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9 PHIL-GETS (GUAM) INTERNATIONAL TRADING CORP.  
10 dba J & B MODERN TECH

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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

9 IN THE APPEAL OF  
10 PHIL-GETS (GUAM)  
11 INTERNATIONAL TRADING CORP.  
12 dba J & B MODERN TECH,  
13 Appellant.

Appeal No. OPA-PA-17-011

PHIL-GETS (GUAM) INTERNATIONAL  
TRADING CORP. dba J & B MODERN  
TECH's AMENDED OPPOSITION TO  
MOTION TO DISMISS FOR LACK OF  
JURISDICTION

14 On December 4, 2017, the OPA Scheduling Order granted the parties time up to  
15 and through December 20, 2017 for Oppositions to the Motions. See Scheduling Order,  
16 p. 1, ¶ 2(b). Accordingly, J&B submits its Amended Opposition with supplemental  
17 authority at pp. 1 and 2 set forth hereinbelow. The remainder of this Amended  
18 Opposition is identical to J&B's Opposition filed on December 1, 2017.

19 The Appellant Phil-Gets (Guam) International Trading Corp. dba J & B Modern  
20 Tech (herein "J&B") submits the following Amended Opposition to the Guam  
21 Community College (herein "GCC") Motion to Dismiss for lack of jurisdiction based on  
22 timeliness of the J&B protest and appeal to the OPA.

23 I. J&B TIMELY FILED NOTICE OF APPEAL

24 The OPA has held that in cases where a proposer is challenging the finding that a  
25 competing deficient proposer was awarded the RFP, the fourteen-day period in  
26 Section 5425(a) does not begin until there is notice of the award. See *In the Appeal of JMI*  
27 *Edison*, OPA-PA-13-009, Decision, p. 4 (Nov. 27, 2013).

28

1           The *JMI Edison Decision* is consistent with federal authorities under the federal  
2 government's analogous procurement regime, which have uniformly found that  
3 protests based on the eligibility of a competing proposer should be brought after an  
4 award is made or the agency otherwise gives pre-award notice confirming eligibility.  
5 See, e.g., *Reep, Inc.*, B- 290688 (Comp. Gen.), 2002 CPD P 158, 2002 WL 31103566 (Sept. 20,  
6 2002) ("Unless the firm with the alleged conflict of interest is actually selected for  
7 award, the protester has not suffered any competitive prejudice . . ."); see also *Kimmins*  
8 *Thermal Corp.*, B- 238646 (Comp. Gen.), B- 238646.3, 90-2 CPD P 198, 1990 WL 278456  
9 (Sept. 12, 1990) (finding that the time to file the protest commenced prior to award  
10 when the agency representatives informed the protestor that it would consider the other  
11 firm's proposal); *Arco Mgmt. of Washington, D.C., Inc.*, B- 248653 (Comp. Gen.), B-  
12 248653.2, 92-2 CPD P 241, 1992 WL 310270 (Oct. 13, 1992).

13           The rationale for these decisions is that "the allegedly conflicted firm may not be  
14 the eventual awardee, either because it loses the competition or because the agency  
15 ultimately concludes that the firm has an impermissible conflict of interest." *Reep, Inc.*,  
16 B- 290688 (Comp. Gen.), 2002 CPD P 158, 2002 WL 31103566 (Sept. 20, 2002); see also  
17 *Kimmins Thermal Corp.*, B- 238646 (Comp. Gen.), B- 238646.3, 90-2 CPD P 198, 1990 WL  
18 278456 (Sept. 12, 1990). These federal authorities recognize that "in applying our  
19 timeliness rules, we will not charge a protester with knowledge that another firm was  
20 considered eligible for award simply because the protester knew that the other firm had  
21 submitted an offer." *Id.* Moreover, the federal authorities "resolve any reasonable  
22 doubt in favor of the protester" on issues of timeliness. *Ervin & Associates, Inc.*, B-  
23 278850 (Comp. Gen.), 98-1 CPD P 89, 1998 WL 126843 (Mar. 23, 1998).

24           5 G.C.A. Section 5425 (a) requires that "the protest shall be submitted in writing  
25 to the head of the purchasing agency within fourteen (14) days 'after such agreed  
26 person knows or should know the fact giving rise thereto'."

1           On June 7, 2017, GCC issued a invitation for bids or "IFB" for the construction of  
2 a Forensic DNA Lab. *See* Agency Report at 1.

3           On July 20, 2017, J&B submitted a Sunshine Act Request to GCC for a copy of the  
4 ProPacific Builder Corp. (herein "PBC") bid documents. Agency Report at 2.

5           On or after July 27, 2017, J&B received a copy of the PBC's bid documents from  
6 GCC. Agency Report at 2. However, nothing in the PBC documents disclosed that  
7 GCC was in violation of the procurement law, GCC intended to violate the law, nor  
8 showed that GCC was in any kind of violation of law. No good cause existed to appeal  
9 anything done wrong by the GCC at that point in time.

10           On September 7, 2017, GCC issued a Notice of Intent to Award the contract to  
11 PBC and a Notice of Non-Award to J&B. Agency Report at 2. Accordingly, J&B then  
12 understood that GCC was in violation of procurement law based on the GCC selection  
13 of PBC which had submitted a higher bid than J&B.<sup>1</sup>

14           On September 11, 2017, J&B sent and served on GCC a complaint or form of  
15 protest regarding the award. Agency Report at 2, PR Tab 12 at 0352-54; *see also* PR Tab  
16 13 at 1544-47.

17           On September 20, 2017, J&B served their protest on GCC, and GCC received this  
18 protest, based on the violations of procurement law committed by GCC. Agency  
19 Report at 2, Tabs 4, 12 and 13.

20           Only thirteen (13) days passed between the September 7, 2017 date - which was  
21 the Notice of Non-Award to J&B and the September 20, 2017 date J&B served its protest.

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25 \_\_\_\_\_  
26 <sup>1</sup> Clearly, TRMA had explained to GCC that in fact J&B had the lower bid when properly calculated by  
27 unit price. *Infra* at 3, footnote 3.

1 POINT AND AUTHORITIES

2 **A. No Reason to Know GCC Would Violate Procurement Law**  
3 **Before September 7, 2017**

4 Only after September 7, 2017, could J&B have known that GCC intended to  
5 violate the procurement law, its regulations and the specifications of the IFB. Nothing  
6 in the PBC bid submission proved any earlier violations by GCC of the procurement  
7 law; for example, no collusion was shown between GCC and PBC, before September 7,  
8 2017. Instead, the PBC bid failures to mathematically compute the sums of its unit  
9 prices, and other PBC glaring deficiencies in their submittal, presented issues relevant  
10 only to GCC as the purchasing agency - and not J&B - to make the correct award by  
11 application of procurement law consistent with the TRMA evaluation that J&B had the  
12 lower bid price. Stated another way, J&B had no reason to know or believe that GCC  
13 would violate the procurement law, its regulations and IFB until after September 7,  
14 2017.

15 On September 8, 2017, importantly, J&B sent their formal written complaint to  
16 GCC regarding the award to PBC that was stamped received on September 11, 2017.  
17 Tab 12.<sup>2</sup>

18 On September 20, 2017, J&B served their formal "Protest!" with detailed  
19 supporting documents and records to explain the protest.<sup>3</sup> PR, Tab 14. No doubt  
20 should remain that the J&B protests were timely twice served before 14 days expired.

21  
22 <sup>2</sup> The OPA may deem this J&B formal Complaint another form of timely protest.

23 <sup>3</sup> The J&B base bid price is \$3,880,850.00. *Id.* at p. 00403. Although PBC mistakenly calculated and  
24 inserted a unsupported conclusory bid number of \$3,863,714.00, the true summation of the unit prices bid  
25 by PBC is \$3,903,747.00. See J&B Comments to Agency Report (11/27/17) at 4; PR Tab 14 pp. 00371-  
26 00375. Therefore, J&B is lower by \$22,984.00 than PBC. Tab 14, p. 00366. In fact, GCC does not deny, and  
admits that the accurate numbers as set forth by J&B are true. Tab 14, p. 00403 (GCC Response to Protest,  
October 17, 2017). TRMA was employed as the evaluation consultant specifically found the properly  
computed J&B bid of \$3,880,850.00 was lower than the PBC bid of \$3,903,000.00. See PR Tab 11, TRMA  
(8/14/17) at p. 00339.

1           **B.     The Timely Protest is Against the GCC Acts and Omissions**

2           GCC is a confused in its effort to apply the Decision of 1-A *Guam WEBZ* OPA-  
3 PA-16-002. Instead of filing an appeal or protest over what PBC may have done wrong,  
4 J&B is timely protesting the wrongful action and conduct of the GCC mistakes and  
5 violations of procurement law. J&B could not know what GCC would do with PBC  
6 error-filled miscalculations, glaring omissions and fundamentally higher unit price bid  
7 in PBC's bid package, until only after the publication on September 7, 2017 of GCC's  
8 intent to award the contract to PBC, and the non-award of J&B.

9           No procurement law authority supports a hypothetical protest or duty to appeal  
10 on J&B as to another competing bidder's mistakes, computation errors and omissions  
11 such as the instant PBC bid submission until and unless the Government; i.e. GCC,  
12 commits a violation of the procurement law and publishes their profound violation of  
13 procurement law in selection of a higher bidder. A bidder should only be protesting  
14 Government Agency action, which means the time for a protest does not start running  
15 until GCC notified the two bidders of its decision to award. If the law was somehow  
16 interpreted any other way, it would be absurd. Every bidder would have to submit a  
17 FOIA/Sunshine Act request for every other bidder's bid, and many piecemeal -  
18 premature protests would have to be filed before any agency decision to award a  
19 contract. Most procurements would be stayed and frozen in place. The interpretation  
20 suggested by GCC is contrary to sound public policy, since the agency itself, before  
21 award or at the time of award, can always moot and avoid any issue by finding the  
22 problematic competitor's bid to be non-responsive or disqualified.

23           In the cited Decision by GCC, *Guam WEBZ* filed their protest late on March 10  
24 after the deadline passed on March 9, 2016. Decision at 5. The Decision was careful to  
25 confine its limited untimeliness finding to a single issue, among many timely filed, that  
26 was premised on *Guam WEBZ's* actual knowledge that at the time of bid opening on  
27

1 February 15, 2016, GCC “publically announced that WSI had submitted two proposals,  
2 a proprietary option and Drupal based option, so that one of many submitted issues of  
3 “submission of two proposals with its bid are not properly before the Public  
4 Auditor” ...” Decision at 7.<sup>4</sup> Putting that issue to the side, the OPA, proceeded to  
5 address the many other merits of Guam WEBZ’s timely protest and appeal as to GCC’s  
6 errors in the evaluation of bids and determination of WSI as a responsible bidder,  
7 because these other issues were determined in fact timely protested, like the J&B protest  
8 at hand. Decision at 7-8. In rebuking the GCC erroneous decision to deny the protest as  
9 totally untimely, the OPA concluded that GCC must rebid the procurement, found  
10 GCC’s evaluation “unfair, improper and violated § 5211(e) and GAR § 3109(n)(1)”, and  
11 therefore terminated GCC’s contract with WSI. Decision at 21-23.

12 Likewise here, J&B submits that GCC’s evaluation of the low bid of J&B, and  
13 accepting the higher bid of PBC, was unfair, improper and violated 5 GCA § 5211(g),  
14 § 5008 and GAR § 3109(m)(4)(c) . See Comments on Agency Report (11/27/17) at 4-6.  
15 J&B’s timely notice of protest filed on September 20th followed after thirteen (13) days  
16 expired from September 7, 2017 (notice of intent to non-award the contract to J&B).  
17 Agency Report at 2.

18 Interestingly, the Decision in *Guam WEBZ* focused on GCC’s failure to evaluate  
19 the bids in accordance with the IFB requirements. Likewise here, GCC violated the IFB  
20 specifications at § 23 (Award, Cancellation and Rejection) that requires “In case of an  
21 error in the extension of prices, unit price will govern.” AR Tab 6, p. 00551. See  
22 Comments on Agency Report (11/27/17) at 5. Nothing can be more clear in the

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24 <sup>4</sup> Respectfully, in light of the fact that GCC’s violation of the procurement law only was known after its  
25 notice of award and non-award to the bidders, even this Guam WEBZ single issue was timely appealed  
26 because GCC was free to actually apply the procurement law and disqualify WSI and award the contract  
to Guam WEBZ anytime prior to notices of award and non-award. Without knowing what GCC would  
do with WSI’s non-compliant two bids, theoretically a earlier protest by Guam WEBZ would have been  
premature and speculative until the purchasing agency error of law was disclosed by actual award; and  
prejudice incurred by Guam WEBZ in a non-award.

1 procurement authorities that the unit prices will govern, and based thereon, PBC's unit  
2 base bid price was higher than J&B. GCC's violation of the unit price rule of law was  
3 only known after September 7, 2017.

4 As in the *Guam WEBZ* Decision, the Public Auditor should find a equivalent fatal  
5 flaw in GCC's evaluation of bids because the IFB's general terms and conditions  
6 mandated that unit price will govern. Decision at 18. Similarly, the Public Auditor  
7 should find that GCC's failure to evaluate the bids using all the criteria and factors set  
8 out in the IFB results in a violation of 5 GCA § 5211. Decision at 18. As stated in the  
9 Decision, "GCC's serious evaluation errors do not end here." *Id.* at 18. Parallel to the  
10 evaluation errors of GCC as concerns J&B and PBC, the Public Auditor found in *Guam*  
11 *WEBZ* that GCC did not properly evaluate the price of the items offered as required by  
12 the IFB. Decision at 18. The contract shall be awarded to the lowest bidder. *Id.* at 18;  
13 *citing*, 5 GCA § 5211(g) and 2 GAR § 3109(m)(1). Fundamentally, the same GCC error  
14 that occurred in *Guam WEBZ* is here again in the failed comparison and contrast of the  
15 J&B lower price to PBC's higher bid price.<sup>5</sup>

## 16 CONCLUSION

17 The GCC Motion based on alleged untimeliness of J&B's Protest is not well taken  
18 and should be denied.

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23 <sup>5</sup> Foreshadowing another GCC error of law, the *Guam WEBZ* Decision pointed out that the local  
24 procurement preference requires a checkmark or an "X" on the block of a procurement preference.  
25 Decision at 3. "Bidders claiming the local procurement preference place a checkmark or an "X" on the  
26 block on a procurement preference that applies to them". *Guam WEBZ* Decision at 3. Here, J&B  
underscores that PBC failed to check any boxes and the award to PBC by GCC is another pricing  
evaluation failure of GCC. *See* Comments on Agency Report (11/27/17) at 6-7, § D ("only J&B is entitled  
to 15% local procurement preference").

1 DATED this 6 day of December, 2017.

2 Respectfully submitted,

3 **BERMAN O'CONNOR & MANN**  
4 Attorneys for Appellant  
5 **PHIL-GETS (GUAM) INTERNATIONAL**  
6 **TRADING CORP. dba J & B MODERN TECH**

7 By:

8 

9 DANIEL J. BERMAN

10 **CERTIFICATE OF SERVICE**

11 I, Christine Pangelinan, hereby certify that on the 6<sup>th</sup> day of December, 2017, I  
12 caused the foregoing *Phil-Gets (Guam) International Trading Corp. dba J & B Modern Tech's*  
13 *Amended Opposition to Motion to Dismiss for Lack of Jurisdiction* to be served as follows:

14 1) Via Hand Delivery to:

15 Rebecca Wrightson, Esq.  
16 Cabot Mantanona LLP  
17 Edge Bldg., Second Floor  
18 929 S. Marine Corps Drive  
19 Tamuning, Guam 96913

20 2) Via U.S. Mail to:

21 Propacific Builders Corporation  
22 750 Rt. 8, Suite 202  
23 Barrigada, Guam 96913

24 DATED this 6<sup>th</sup> day of December, 2017.

25 

26 CHRISTINE PANGELINAN