

**THOMPSON THOMPSON & ALCANTARA, P.C.**

238 Archbishop Flores Street, Suite 801

Hagåtña, Guam 96910

Telephone: (671) 472-2089

Facsimile: (671) 477-5206

Attorneys for Interested Party

Landscape Management Systems, Inc.

**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: Jan 25, 2019

TIME: 11:56  AM  PM BY: [Signature]

FILE NO OPA-PA: 19-001

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

In the Appeal of	)	<b>APPEAL NO. OPA-PA-19-001</b>
	)	
JJ GLOBAL, INC.,	)	<b>LANDSCAPE MANAGEMENT</b>
	)	<b>SYSTEMS, INC.'S COMMENTS</b>
Appellant.	)	<b>TO AGENCY REPORT</b>
_____	)	

Interested Party Landscape Management Systems, Inc. (“LMS”) submits its comments as to the Agency Report submitted by Guam Visitors Bureau (“GVB”) on January 17, 2019 (the “Agency Report”), herein.

**I. 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 Guam Code Annotated (“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).

**ORIGINAL**

*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 Appellant JJ Global Services ("Appellant") issued the same day, GVB explained that its determination was based on adverse comments by other agencies as to Appellant'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, Appellant submitted its protest of GVB's determination on November 19, 2018. GVB responded by sending Appellant 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. As far as LMS is aware, Appellant failed to submit any such statements. Instead, Appellant filed its appeal herein on January 2, 2019. Procurement Record, p. 50.

Unlike Appellant, 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. Based on the foregoing, GVB was well within its discretion in determining that Appellant was non-responsible.

## **II. APPELLANT'S CLAIM OF "BIAS" IS MERITLESS**

Appellant also asserts that there was a "biased procurement process," and that "GVB colluded with LMS." However, Appellant only offers up suspicion and innuendo as 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, Appellant’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 Appellant 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, Appellant’s appeal should be DENIED.

Respectfully submitted this 25<sup>th</sup> day of January, 2019.

**THOMPSON THOMPSON & ALCANTARA, P.C.**  
Attorneys for Landscape Management Systems, Inc.

By:   
\_\_\_\_\_  
**MITCHELL F. THOMPSON**