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

IN THE APPEAL OF)	APPEAL NO. OPA-PA-17-011
)	
J&B Modern Tech,)	
)	PURCHASING AGENCY'S REBUTTAL TO
Appellant,)	COMMENTS ON STATEMENT ANSWERING
)	ALLEGATIONS OF APPEAL
and)	
)	
Guam Community College)	
)	
Purchasing Agency.)	
)	

Pursuant to 2 GAR, Div. 4, § 12105(g), Purchasing Agency Guam Community College (“GCC”) submits this rebuttal to Appellant J&B Modern Tech’s (“J&B”) comments (“Comments”) on GCC’s statement answering the allegations (“Statement”) of J&B’s above-captioned appeal (“Appeal”). For the reasons articulated below, J&B’s Comments neither bestow jurisdiction over nor merit on its Appeal.

BACKGROUND SUMMARY¹

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.) At the Bid Opening

¹ Because GCC’s Statement provides a detailed background, only a brief summary is provided herein.

on July 19, 2017, two bidders submitted bid packets for the Solicitation: (1) J&B, and (2) Propacific Builder Corporation (“PBC”). (*See* AR, Tab 10 at 003-04.) The day after the Bid Opening, J&B — acting on the advice of its attorney — “submitted a Sunshine Act request to GCC for a copy of PBC’s bid documents.” (Appeal at 2; *see* Comments at 1; AR, Tab 5 at 001- 02.) “J&B received a copy of [PBC’s bid] documents on July 27, 2017.” (Appeal at 2; *see* Comments at 2; AR, Tab 5 at 003-06.)

GCC forwarded the bid packets to its architect (“Architect”) for evaluation. (*See* AR, Tab 9 at 025.) Noting that both bidders’ packets had “issues,” 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.) GCC 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 recommended that the contract be awarded to PBC because it was the lowest responsive and responsible bidder. (*See id.* at 002.) GCC approved the Architect’s recommendation (*see id.* at 001) and, on September 7, 2017, issued a notice of intent to award to PBC and a notice of non-award to J&B (*see* PR, Tab 12 at 0346-50).

On September 20, 2017, GCC received a protest (“Protest”) from J&B grounded solely on four items in PBC’s bid packet. (*See* AR, Tab 4.) Because J&B had received a copy of PBC’s bid packet in July, GCC rightfully denied J&B’s September 20 Protest as untimely, and also denied the Protest on its merits. (*See* AR, Tab 3 at 002-04.)

In its Appeal, J&B reiterates its allegations that PBC’s bid packet contained four errors. (*See id.* at 3-4.) J&B also complains that GCC incorrectly denied its Protest as untimely. (*See id.* at 5.) For the reasons explained below and in GCC’s Statement, J&B’s Appeal must be dismissed.

REBUTTAL TO J&B'S COMMENTS

In its Statement, GCC explained, with ample record and legal citations, why the Public Auditor lacks jurisdiction and, alternatively, why J&B's grounds for Appeal fail on their merits. (*See* Statement at 3-8.) With its Comments, J&B attempts to resuscitate its Appeal under a misguided view of both the record and the law. (*See* generally Comments.) J&B's Comments provide no reason for its Appeal to proceed, let alone prevail.

A. J&B's Misunderstands the Law Governing Both the Untimeliness of Its Protest and the Public Auditor's Lack of Jurisdiction

In its Statement, GCC explained how J&B's Protest was untimely under the governing law and how, as a result, the Public Auditor lacks jurisdiction over the instant Appeal. (*See* Statement at 3-5.) Noticeably, J&B does not even acknowledge the statutes and regulations that govern the untimeliness of its Protest. (*See generally* Comments.) Rather, J&B continues to wrongfully insist that it could lodge its Protest grounded solely on four items in PBC's bid packet *fifty-five days after J&B received a copy of PBC's bid packet*. (*See* Comments at 1-3.) Guam's Procurement Law clearly undercuts J&B's position.

Under 5 GCA § 5425(a), a "*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). And Guam's Procurement Law unequivocally provides that a protest can be filed at any stage of a procurement. *See* 5 GCA § 5425(a) (providing that a protest is allowed for matters "*in connection with*" a solicitation) (emphasis added); 2 GAR § 9101(c)(2) ("*Protestors may file a protest on any phase of solicitation*") (emphasis added); *1-A GuamWEBZ*, OPA-PA-16-002, Decision (Aug. 22, 2016)

at 7 (concluding that two issues were untimely protested because the protestor knew of the facts underlying these issues at the bid opening).

Notably, J&B's continued insistence that it could not lodge its Protest until after GCC issued the notice of non-award is not only legally incorrect, it is disingenuous. J&B is well aware that a protest can be lodged at any point because it has previously lodged protests grounded on other bidders' submissions and *before the agency informed J&B that it would not be awarded the contract. See, e.g., J&B Modern Tech, OPA-PA-11-018, Decision (Apr. 13, 2012) at 7-8 (finding that J&B filed a protest grounded on two other bidders' submission on the day of the bid opening and one week before the purchasing agency informed J&B that its bid was rejected).*

Here, there is no question that J&B's Protest was untimely. On the day after the Bid Opening, J&B requested a copy of PBC's bid packet "[a]s per advised of [its] corporate legal adviser [sic]." (AR, Tab 5 at 002.) And every single "fact [] giving rise" to J&B's Protest is found within PBC's bid packet, which J&B acknowledges that it received a copy of on July 27, 2017. (*See Appeal at 2; Comments at 2; see also AR, Tab 5 at 003-06.*) J&B's Protest — filed on September 20 — clearly is grounded on items that J&B 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.*)

As a matter of indisputable fact, J&B's Protest alleged that "PBC's bid should have been rejected" because: (1) PBC's bid packet contained a mathematical error; (2) PBC should have submitted records from GCLB and OSHA; (3) PBC should have submitted an insurance

certificate; and (4) PBC should have submitted a Certificate of Owner's Attorney.² (AR, Tab 4 at 003-04.) In short, J&B unequivocally knew about the facts giving rise to its Protest on July 27 when it received a copy of PBC's bid packet 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.").

Furthermore, J&B misreads the Public Auditor's decision in *GuamWEBZ*. (*See* Comments at 3-4.) In *GuamWEBZ*, the protestor filed a protest that raised four issues. *GuamWEBZ*, OPA-PA-16-002, Decision (Aug. 22, 2016) at 6. The Public Auditor determined that she lacked jurisdiction to hear two of the issues because the protestor knew about the facts giving rise to those issues at the bid opening, but did not file a protest within fourteen days after the bid opening. *Id.* at 7 ("[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 were not timely protested because the issues indisputably arise from facts that J&B knew about when it received a copy of PBC's bid packet on July 27, 2017 — i.e., nearly two months before J&B lodged its Protest on September 20. (*See* Appeal at 3-4; AR, Tab 5 at 003-06.) Indeed, every substantive issue raised by J&B arises from PBC's bid packet. (*See* Appeal at 3-4 & Exs. B, E, K.) And, like the protestor in *GuamWEBZ*, J&B failed to timely lodge its Protest within

² Thus, in stark contrast to J&B's assertion that it protested "the actions and conduct of GCC" (*see* Comments at 3), the record irrefutably shows that J&B's Protest was clearly grounded only on four items in PBC's bid packet (*see* AR, Tab 4 at 003-04).

fourteen days of when it knew of the facts giving rise to its Protest. In fact, J&B did not lodge its Protest until *fifty-five days after it received PBC's bid packet*. (See AR, Tab 4; AR, Tab 5 at 003-06.) Thus, like in *GuamWEBZ*, the Public Auditor “lacks the jurisdiction to hear [J&B’s] issues in this appeal.” *GuamWEBZ*, OPA-PA-16-002, Decision (Aug. 22, 2016) at 7.

Accordingly, under both the codified Procurement Laws and OPA precedent, GCC properly denied J&B’s Protest as untimely and the Public Auditor lacks jurisdiction to consider any of the substantive issues in J&B’s Appeal.³

B. Even Assuming that J&B’s Protest Was Timely, Its Comments Do Not Bestow Merit on the Substantive Issues in Its Appeal

Assuming *arguendo* that J&B timely filed its Protest — which it did not — GCC provided factually and legally supported reasons why the other four issues presented in J&B’s Notice of Appeal are unavailing. (See Statement at 5-8.) J&B’s Comments proffer nothing to bestow merit on these issues.

Although not altogether clear, J&B appears to argue that GCC could not clarify items in the bidders’ bid packets. (See Comments at 4-6.) This argument is curious because if GCC had not clarified items in J&B’s bid packet, then J&B’s bid would have been rejected as non-responsive due to a failure to meet the required completion time and a failure to include LEED activities.⁴ (See AR, Tab 9 at 008, 019.) Further, J&B’s suggestion that somehow a “unit price” was part of this IFB is nonsensical. (See Comments at 5-6.) This IFB unequivocally did not solicit for any items that are sold in units — such as, reams of paper or boxes of pens. This IFB solicited for the construction of a building. And the IFB’s cost breakdown applied to

³ On November 16, 2017, GCC filed a motion to dismiss the instant Appeal for lack of jurisdiction.

⁴ Paradoxically, the regulation that J&B quotes regarding prejudice and correction of minor mistake also applies to “delivery.” (See Comments at 6 (quoting 2 GAR § 3109(m)(4)(B).) Therefore, by J&B’s own puzzled reasoning, clarification of its proposed contract completion time would not be allowed.

divisions in the specifications for construction of that building. (*See* AR, Tab 6 at 027.) Thus, “unit prices” clearly are *not* part of this IFB.

Importantly, 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, J&B provides no reason whatsoever to conclude that PBC did not offer the lowest price for the IFB. (*Accord* AR, Tab 3 at 002; AR, Tab 9 at 002.)

Similarly, J&B’s Comments fail to provide any reason to conclude that its other three issues regarding PBC’s bid packet are *not* futile. (*See* Comments at 7-8.) As GCC explained (*see* Statement at 6-7), the IFB clearly required that bidders to only “*indicate* outstanding issues with the GCLB and OSHA,” (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). And, as GCC explained (*see* Statement at 7), the IFB clearly required *only the prevailing bidder* to submit insurance certificates (*see* AR, Tab 6 at 039). Finally, as GCC explained (*see* Statement at 7-8), the Certificate of Owner’s Attorney is completed only upon award of the contract (*see* AR, Tab 9 at 012-16).

Accordingly, even if J&B timely protested the substantive issues presented in its Appeal — which it unequivocally did not — J&B proffers no reason whatsoever for the Public Auditor to conclude that these issues are *not* meritless.

C. J&B's Comments Contain Improper Assertions that the Public Auditor Should Disregard

In its Comments, J&B presents two improper assertions that should be disregarded. First, J&B's assertion regarding the Local Procurement Preference in 5 GCA § 5008 is not properly before the Public Auditor *because J&B did not present this issue in its Protest. See GuamWEBZ, OPA-PA-16-002, Decision (Aug. 22, 2016) at 9* ("The Public Auditor finds that this issue is not properly before her *because it was not a claim made in GuamWEBZ's initial protest.*") (emphasis added); *accord, e.g., Kim Brothers Constr., OPA-PA-11-017, Decision and Order re Purchasing Agency's Mot. to Dismiss (Feb. 22, 2012)* (dismissing for lack of jurisdiction because the appellant had not protested the issues in its appeal); *Data Mgmt. Resources, OPA-PA-11-010, Order Dismissing Appeal for Lack of Jurisdiction (Aug. 29, 2011)* (dismissing for lack of jurisdiction because the appeal was filed before the agency issued its protest decision); *Mega United Corp., OPA-PA-09-001, Order of Dismissal (Jan. 26, 2009)* (dismissing for lack of jurisdiction because the purchasing agency had not issued a decision on the issues raised in the protest).

Furthermore, J&B's reliance on its checkmarks "on boxes 'b' and 'c'" is misguided. (Comments at 7.) Notably, boxes "b" and "c" on the Local Procurement Preference Application apply to only the procurement of supplies, which this IFB clearly is not soliciting for as the Solicitation is for construction of a building. (See AR, Tab 6 at 016 ("(b) a business that regularly carries an inventory for regular immediate sale of at least fifty percent (50%) of the items of supplies to be procured" and "(c) a business that has a bona fide retail or wholesale business location that regularly carries an inventory on Guam. . . . of supplies and

items of a similar nature to those being sought").⁵) Thus, J&B's checkmarks in boxes "b" and "c" of its Local Procurement Preference Application are irrelevant for this IFB. Moreover, contrary to J&B's perfunctory assumption about applicability of the local preference (see Comments at 7), 5 GCA § 5008 provides a local preference for qualified businesses licensed to do business on Guam and located on Guam — i.e., the business representative's place of birth is immaterial.⁶

Second, *although not even requested as relief in its Appeal* (see Appeal at 5), J&B now requests for the Public Auditor to "award the contract to J&B" (Comments at 9). J&B's newly asserted request unequivocally fails as a matter of law. Where, as here, GCC has not yet awarded the contract, the Procurement Code provides only two remedies for a disgruntled bidder — *neither of which is an award*:

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (a) cancelled; or
- (b) revised to comply with the law.

5 GCA § 5451; see 2 GAR, Div. 4, § 9105; see also *id.* at § 3115(b) ("issuance of a solicitation does not compel award of a contract"); accord, e.g., *Square One Armoring Serv., Inc. v. United States*, 123 Fed. Cl. 309, 325 (2015) ("[T]he court is without authority to direct the award to Square One. . . . the court could only enjoin the award to O'Gara, and either order GSA to

⁵ As a side note, boxes "a" and "d" on the application do not apply to this IFB either. This is so because "a" applies only to a "manufacturing business that adds at least twenty-five percent of the value of an item," and "d" applies only to a qualified "service business" and "only if the Government's requirement is for service." (AR, Tab 6 at 016 (emphasis in original).)

⁶ Ironically, J&B's misguided assumption about the birthplace of business representatives would render J&B ineligible for the local preference because the resumes of J&B's representatives indicate that they all were born in the Philippines. (See AR, Tab 7 at 072-80.)

re-evaluate the original proposals or re-procure the task order[.]”); *id.* at n.13 (“It is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties.”) (citations omitted); *C.A.C.I., Inc.–Fed. v. United States*, 719 F.2d 1567, 1575 (Fed. Cir. 1983) (“a disappointed bidder has ‘no right . . . to have the contract awarded to it’”) (citation omitted). Accordingly, even if the Public Auditor finds that she has jurisdiction and that the instant Appeal has merit — which she does not, and it does not — the law does not entitle J&B to an award of the contract.⁷

RECOMMENDATIONS

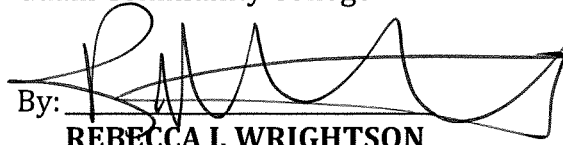
For the foregoing reasons, GCC recommends that the Public Auditor:

- (1) Find that J&B’s Protest was untimely.
- (2) Find that the Public Auditor lacks jurisdiction to hear the issues in J&B’s Appeal because J&B failed to timely present them to GCC.
- (3) Find that the Public Auditor lacks jurisdiction to hear any issues that J&B did not present in its Protest.
- (4) Find that the issues presented in J&B’s Appeal lack merit.
- (5) Deny all relief requested by J&B.
- (6) Dismiss the instant matter so that GCC may proceed with awarding the contract to PBC and construction may commence for the Forensic DNA Lab.

⁷ Indeed, J&B knows that it is legally impossible for the Public Auditor to award a contract. *See J&B Modern Tech*, OPA-PA-17-003, Appellant’s Comments on Statement (Apr. 4, 2017) at 7 (“J&B admits that it overstated the relief in its Notice of Appeal when it asked that the OPA direct GCC to award the contract to J&B.”).

Respectfully submitted this 4th day of December 2017.

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