



Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-25-002: In the Appeal of Glimpses of Guam, Inc. - Omnibus Reply

Christine Jackson <chrissy@mcdonald.law>

Wed, May 14, 2025 at 2:16 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: Dan Berman <djberman@pacificlawyers.law>, Charles McDonald <charles@mcdonald.law>, McDonald Law Office <guam@mcdonald.law>

Hafa Adai Mr. Hernandez,

Please see the attached ***Purchasing Agency's Omnibus Reply to Appellant's Opposition to Motions*** for filing in the above-reference matter.

Kindly confirm receipt of this email and its attachment.

Sincerely,

Christine (Chrissy) Jackson

Legal Assistant I McDonald Law Office, LLC

173 Aspinall Avenue, Suite 207A

Hagåtña, Guam 96910

Telephone: (671) 588-8866

Email: chrissy@mcdonald.law

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**Purchasing Agency's Omnibus Reply to Appellant's Oppositions to Motions.pdf**

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1 **McDONALD LAW OFFICE, LLC**

2 173 Aspinall Avenue, Suite 207A

3 Hagatna, Guam 96910

4 Telephone: (671) 588-8866

5 Facsimile: 671-472-9616

6 Email: guam@mcdonald.law

7 Attorneys for Purchasing Agency

8 *Guam Visitors Bureau*

9 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

10 IN THE APPEAL OF

Appeal No. OPA-PA-25-002

11 GLIMPSES OF GUAM, INC.,

12 Appellant.

13 **PURCHASING AGENCY’S OMNIBUS
14 REPLY TO APPELLANT’S
15 OPPOSITION TO MOTIONS**

16 OMNIBUS REPLY TO GLIMPSES’ OPPOSITION TO MOTION TO DISMISS AND

17 MOTION TO CONFIRM DETERMINATION

18 Purchasing Agency Guam Visitors Bureau (“GVB”), by and through its legal counsel
19 McDonald Law Office, herein replies to Glimpses of Guam, Inc.’s (“Glimpses”) Opposition to
20 the agency’s Motion to Dismiss and Motion to Confirm Determination.

21 I. REPLY TO OPPOSITION TO MOTION TO DISMISS

22 A. Glimpses did not exhaust administrative remedies because it did not obtain
23 an agency decision on its protest.

24 Through express statutory authority in the Procurement Code, specifically, 5 GCA
25 § 5425 (b); where a protest cannot be resolved, protestants must exhaust administrative remedies
26 by obtaining a decision from the agency head in writing pursuant to § 5425 (c). It is only when
27 they have a decision that they are allowed to appeal that decision to the Public Auditor under
28 § 5425 (d). Glimpses did not exhaust administrative remedies because it filed the instant appeal

1 on March 11, 2025, before GVB's March 21, 2025 decision was issued by the acting general
2 manager. Therefore, the Public Auditor has no jurisdiction over the instant appeal.
3

4 B. Glimpses has no valid grounds for its protest.
5

6 As for specific grounds in its February 4 protest, Glimpses alleged wrongful acceptance
7 of RIMS' bid for four reasons, the scope of the solicitation, selection bias, recent contract
8 renewal, and award to *Manhita*. Leaving aside *arguendo* that GVB had not responded to these
9 grounds at the time of filing of this appeal; scope of solicitation was known on the date of the
10 solicitation—making the protest too late under § 5425 (a), and the recent contract renewal was
11 followed by a cancellation for convenience.
12

13 As for selection bias, to make a threshold showing of selection bias in a procurement
14 case, the protesting party must provide sufficient well-grounded allegations of bias to support an
15 inquiry. *Remote Diagnostic Technologies LLC v. United States*, 132 Fed.Cl. 73 (Ct. Cl. 2017).
16 Glimpses original protest alleged that evaluator B had a subjectively low score. To overcome the
17 presumption that procurement officials are acting in good faith, the bid protestor must provide
18 clear and convincing evidence of bad faith or bias. *Bear Mountainside Realty LLC v. United*
19 *States*, 168 Fed.Cl. 179 (Ct. Cl. 2023). This level of proof generally includes showing some
20 specific intent to injure the plaintiff. *Marathon Targets, Inc. v. United States*, 175 Fed.Cl. 725
21 (Ct. Cl. 2025). Mere innuendo, suspicion, conjecture, or counsel's argument are not sufficient
22 *Proxtronics Dosimetry, LLC v. United States*, 128 Fed.Cl. 656 (Ct. Cl. 2016). Glimpses'
23 allegation bias is pure conjecture.
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1 Glimpses itself simply was not harmed by the Manhita submission through collusive,
2 anticompetitive, or other conduct prohibited by the Procurement Code. Who the other bidders
3 were simply had no effect on whether the solicitation complied with the law. At any rate, when
4 it was evaluated, RIMS' proposal called "Navigating Forward" by the Manhita Team was
5 accompanied by RIMS' business license, certifications and other required documents. There is
6 nothing in the record that shows GVB did not know who it was dealing with.
7

8
9 C. GVB complied with the Procurement Code.

10 Through express statutory provision in the Procurement Code, specifically,
11 § 5425 (g) (1), agencies are authorized to make a determination of need to award a contract
12 without delay to protect substantial interests of Guam. To comply with the Code, the agency
13 must obtain the concurrence of the attorney general or a designated deputy attorney general
14 (which GVB did). Then, the agency must wait two days to allow the protestant to protest the
15 determination with the Public Auditor (which GVB did) before continuing with negotiation,
16 award and execution of the contract, or taking further action under the solicitation, or cancelling
17 it. Glimpses ignored or neglected the notification and now seeks an excuse for its ignorance or
18 neglect.
19

20
21 Like with all other determinations of need expressly provided for in the Procurement
22 Code, there is nothing in § 5425 that requires notice to a competing bidder of its right to seek
23 administrative and judicial of the determination. Still, in terms of the actual protested grounds,
24 the protesting party is not harmed since the original protest grounds continue, however, with
25 post-award remedies available under, and subject to, the provisions of § 5452.
26
27
28

1
2 D. Glimpses grounds brought to the first time to appeal must be denied for
3 failure to exhaust administrative remedies.

4 The un-protested grounds that were presented at appeal; namely (i) no state of public
5 emergency, (ii) it's self-evaluation, (iii) GVB's failure to notify Glimpses of right to review and
6 appeal, (iv) ambiguous specifications, and (v) RFP vs. IFB method of selection should be denied
7 for failure to exhaust administrative remedies by lodging a § 5425 (a) protest and resolving the
8 protest or obtaining a § 5425 (c) decision before filing an appeal under § 5425 (e). The Public
9 Auditor's *de novo* review is not authorized unless there is a § 5425 (c) decision.
10

11
12 II. REPLY TO OPPOSITION TO MOTION TO CONFIRM DETERMINATION

13 A. GVB made a determination of need pursuant to § 5425 (g), and the AG
14 concurred that it was necessary to award the contract without delay to protect the substantial
15 interests of Guam.

16
17 In a protest seeking confirmation of a determination under § 5425 (g), no discovery is
18 allowed. The review by the Public Auditor is to confirm the determination. In such a
19 confirmation, an authorized person had to have made a determination that identifies substantial
20 interests of Guam and that, the substantial would be impaired by the delay of a protest. GVB's
21 acting general manager made such a determination, and the designated deputy attorney general
22 concurred with the agency's determination. Even at this stage of the procurement, the Public
23 Auditor may grant GVB's motion without harm to Glimpses.
24

25 The Superior Court does not appear to have jurisdiction over a confirmation of the
26 determination of need under § 5425 (g) because the Procurement Code does not confer it.
27 Section 5425 (e) decisions of the Public Auditor concern § 5425 (a) protests which were resolved
28

1 through a § 5425 (c) decision. There is nothing in § 5425 (g) that speaks to a decision by the
2 Public Auditor, only the confirmation of the determination of need to protect substantial interests
3 without delay by award (and not of a decision). Likewise, there is nothing in § 5480 that waives
4 sovereign immunity in connection with a determination of need under § 5425 (g). *See* § 5480
5 (waiving sovereign immunity in connection with a solicitation or award being in accordance with
6 the Procurement Code, Procurement Regulations and solicitation, but not in connection with a
7 determination of need).
8

9
10 **RESPECTFULLY SUBMITTED THIS** 14th day of May, 2025.

11 **McDONALD LAW OFFICE, LLC**

12 Attorneys for Purchasing Agency

13 *Guam Visitors Bureau*

14 By:

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JOSEPH B. MCDONALD