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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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PROCUREMENT APPEAL

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of)	APPEAL NO. OPA-PA-19-001
)	
JJ GLOBAL, INC.,)	LANDSCAPE MANAGEMENT
)	SYSTEMS, INC.'S HEARING
Appellant.)	BRIEF
_____)	

Interested Party Landscape Management Systems, Inc. (“LMS”) submits its hearing brief herein.

I. THE APPEAL WAS UNTIMELY AND SHOULD BE DISMISSED

A party has fourteen days from notice of an issue in which to submit a protest thereof. 5 Guam Code Annotated (“G.C.A.”) § 5425(a). If the protest is untimely, the OPA is without jurisdiction over the appeal. In the Appeal of Jones & Guerrero, Co., Inc. dba IBSS, OPA Procurement Appeal No. OPA-PA-08-011, Decision, p. 6 (Nov. 28, 2008).

In this case, Guam Visitors Bureau (“GVB”) served Appellant JJ Global, Inc. (“JJ Global”) with notice of its determination of non-responsibility on November 1, 2018, as set out in the Affidavits of Garrett and Linek found in GVB’s Agency Report, pp. 83-84. JJ Global claims that it received the document in question on November 7, 2018, but has failed to offer any testimony under oath to support such claim. JJ Global has failed to

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rebut the now undisputed testimony that it received the document in question more than fourteen days prior to the filing of its protest, such that the protest was untimely. JJ Global's appeal should be dismissed as untimely.

II. GVB'S DETERMINATION OF NON-RESPONSIBILITY WAS REASONABLE AND WITHIN ITS DISCRETION

Under Guam procurement law, "responsible bidder" is defined as a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance. 5 G.C.A. § 5201(f). Before awarding a contract, the procurement officer must be satisfied that the prospective contractor is responsible. 5 G.C.A. § 5230(a) and 2 Guam Administrative Rules and Regulations ("GAR") § 3116(b)(4).

See In re Appeal of Latte Treatment Center, OPA Procurement Appeal No. OPA-PA-08-008, Final Decision (Feb. 26, 2009), pp. 15-16 (Agency committed serious error by not conducting a responsibility inquiry).

Under Guam law, the agency may consider a number of factors in making its determination as to the responsibility of a prospective contractor. *See* 2 GAR § 3116(b)(2)(A). These factors include: (1) satisfactory record of performance; and (2) satisfactory record of integrity. 2 GAR §§ 3116(b)(2)(A)(ii) and (iii).

The agency has discretion in making a determination of responsibility or non-responsibility. *In re Appeal of Jones & Guerrero Co., Inc. dba J&G Construction*, OPA Procurement Appeal OPA-PA-07-005, Final Decision, p. 12 (Dec. 12, 2008).

Under analogous federal law, it is well-established that contracting officers have substantial discretion in making responsibility determinations. *John C. Grimberg Co., Inc.*

v. United States, 185 F.3d 1297, 1303 (Fed. Cir. 1999); Trilon Educ. Corp. v. United States, 578 F.2d 1356, 1358, 217 Ct. Cl. 266 (1978). This is because such determinations are practical, not legal, determinations, which are not readily susceptible to judicial review. Colonial Press Int'l, Inc. v. United States, 113 Fed. Cl. 497, 514-15 (2013).

In this matter, GVB made a written determination of non-responsibility on October 31, 2018. GVB's Procurement Record ("Procurement Record"), p. 177 (Jan. 11, 2019). In a letter to JJ Global issued the same day, GVB explained that its determination was based on adverse comments by other agencies as to JJ Global's performance and integrity. Procurement Record, p. 175. These adverse comments included marginal performance; work not satisfactory and failure to follow instructions; discrepancies in performance; and finished job was sloppy and messy. *Ibid.* Given this information, GVB's determination of non-responsibility was well within its discretion.

Under analogous federal law, the contracting officer's determination of non-responsibility has been repeatedly upheld under similar circumstances. *See* Campbell Indus., Comp. Gen. B-23887 (July 2, 1990) (poor management and technical judgment); Ford Motor Co., Comp. Gen. B-207179 (Jan. 20, 1983) (late deliveries); United Power & Control Sys., Inc., Comp. Gen. B-184662 (Dec. 27, 1978) (nonconforming items); Land-Air, Inc., Comp. Gen. B-166969 (Sep. 2, 1969) (delinquent performance).

In this matter, JJ Global submitted its protest of GVB's determination on November 19, 2018. GVB responded by sending JJ Global a letter requesting, *inter alia*, to forward evidence of satisfactory performance, such as statements from responsible individuals at the agencies in question. Letter to L. Bustamante (Dec. 18, 2018),

Procurement Record, p. 325. JJ Global failed to submit any such statements. Instead, JJ Global filed its appeal herein on January 2, 2019. Procurement Record, p. 50.

Unlike JJ Global, LMS submitted written references from respected customers, such as KEN Corp., and the U.S. Navy, in support of its bid. Agency Report, pp. 67-71. JJ Global has failed its burden of establishing that GVB's determination of non-responsibility was arbitrary and capricious. Based on the foregoing, GVB was well within its discretion in determining that JJ Global was non-responsible.

III. APPELLANT'S CLAIM OF "BIAS" IS MERITLESS

JJ Global also asserts that there was a "biased procurement process," and that "GVB colluded with LMS." However, JJ Global only offers up suspicion and innuendo in support of its claims.

In reviewing analogous claims, federal courts hold that a party alleging conflict of interest or appearance of impropriety must demonstrate "hard facts," not mere suspicion or inference, to support such claims. PAI Corp. v. United States, 614 F.3d 1347, 1352-54 (Fed. Cir. 2010) (organizational conflict of interest); Communication Const. Services, Inc. v. United States, 116 Fed. Cl. 233, 265 (2014) (same); CACL, Inc.-Fed. v. United States, 719 F.2d 1567, 1581-82 (Fed. Cir. 1983) (appearance of impropriety); Harkcon, Inc. v. United States, 133 Fed. Cl. 441, 463 (2017) (same).

Conclusory claims that there was "bias" or "collusion" do not constitute the type of "hard facts" needed to support such claims. Further, JJ Global's suspicion of "collusion" is not borne out by the facts. For example, GVB did not award LMS the Island Road Maintenance Project in November 2016, despite LMS having submitted the lowest bid.

More troubling, GVB has indicated that JJ Global submitted a falsified document in support of its protest. Agency Report, pp. 81-84. Given Appellant's own misconduct, its meritless claim of "collusion" should be disregarded.

CONCLUSION

Based on the foregoing, JJ Global's appeal should be DENIED.

Respectfully submitted this 8th day of March, 2019.

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By: 

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