not be awarded the contract. (*See id.* at 3-4.) J&B also complains that GCC incorrectly denied its Protest as untimely. (*See id.* at 5.) In light of both the law and the undisputed facts in the record, J&B's Appeal should be dismissed for lack of jurisdiction or, alternatively, expeditiously dismissed on its merits.

LEGAL STANDARDS

The Procurement Code mandates that "Public Auditor shall have the power to review and determine de novo any matter properly submitted to her." 5 GCA § 5703. The Public Auditor has determined that issues not timely protested to the purchasing agency are not properly before her; therefore, she lacks jurisdiction to hear such issues on appeal. *See 1-A GuamWEBZ*, OPA-PA-16-002, Decision (Aug. 22, 2016) at 7.

Under 2 GAR § 12109(a), the Hearing Officer has the authority “to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.” And Hearing Officers have used “such authority to find that there are no genuine issues of material fact concerning an issue when the facts are clear from the record and the parties do not dispute them.” *In re Appeal of Korando Corp.*, No. OPA-PA-15-009, Decision & Order re Appellant’s Mot. for Summ. J. (Dec. 3, 2015); *In re Appeal of Korando Corp.*, No. OPA-PA-15-009, Decision & Order re Purch. Agency’s Mot. for Summ. J. (Dec. 3, 2015).

As explained below, J&B did not timely protest the issues presented in its Appeal and there are no disputed material facts in the record regarding the issues presented by J&B’s Appeal. Therefore, the Public Auditor should dismiss this Appeal for lack of jurisdiction or, alternatively, the Hearing Officer should expeditiously dispose of the Appeal without a hearing because there are no material facts in dispute.

ARGUMENT

In its Appeal, J&B complains that GCC incorrectly denied its Protest as untimely and that errors in PBC’s bid packet render an award improper. (*See* Appeal at 3-5.) A de novo review of the record, *see* 5 GCA § 5703, reveals that J&B’s complaints are meritless.

A. The Public Auditor Lacks Jurisdiction to Consider the Instant Appeal Because, Without Question, J&B’s Protest Was Untimely

In its Appeal, J&B posits that its Protest was timely because, “[u]nder 5 GCA § 5425(a), a bidder can only protest ‘the method of source selection, solicitation, or award of a contract,’ all of which require action by the procuring agency.” (Appeal at 5 (quoting 5 GCA § 5425(a)).) J&B misguidedly reads 5 GCA § 5425(a), which provides:

Any actual or prospective bidder, offeror, or contractor who may be aggrieved *in connection with* the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency. *The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.*

5 GCA § 5425(a) (emphasis added); *see* 2 GAR § 9101(c)(1). Thus, the plain language of § 5425(a) provides that a protest is allowed for matters “in connection with” a solicitation, which means that a bidder can lodge a protest *at any point in a procurement* but must lodge its protest within fourteen days of when that bidder knows or should know of the facts underlying its protest. Indeed, the corresponding Procurement Regulations provide:

Subject of Protest. *Protestors may file a protest on any phase of solicitation* or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.

2 GAR § 9101(c)(2) (emphasis added); *see, e.g., 1-A GuamWEBZ*, OPA-PA-16-002, Decision (Aug. 22, 2016) at 7 (concluding that two issues were untimely because the protestor knew of the facts underlying these issues at the bid opening).

Here, there is no question that J&B’s Protest was untimely. Notably, J&B acknowledges that it received a copy of PBC’s bid packet on July 27, 2017. (*See* Appeal at 2; *see also* AR, Tab 5 at 003-06.) J&B’s Protest — filed on September 20 — clearly is grounded on items that it perceived to be improper within PBC’s bid packet and, indeed, attached pages from PBC’s bid packet. (*See* AR, Tab 4 at 003-04, 008-12, 022, 038; *see also* PR, Tab 12 at 0353-54 (letter from J&B to GCC dated Sept. 8, 2017 complaining about items in PBC’s bid packet).) In other words, J&B unequivocally knew or should have known of the facts giving rise to its protest on July 27 and therefore should have filed its Protest no later than August 10. *See* 5 GCA § 5425(a); 2 GAR § 9101(c)(1). And because J&B’s September 20

Protest was untimely, GCC rightfully denied it as such. *See* 2 GAR § 9101(c)(1) (“Protests filed after the 14 day period shall not be considered.”).

Importantly, because every issue in J&B’s Protest was untimely presented to GCC, the Public Auditor lacks jurisdiction to consider the issues in J&B’s Appeal. The Public Auditor’s jurisdiction “is limited to matters that are properly before her.” *1-A GuamWEBZ*, OPA-PA-16-002, Decision (Aug. 22, 2016) at 7 (citing 5 GCA § 5703). In *GuamWEBZ*, the Public Auditor determined that she lacked jurisdiction to hear two issues in the appeal because the protestor knew about these issues at the time of bid opening, but did not file a protest within fourteen days after the bid opening. *Id.* (“[T]he issues raised by GuamWEBZ . . . are not properly before the Public Auditor because GuamWEBZ failed to file a timely protest concerning them as set forth above. Accordingly, the Public Auditor finds that she lacks the jurisdiction to hear these issues in this appeal.”).

Here, like in *GuamWEBZ*, J&B’s Appeal clearly raises issues that are grounded on facts that J&B knew or should have known about when it received a copy of PBC’s bid packet on July 27. (*See* Appeal at 3-4; AR, Tab 5 at 003-06.) Indeed, every issue raised in J&B’s Appeal arises from PBC’s bid packet. (*See* Appeal at 3-4 & Exs. B, E, K (pages from PBC’s bid packet).) And, like the protestor in *GuamWEBZ*, J&B failed to timely file its Protest within fourteen days of receiving PBC’s bid packet. In fact, J&B did not file its Protest until fifty-five days after it received PBC’s bid packet. (*See* AR, Tab 4 (Protest filed Sept. 20, 2017); AR, Tab 5 at 003-06 (Sunshine Act Response dated July 27, 2017).) Thus, like in *GuamWEBZ*, the Public Auditor “lacks the jurisdiction to hear [J&B’s] issues in this appeal.” *1-A GuamWEBZ*, OPA-PA-16-002, Decision (Aug. 22, 2016) at 7.

Accordingly, based on the undisputed facts and law, the Public Auditor lacks jurisdiction to consider any of the issues in J&B's Appeal and the instant matter should be dismissed for lack of jurisdiction.

B. Even Assuming that J&B's Protest Was Timely and the Public Auditor Has Jurisdiction, the Undisputed Facts in the Record Reveal that the Issues in the Appeal Lack Merit

Assuming *arguendo* that J&B timely filed its Protest — which it did not, *see supra* — and that the Public Auditor has jurisdiction to hear J&B's Appeal — which she does not, *see supra* — the undisputed facts in the record reveal that the issues presented in J&B's Appeal are unavailing. J&B argues that PBC should not be awarded the contract because PBC's bid packet contained a mathematical error and because PBC did not sufficiently respond to three items in the IFB. (*See Appeal at 3-4.*) J&B is wrong.

The IFB contained a detailed chart for nearly eighty different costs that are incorporated in the bidders' total price for the Base Bid, along with the bidders' prices for three alternate bid items. (*See AR, Tab 6 at 027-31.*) As stated in their respective bid packets, PBC's total Base Bid was \$3,863,714.00 (*see AR, Tab 8 at 009*), and J&B's total Base Bid was \$4,394,450.00, which apparently included prices for the three alternate bid items (*see AR, Tab 7 at 061, 065*). While J&B correctly notes that the sum of PBC's cost breakdown did not equal its Base Bid (*see Appeal at 3*), GCC properly clarified with PBC that its stated Base Bid price was the price that PBC was offering (*see AR, Tab 9 at 004-07*) — just like GCC clarified with J&B items in its bid packet (*see id. at 003, 008*). Moreover, obvious mathematical errors can be corrected during the evaluation period of bid packets. *See 2 GAR § 3109(m)(4)(C)*. And GCC could have held PBC to its stated Base Bid price, even if PBC had intended for its Base Bid to be the actual total of all the costs in its breakdown. *See 2 GAR § 3109(m)(4)(D)*.

Thus, contrary to J&B's argument, PBC offered the lowest price for the IFB. (*Accord* AR, Tab 3 at 002; AR, Tab 9 at 002.)

J&B's arguments regarding PBC's responses to three items in the IFB are also futile. First, J&B insists that PBC should have submitted a record from the Guam Contractors Licensing Board ("GCLB") with its bid packet. (*See* Appeal at 3-4.) The IFB, however, did not require bidders to submit anything from GCLB. Rather, the IFB stated:

Contractors shall indicate outstanding issues with the GCLB and OSHA and indicate methods being utilized to avoid similar problems in the future. Contractor records will be checked with the Guam Contractors Licensing Board and shall be considered in determining the most responsive responsible bidder.

(AR, Tab 6 at 032 (emphasis added).) In accordance with the IFB, PBC indicated that it had no outstanding issues with GCLB or OSHA (*see* AR, Tab 8 at 086-87) and GCC's Architect confirmed this by checking PBC's records with GCLB and OSHA (*see* AR, Tab 9 at 020). PBC therefore properly responded to this item in the IFB. (*Accord* AR, Tab 3 at 003.)

Second, J&B also misguidedly insists that the IFB required PBC to submit insurance certificates with its bid packet. (*See* Appeal at 4.) The IFB did not contain such a requirement. The IFB required *only the prevailing bidder* to submit insurance certificates:

1.9 ADMINISTRATIVE SUBMATERIALS

A. Contractor will submit for approval *within ten (10) calendar days of award of the Contract*, the following, which may also be referred to in other portions of these Specifications:

....

6. Insurance Certificates.

(AR, Tab 6 at 039 (emphasis added).) Thus, insurance certificates were not required items for the bid packets. (*Accord* AR, Tab 3 at 003.)

Third, J&B mistakenly insists that a “Certificate of Owner’s Attorney” was required with bid packets. (Appeal at 4.) The “Certificate of Owner’s Attorney” is a form required by the U.S. Department of Agriculture (“USDA”),² and GCC confirmed with USDA that this form is completed only upon award of the contract. (See AR, Tab 9 at 012-16.) Furthermore, this form is intended for the “Owner’s Attorney” to complete — i.e., not a bidder’s or a contractor’s attorney. (AR, Tab 6 at 026; *see id.* at 037 (stating the “Contract Form shall be: AIA Standard Form – Owner/Contractor Agreement A-101-2007”); *see generally* PR, Tab 3 at 0466-522 (AIA Standard Form contract documents that are executed by and between the Owner and the Contractor).) Consequently, a completed “Certificate of Owner’s Attorney” was not a requirement for a bid packet.

Accordingly, even if J&B’s timely protested the issues presented in its Appeal and the Public Auditor has jurisdiction, the undisputed facts in the record reveal that these issues are unavailing. Therefore, the Hearing Officer should find that an expeditious dismissal of the instant Appeal is warranted

CONCLUSION

For the foregoing reasons, GCC submits that the Public Auditor should dismiss the instant Appeal for lack of jurisdiction. Alternatively, GCC requests that the Hearing Officer find an expeditious dismissal of the instant Appeal is warranted because the record reveals that there are no material disputed facts and in light of the record’s undisputed facts, J&B’s Appeal clearly is unavailing.

² This project is federally funded. (See PR, Tab 7 at 061.)

Respectfully submitted this 16th day of November 2017.

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By: 

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