

BACKGROUND SUMMARY²

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 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 facts pertaining to four items in PBC’s bid packet. (See AR, Tab 4.) Because J&B

² Because GCC’s Statement provides a detailed background, only a summary is provided herein.

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.)

J&B filed its Appeal on October 30, 2017, reiterating its allegations that PBC's bid packet contained four errors and complaining that GCC incorrectly denied its Protest as untimely. (*See* Appeal at 3-5.) On November 16, GCC filed its Agency Report and its Motion to Dismiss for Lack of Jurisdiction or, Alternatively, for Expeditious Disposition of the Appeal ("Motion"). J&B filed its Opposition to the Motion on December 1, which addresses only J&B's jurisdictional problem.

On the morning of December 4, 2017, the Hearing Officer held a Pre-Hearing Conference and, that afternoon, issued a Scheduling Order.

In her Scheduling Order, the Hearing Officer "ORDERED:"

1. Regarding Purchasing Agency's Motion to Dismiss for Lack of Jurisdiction or, Alternatively, for Expeditious Disposition, J&B has filed an opposition to the motion and the deadline for GCC to file any reply to J&B's opposition is December 11, 2017.

(Sched'g Order (Dec. 4, 2017) at 1.) Although the Hearing Officer clearly ordered that the only brief that could be filed regarding GCC's Motion was the instant Reply, J&B — without seeking leave — filed an Amended Opposition on December 6. Contemporaneous with this Reply, GCC filed a motion to strike J&B's improperly-filed Amended Opposition.

Nothing proffered by J&B precludes the conclusion that either the Public Auditor lacks jurisdiction or that an expeditious disposition is warranted. Accordingly, for the reasons explained below and in GCC's Motion, J&B's Appeal must be dismissed.

ARGUMENT

In its Motion, GCC explained — with ample record and legal citations — why the Public Auditor lacks jurisdiction and, alternatively, why the undisputed material facts in the record establish that J&B's grounds for Appeal fail on their merits. (*See Mot.* at 4-9.) In its Opposition, J&B attempts to resuscitate the lack of jurisdiction over its Appeal through a misguided view of both the record and the law. (*See generally Opp'n.*) Noticeably, J&B does not even address GCC's request for an expeditious disposition of this matter. (*See id.*) J&B's Opposition provides no reason for its Appeal to proceed, let alone proceed to a formal hearing and prevail.

A. The Record Unequivocally Shows that All of the Facts Giving Rise to the Issues that J&B Protested Are Found in PBC's Bid Packet

At the outset, J&B's repeated misperception of its Protest must be addressed. (*See generally Opp'n.*) Perhaps hoping that avoidance will somehow alter the record, J&B wholly disregards the actual facts that gave rise to its Protest. (*See generally Opp'n.*) Ignoring the record, however, will not change it. The record unequivocally shows that every salient fact in J&B's Protest arises from PBC's bid packet — which J&B undoubtedly received on July 27, 2017 (*see AR, Tab 5.*)

The record clearly and indisputably establishes that J&B presented four grounds in its Protest:

- (1) J&B alleged that PBC's bid packet contained an arithmetical error, and J&B attached pages from PBC to demonstrate this alleged error;
- (2) J&B alleged that PBC should have submitted records from GCLB and OSHA, and J&B attached a page from PBC's bid packet to demonstrate this alleged error;

- (3) J&B alleged that PBC should have submitted an insurance certificate, and J&B further alleged that PBC's bid packet did not contain this item; and
- (4) J&B alleged that PBC should have submitted a Certificate of Owner's Attorney, and J&B attached a page from PBC's bid packet to demonstrate this alleged error.

(See AR, Tab 4 at 003-04; 008-12; 022; 038.)

Thus, the record unquestionably shows that the facts underlying every ground presented in J&B's Protest arise from PBC's bid packet. Because these are the facts giving rise to its Protest, J&B knowledge of *these facts* governs when it should have filed its Protest. *See infra*. And, most notably, the record indisputably shows that J&B had knowledge of *these facts* when it received a copy of PBC's bid packet on July 27, 2017 (*see* AR, Tab 5), but J&B did not lodge its Protest until September 20 — i.e., *fifty-five days after J&B knew of the facts giving rise to its Protest* (*see* AR, Tab 3). In short, J&B wholly disregards what the record indisputably shows: J&B's Protest was grounded on facts that J&B clearly knew about nearly two months before it lodged its Protest.

Accordingly, the record clearly shows that the facts giving rise to J&B's Protest are all found in PBC's bid packet and that J&B's Protest was untimely.

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

In its Motion, 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* Mot. at 4-7.) Noticeably, J&B does not even acknowledge the statutes and regulations that govern the untimeliness of its Protest. (*See generally* Opp'n.) Rather, J&B continues to wrongfully insist that it could lodge its Protest grounded solely on facts arising from four

items in PBC's bid packet *fifty-five days after J&B received a copy of PBC's bid packet.* (See Opp'n at 1-3.) Guam's Procurement Law clearly undercuts J&B's position.

Under 5 GCA § 5425, "any actual or prospective bidder . . . *who may be aggrieved in connection with* the method of source selection, *solicitation* or award of a contract, may protest," but that "*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); 2 GAR § 9101(c)(2) ("Protestors may file a protest on any phase of solicitation"); *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); accord, e.g., *James Hamilton Const. Co. v. New Mexico State Highway & Transp. Dep't*, 68 P.3d 173, 174-76 (N.M. Ct. App.) (rejecting the protestor's argument that it could not protest another bidder's submission because the phrase "*in connection with*" in New Mexico's procurement law "*speaks to the entire process from solicitation to award*" and holding: "It is clear from both the statute and the regulation that *the triggering event is the knowledge of facts or occurrences giving rise to the protest* during the entire procurement process, *regardless of whether the protestant is protesting the solicitation, bid, or award processes.*") (emphasis added).

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' submissions on the day of the bid opening and *one week before the purchasing agency informed J&B that its bid was rejected*).³

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.) In other words, J&B's Protest — filed on September 20 — clearly is grounded on items (i.e., facts) 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, *see supra*, J&B's Protest alleged that: (1) PBC's bid packet contained an arithmetical 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.⁴ (AR, Tab 4 at 003-04.) In short, J&B

³ Additionally, J&B's "public policy" reasoning is both incongruous and beside the point. (See Opp'n at 4.) Importantly, although not required to do so, J&B *did* request and receive a copy of PBC's bid packet. (See AR, Tab 5.) And the reason that a protest must be promptly filed is so that it can be promptly resolved, thereby allowing for the soonest possible resolution of any concerns — e.g., a non-responsive bid packet — so the procurement can swiftly continue. See generally 2 GAR § 9101.

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

unequivocally knew about the facts giving rise to its Protest on July 27, 2017 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* Opp'n at 4-5.) In *GuamWEBZ*, the protestor filed a protest that raised four issues. *See* OPA-PA-16-002, Decision (Aug. 22, 2016) at 6. The Public Auditor determined that she lacked jurisdiction to hear two of the protested issues because the protestor knew about the facts giving rise to these issues at the bid opening, but did not file a protest within fourteen days after the bid opening. *See 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 these 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.) In fact, every substantive issue raised by J&B's Appeal 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 fourteen days of when it knew of the facts giving rise to its Protest. Indeed, 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.

C. Although J&B’s Amended Opposition Was Improperly Filed and Therefore Should Be Stricken, J&B’s So-Called “Supplemental Authority” Provides No Reason to Deny GCC’s Motion

Contrary to the briefs that the Hearing Officer ordered could actually be filed regarding GCC’s Motion, J&B filed an “Amended Opposition” on December 6, 2017 that purportedly contains “supplemental authority.” (Am. Opp’n at 1.) GCC contemporaneously filed a motion to strike J&B’s improperly-filed Amended Opposition. Should the Public Auditor choose to consider J&B’s Amended Opposition, the so-called “supplemental authority” provided therein clearly has no bearing on the instant Motion.⁵

J&B seemingly believes that the decision in *JMI Edison*, OPA-PA-13-009, somehow aids its cause. (See Am. Opp’n at 1-2.) J&B is wrong. Most notably, the *JMI Edison* protestor did not *request and receive a copy of the other bidder’s submission* and then *wait fifty-five days to lodge a protest grounded solely on facts arising from the other bidder’s submission*. See OPA-PA-13-009, Decision (Nov. 27, 2013) at 1-3. Indeed, *JMI Edison* does not even mention when that protestor knew about the facts giving rise to its alleged problems in the other bidder’s submission. See *id.* Thus, *JMI Edison* provides nothing that alleviates J&B’s jurisdictional predicament.

⁵ Noticeably, J&B does not even attempt to demonstrate how or why its so-called “supplemental authority” applies to the matter at hand. (See *generally* Am. Opp’n.)

Similarly, the federal authorities cited in the Amended Opposition do not help J&B for the matter at hand, and for a variety of reasons.

First, contrary to J&B's suggestion, the federal government's "procurement regime" certainly is *not* "analogous" to Guam's. (Am. Opp'n at 2.) In fact, as illustrated by decisions cited in the Amended Opposition, the two sovereigns' procurement regulations vary significantly. For example, two of the decisions cited by J&B involved application of an organizational conflict of interest regulation that Guam's law clearly does not have. *See REEP, Inc.*, B-290688, 2002 WL 31103566, (Comp. Gen. Sept. 20, 2002); *Kimmins Thermal Corp.*, B-238646, 1990 WL 278456, (Comp. Gen. Sept. 12, 1990).

Second, like the Public Auditor's decision in *GuamWEBZ, Kimmins Thermal* teaches that, under the federal procurement regulations, a bidder is required to lodge its protest when it knows about the facts that allegedly render another bidder's submission problematic. *See* B-238646. Third, J&B's reliance on *Arco Management* is odd because that case involved a premature protest grounded on the protestor's anticipation of bias during the agency's re-evaluation of the bidders' submissions, *see* B-248653, 1992 WL 310270, (Comp. Gen. Oct. 13, 1992) — which clearly is not the posture of the instant matter.

Fourth, *Ervin and Associates, Inc.* illustrates yet another difference between the federal procurement laws and Guam's because that case dealt with a federal regulation that requires a protest to contain information establishing timeliness. *See* B-278850, 1998 WL 126843, (Comp. Gen. Mar. 28, 1998).⁶ Finally, and almost needless to say, not one of these

⁶ Furthermore, there is no "reasonable doubt" regarding the untimeliness of J&B's Protest, and J&B does even suggest that there is. (Am. Opp'n at 2; *see generally id.*) Here, the record indisputably establishes that J&B knew of the facts giving rise to its Protest almost two months before lodging it. *See supra*.

federal agency decisions either binds the Public Auditor or negates OPA's precedent — namely, *GuamWEBZ*.

Accordingly, even if the Public Auditor chooses not to strike J&B's improperly-filed Amended Opposition, the so-called "supplemental authority" therein provides no reason whatsoever to deny GCC's Motion.

D. J&B Does Not Contend that Any Material Facts Are Disputed; Therefore, Assuming Arguendo that J&B's Protest Was Timely and the Public Auditor Has Jurisdiction, the Hearing Officer Should Expeditiously Dispose of This Matter on the Record

In its Motion, GCC alternatively requested that the Hearing Officer expeditiously dispose of this matter because there are no disputed material facts regarding the substantive issues presented in J&B's Appeal. (*See* Mot. at 7-9.) Noticeably, J&B does not address this alternative request in its Opposition, or its Amended Opposition.⁷ (*See generally* Opp'n; Am. Opp'n.) Therefore, GCC's alternative request for expeditious disposition is unopposed. As explained in GCC's Motion, even if J&B had timely filed its Protest — which it did not — and the Public Auditor has jurisdiction to hear J&B's Appeal — which she does not — the undisputed material facts in the record clearly establish that the substantive issues in J&B's Appeal are unavailing. (*See* Mot. at 7-9.)

Accordingly, in the unlikely event that the Public Auditor concludes she has jurisdiction, the Hearing Officer should expeditiously dispose of this Appeal on the record.

⁷ To be fair, while not altogether clear, J&B does seem to make a fleeting suggestion that somehow a "unit price" was part of this IFB and that its bid was therefore the lowest. (*See* Opp'n at 5.) As explained in GCC's Rebuttal to J&B's Comments, J&B's suggestion is nonsensical. (*See* Rebuttal (Dec. 4, 2017) at 6-7.) This IFB certainly 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 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. Of further irrelevance, J&B footnoting its misguided perception about the local procurement preference has no bearing whatsoever on its Appeal. (*See* J&B's Opp'n at 6 n.5; GCC's Rebuttal at 8-9 (explaining the lack of both jurisdiction and merit for this un-protested claim).)

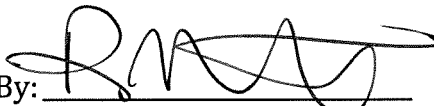
See, e.g., Korando Corp., No. OPA-PA-15-009, Decision & Order re Appellant's Mot. for Summ. J. (Dec. 3, 2015) at ¶¶ 2-3 (concluding that an issue would not be addressed at the formal hearing because the facts regarding this issue were both undisputed and clear in the record); Korando Corp., No. OPA-PA-15-009, Decision & Order re Purch. Agency's Mot. for Summ. J. (Dec. 3, 2015) at ¶¶ 2-3 (same).

CONCLUSION

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

Respectfully submitted this 11th day of December 2017.

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