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BEFORE THE PUBLIC AUDITOR

PROCUREMENT APPEALS

9 IN THE APPEAL OF:

DOCKET NO. OPA-PA-19-001

10 JJ GLOBAL SERVICES,

11 Appellant,

12 and

13 GUAM VISITORS BUREAU,

14 Purchasing Agency.

**REPLY BRIEF IN SUPPORT OF
MOTION FOR INJUNCTIVE RELIEF**

15
16 On January 2, 2019 JJ Global filed its appeal with the Office of the Public Accountability
17 requesting relief. On January 11, 2019, GVB filed the Procurement Record. On February 6, 2019,
18 JJ Global filed a Motion for Injunctive Relief and Stay of Procurement Pending Final Resolution
19 of Appeal and for Order Requiring the Guam Visitors Bureau to Issue a Final Decision on Protest
20 2. On February 13, 2019, GVB filed their Opposition. JJ Global now submits this reply to the
21 opposition.

22
23 **I. THE OPA HAS THE EQUITABLE AUTHORITY TO ISSUE A STAY.**

24 JJ Global moves the Office of Public Accountability (OPA) for a temporary restraining
25 order restraining and enjoining the Procuring Agency - the Guam Visitors Bureau ("GVB") - from
26 progressing forward with contract performance of GVB IFB No. 2018-001, pending final
27 resolution of this appeal. JJ Global is not seeking the enforcement of the "automatic" stay
28 pursuant to 5 G.C.A. § 5425(g). This is certainly within the power of the OPA. The OPA's

1 authority to enjoin a purchasing agency and impose a stay of the contract is provided for in 2
2 G.A.R. § 12215.

3 *TLK Marketing Co. Ltd. v. Guam Visitors Bureau*, Superior Court of Guam Civil Case
4 No. CV0914-16, Decision and Order (Nov. 13, 2018) is inapposite. There, the Superior Court
5 upheld the OPA's determination that no automatic stay was in place under *Guam Imaging*
6 *Consultants, Inc. v. Guam Memorial Hospital Association*, 2004 Guam 15. *TLK Marketing*, at p.
7 9. JJ Global is not arguing that the automatic stay is in place. The OPA has the statutory
8 authority and jurisdictional power to issue a temporary restraining order enjoining the contract
9 pending this appeal. Neither is *Guam Imaging* controlling. There, the Supreme Court's decision
10 was limited to interpreting when the automatic stay in 5 G.C.A. § 5425(g) was triggered, but did
11 not otherwise limit the OPA's statutory authority.

12 LMS urges the OPA to follow the maxim *expressio unius est exclusio alterius*, a rule of
13 statutory construction outlined by the Supreme Court of Guam in *Rinehart v. Rinehart*, 2000
14 Guam 14 ¶ 9. The Supreme Court explained that "[t]his a rule of statutory construction means
15 that if an option is express in a law, all other options not expressed were intentionally excluded.
16 However, in following this maxim the Court recognized "[c]ourts have been warned to use this
17 maxim prudently." *Id.* The Supreme Court's finding in *Rinehart* was limited to its application in
18 the context of telephonic testimony being excluded from Guam's testimonial laws. *Id.* There is
19 no comparison here. This is not the case of the legislature listing or enumerating the limited
20 remedies that the OPA has in enforcing the procurement laws of Guam.

21 Instead, the statute governing the jurisdiction of the Public Auditor conveys broad
22 authority to the Public Auditor including "the power to review and determine de novo any matter
23 properly submitted to her or him" and charging the Public Auditor's jurisdiction "to be utilized
24 to promote the integrity of the procurement process and the purpose of [Guam Procurement
25 Law]." 5 G.C.A. § 5703(a) and (f). Issuing a stay of this procurement to resolve the serious
26 questions implicated by GVB's procurement would promote the integrity of the procurement
27 process and the purposes of Guam Procurement Law and is therefore within the Public Auditor's
28 jurisdiction.

1 **II. THE SERIOUS QUESTIONS RAISED REQUIRE EXTRAORDINARY RELIEF.**

2 **A. JJ Global is Likely to Succeed on the Merits because there is Absolutely No**
3 **Factual Support for the Non-Responsibility Determination in the**
4 **Procurement Record.**

5 The substantive issue in this case is whether GVB's Determination of Non-Responsibility
6 was in violation of procurement law. *See* Procurement Record, p. 175. A determination of non-
7 responsibility pursuant to 5 G.C.A. 5232(c) is improper if it is clearly erroneous, arbitrary,
8 capricious, or contrary to law. 2 G.A.R. § 3125. An action is arbitrary when it is unsupported by
9 the procurement record. *TLK Marketing Co. Ltd. v. Guam Visitors Bureau*, Superior Court of
10 Guam Civil Case No. CV0914-16, pp. 8-9, Decision and Order (Nov. 13, 2018). GVB's
11 Determination of Non-Responsibility is arbitrary because it is unsupported by any information in
12 the procurement record. Although the Determination of Non-Responsibility states that comments
13 were received by GVB from GPA, GWA, GIAA, and DPR, the Procurement Record is devoid of
14 these comments from any of these agencies. *See* Procurement Record, p. 175.

15 Further GVB's Determination of Non-Responsibility is contrary to law because it did not
16 meet the requirements of 2 G.A.R. § 3116 in failing to promptly provide this notice to JJ Global
17 who would have otherwise been awarded the contract. Section 3116(5) provides in pertinent part:

18
19 If a bidder or offeror who otherwise who have been awarded a
20 contract is found nonresponsible, a written determination of
21 nonresponsibility setting forth the basis of the finding shall be
22 prepared by the ...head of a Purchasing Agency. A copy of the
23 determination shall be sent promptly to the nonresponsible bidder or
24 offeror. The final determination shall be made part of the
25 procurement file.

26 2 G.A.R. § 3116(5).

27 The Procurement Record provides JJ Global is likely to succeed on this issue. Over two
28 months passed after the bid opening before GVB provided JJ Global notice of its Determination
of Non-Responsibility. GVB knew on August 20, 2018, that JJ Global would have been otherwise
awarded the contract if found responsible as the lowest bidder. *See* Procurement Record, p. 135.

1 GVB conducted a Bid Analysis and Administrative review on August 30, 2018. The only relevant
2 commentary in the Bid Analysis and Administrative Review is that there was a lack of contact
3 information to verify information provided in JJ Global’s Project Reference List and “some
4 negative feedback from some of the sources contacted.” See Procurement Record, p. 132. Not
5 having heard from GVB, JJ Global followed up with GVB on September 19, 2018 requesting a
6 status of the bid and contract award. See Procurement Record, p.183. On September 28, 2018,
7 GVB requesting JJ Global’s clarification regarding JJ Global’s Project Reference List. See
8 Procurement Record, p. 214. The September 28, 2018 letter does not say anything about JJ Global
9 having received negative feedback or prior unsatisfactory project performance. The Procurement
10 Record does not include a log of communications related to the procurement from which to glean
11 where GVB might have received this information. The Determination of Non-Responsibility
12 setting forth a purported basis of unsatisfactory performance is dated October 31, 2018. See
13 Procurement Record, p. 175.

14 GVB’s reliance on *Impresa Costruzioni Geom. Domenico Garufi v. United States*
15 (*Garufi*), 238 F.3d 1324, 1334–35 (Fed. Cir. 2001) is misplaced. *Garufi* dealt with a contracting
16 officer’s responsibility determination, not nonresponsibility determination. This case challenged
17 a contracting officer’s *responsibility* determination, not a non-responsibility determination. The
18 distinction was noted because a determination of responsibility does not require a contracting
19 offer to provide the written basis for its determination. *Id.* at 1337–38. In any event, the Court’s
20 finding was that that although contracting offers are generally given wide discretion in making
21 responsibility determinations, that discretion is not absolute. *Id.* at 1335.

22 There, the record did not include the contracting officer’s articulation of his conclusions
23 in reviewing a certification of responsibility. *Id.* at 1340. The Court noted that because the record
24 was inadequate to resolve the responsibility question, the court could order the agency to provide
25 explanation if such an explanation is required for meaningful judicial review, even though the
26 agency was not obligated to provide its reasons. *Id.* at 1337-38. Thus, the Court ordered the
27 deposition of the contracting officer in order to determine whether the officer had sufficient
28

1 information before making a determination of responsibility and on what basis the responsibility
2 determination was made. *Id.* at 1339.

3 JJ Global is likely to prevail on the merits here because the because the Procurement
4 Record is inadequate to show the basis of GVB’s Determination of Non-Responsibility, does not
5 include a log of communications to show what sources or bases on which GVB relied to make
6 the Determination of Non-Responsibility, and did not promptly send this Determination to JJ
7 Global after the Bid Analysis and Administrative review on August 30, 2018. Instead, the
8 Determination of Non-Responsibility setting for the purported basis of non-satisfactory
9 performance was undisputedly not formed until two months later – October 31, 2018.

10
11 **B. Irreparable Injury**

12 LMS’s reliance on *Weed v. Bachner Co. Inc.*, 230 P.3d 697 (Alaska 2010) is misplaced.
13 The question was not whether an aggrieved bidder would suffer irreparable injury, but whether
14 “the procurement officials are entitled to absolute or qualified immunity for allegedly tortious
15 conduct arising out of actions they took in the course of the bid evaluation process?” *Id.* at 679.
16 This required the Alaska court to consider the availability of other remedies or forms of relief but
17 did not expressly preclude that lost profits were an irreparable injury.

18
19 **C. Serious questions are raised and the balance of hardships tips in its favor.**

20 In order for a preliminary injunction to be granted, the movant must show: “(1) irreparable
21 injury and (2) likelihood of success on the merits.” *Hong Kong & Shanghai Banking Corp.*, 2005
22 Guam 13 ¶ 18. More specifically, the movant must demonstrate either: “a combination of
23 probable success on the merits and the possibility of irreparable harm; or ... that serious questions
24 are raised and the balance of hardships tips in its favor.” *A & M Records, Inc. v. Napster, Inc.*,
25 239 F.3d 1004, 1013 (9th Cir.2001). This is the applicable standard. Federal procurement
26 authority is instructive to the extent that it describes and is not inconsistent with the analysis of
27 serious questions being raised and the balance of hardships tipping in the appellant’s favor.

1 There are undoubtedly serious questions raised. It is most certainly in the public interest
2 to protect the integrity of the Government of Guam procurement system. GVB's actions under
3 any timeline show a two-month delay in providing JJ Global a Determination of Non-
4 Responsibility based on prior unsatisfactory performance. There is absolutely no information in
5 the Procurement Record to support this finding. GVB made this Determination of Non-
6 Responsibility concurrently with the Notice of Award to LMS, thereby depriving JJ Global of
7 any opportunity to trigger the automatic stay that would otherwise protect the integrity of the
8 procurement system. Finally, the Procurement Record GVB provided shows no log of
9 communications as to identify the sources of the purported information on which GVB relied.

10 This final point is most critical. Only three months ago, the Superior Court of Guam
11 addressed GVB's prior failures in keeping a complete procurement record. *See TLK Marketing*
12 *Co. Ltd. v. Guam Visitors Bureau*, Superior Court of Guam Civil Case No. CV0914-16, Decision
13 and Order (Nov. 13, 2018). The Court highlighted that failure to maintain a complete
14 procurement record renders any award and potentially the entire RFP void. 5 GCA § 10 5250 (No
15 procurement award shall be made unless a procurement officer certifies that the complete
16 procurement record has been maintained); *Teleguam Holdings, LLC v. Territory of Guam*, 2018
17 Guam 5 ¶ 41 ("Guam procurement law allows both pre-award and post-award procurements to
18 be canceled or terminated if the solicitation, proposed award, or contract is in 15 violation of
19 law."). It is baffling that GVB would be cavalier in its disregard of maintaining a log of
20 communications since. This extraordinary disregard for Guam Procurement Law requires
21 extraordinary relief.

22 The public interest in the integrity of the procurement system outweighs any harm to
23 Defendant and LMS. LMS's alleged harm rests on the false premise that GVB is its only source
24 of business. GVB's alleged harm is the tourism industry. It is not necessary to proceed with the
25 LMS contract to protect substantial interests of the territory. To the extent there is a concern with
26 public safety, Guam procurement law address situations in which there is a threat to public health,
27 welfare or safety. *See* 5 G.C.A. § 5215. Guam's emergency procurement law provision would
28

1 address any urgent landscaping that must be addressed during the brief period in which a stay
2 would be imposed; the final hearing is less than a month away.

3 LMS' reliance on *Bannum, Inc. v. U.S.*, 60 Fed. Cl. 718, 730 (Fed. Cl. 2004) is misplaced.
4 The policy cited in *Bannum* and outlined in *Keco Indus., Inc. v. Laird*, 318 F. Supp. 1361, 1364
5 (D.D.C. 1970) is based on the premise that the Government would incur liability for costs under
6 stop works orders and termination damages, and that these liabilities may outweigh the benefits
7 derived from enforcement of the regulations of the procurement system. *Id.* at 1364. There is no
8 similarly risk of liability here. GVB may terminate LMS' contract for convenience. *See*
9 *Procurement Record*, pp. 151-152

10
11 **III. THE OPA ALSO HAS THE AUHORITY TO COMPEL A DECISION ON PROTEST 2.**

12 JJ Global requests that the Public Auditor order GVB to render a decision on Protest 2 so
13 that all protest matters related to the GVB IFB No. 2018-001 can be timely and efficiently
14 resolved by the OPA. This request is hardly unprecedented. *See, In the Appeal of Town House*
15 *Department Stores, Inc. dba Island Business Systems and Supplies*, OPA-PA-08-003, *Decision*
16 *and Order*, July 14, 2008. (Public auditor ordered Agency to render a protest decision...). *Mobil*
17 *Oil Guam Inc. v. Guam Power Authority*, Superior Court of Guam Civil Case No. CV0080-16,
18 *Decision and Order* (Mar. 3, 2017) is inapposite. There, the Superior Court found that a second
19 protest could not arise from an OPA's decision on an initial protest. *Id.* at pp. 4-5. Here, JJ
20 Global discovered LMS was non-responsive from GVB's response to its Sunshine Act request.

21
22 **III. CONCLUSION**

23 For the reasons set forth in JJ Global's Motion and for the foregoing reasons, the Motion
24 should be granted.

25 Submitted this 20th day of February, 2019.

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