

*The Law Office of
John Richard Bordallo Bell*
341 S. Marine Corps Drive
RK Plaza Suite 309
Tamuning, Guam 96913
Tel: (671) 646-5722/3
Fax: (671) 646-5721
E-mail: john.r.b.bell@gmail.com
Attorney for Appellant 1-A GuamWEBZ

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PROCUREMENT APPEALS

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FILE NO OPA-PA: 16-002

IN THE OFFICE OF THE PUBLIC AUDITOR

In the Appeal of

1-A GuamWEBZ,

Appellant

DOCKET NO. OPA-PA -16-002

**APPELLANT GUAMWEBZ'S BRIEF
REGARDING REMEDIES**

Pursuant to the Hearing Officer's instructions to provide an optional brief regarding remedies no later than July 11, 2016, Appellant 1-A GuamWEBZ ("GuamWEBZ") provides its brief herein. In order to provide a factual and legal basis for its proposed remedies, GuamWEBZ also provides proposed findings of fact and conclusions of law (not intended as exhaustive).

GuamWEBZ's Proposed Findings of Fact

Based on the live witness testimony, procurement record, and other evidence presented at the merit hearing(s) and throughout the Appeal, GuamWEBZ proposes that the Office of the Public Auditor find that:

- WSI's General Manager, Carlos Halehale, had notice of this Appeal and an opportunity to respond to GuamWEBZ's challenging his being awarded the bid, but failed to do so.
- It is unclear when WSI actually submitted its winning bid.
- The business address provided by WSI, 788 Route 4, Sinajana Guam, unit 404, is a gated residential condominium complex known as Holiday Towers.

- Per GuamWEBZ's evidence presented and respective counsels' stipulation at the merit hearing, WSI's Guam business license which had expired June 30, 2013 was not renewed until March 11, 2016.
- GCC's bid packet required that the "descriptive literature" must "show that the product(s) offered conform(s) to the specifications and other requirements of this solicitation. Failure to furnish the descriptive literature(s) by the time specified in Solicitation will require rejection of the Bid."
- GuamWEBZ spent at least eight days preparing its proposal to make sure that its descriptive literature showed its product conformed to the specifications of the IFB.
- WSI's descriptive literature generally did not show how its proposal would satisfy the specifications of the bid.
- On February 16, 2016, GCC hastily reviewed GuamWEBZ's and WSI's competing bids and, without meaningfully considering the descriptive literature of either bidder's proposal, determined that WSI had met the specifications and won the bid.
- On February 23, 2016, GCC notified the bidders that GCC determined WSI has won the bid.
- March 1, 2016, the day which GCC provided GuamWEBZ selected portions of the procurement record, was the earliest possible day which GuamWEBZ knew or should have known its factual basis for protesting GCC's awarding the bid to WSI.

GuamWEBZ's Proposed Conclusions of Law

- Per the terms of GCC's applicable bid packet, although GCC did not require a *copy* of a current business license until an award was made, GCC could not consider for award any bid by a bidder which was *not in fact* duly licensed at the time GCC considered the bidder for award by reviewing its proposal.

- For purposes of determining the lowest acceptable bid, GCC must consider both the initial three years as well as the two additional optional years contemplated by the IFB.
- WSI was not entitled to the local procurement preference as contemplated by 5 GCA 5008.
- Because WSI was in fact operating without a business license from June 30, 2013 through March 11, 2016, per Guam law and the terms of the IFB, WSI was not a responsible bidder to the IFB at issue.
- Because most of WSI's descriptive literature did not *show* that it in fact met the technical requirements of the IFB, its proposal was not sufficiently responsive to the IFB for award.
- Had GCC determined that only GuamWEBZ was qualified for the local procurement preference contemplated by 5 GCA 5008, GuamWEBZ would have been the lowest acceptable bidder and thus won the award.
- GuamWEBZ suffered substantial prejudice in its ability to perfect its protest and appeal due to GCC and WSI improperly withholding parts of the procurement record which should have been made publicly available to GuamWEBZ.
- Still, GuamWEBZ timely and sufficiently protested GCC's awarding the bid to WSI when GuamWEBZ duly filed its Protest on March 10, 2016.
- The contract signed between GCC and WSI on or about March 14, 2016 is void *ab initio*, per 2 GAR 9101(e), because GuamWEBZ timely protested the award on March 10, 2016.
- GuamWEBZ's thorough proposal left it the lowest responsive and responsible bidder.

GuamWEBZ's Proposed Remedies

Per 2 GAR 12103(a), "The Public Auditor shall have the power to review and determine de novo any matter properly submitted to her....[and her] jurisdiction shall be

utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5", which, per 5 GCA 5001(b) are:

- (1) to simplify, clarify, and modernize the law governing procurement by this Territory;
- (2) to permit the continued development of procurement policies and practices;
- (3) to provide for increased public confidence in the procedures followed in public procurement;
- (4) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory;
- (5) to provide increased economy in territorial activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Territory;
- (6) to foster effective broad-based competition within the free enterprise system;
- (7) to provide safeguards for the maintenance of a procurement system of quality and integrity; and
- (8) to require public access to all aspects of procurement consistent with the sealed bid procedure and the integrity of the procurement process.

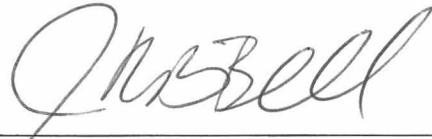
As a matter of law, as indicated above, the contract signed between GCC and WSI on or about March 14, 2016 is void *ab initio*. Additionally, GCC is further bound via an automatic stay lasting until the time has run for any party to appeal the Public Auditor's final decision to the Superior Court of Guam. *Teleguam Holdings, LLC v. Territory of Guam*, 2015 Guam 13.

In the Appeal of Guam Publications, Inc., OPA-PA-08-007, the Public Auditor terminated the contract which had been awarded to the lowest bidder, then awarded the contract to the remaining, higher bidder. In that case, the Public Auditor found the low bidder to be nonresponsive, so there

was no other bidder prejudiced by this action. Here, the Public Auditor should likewise not only determine any existing contract between GCC and WSI is void, but should further award the bid to GuamWEBZ.

Here, GuamWEBZ should have been awarded the bid, yet was not. The Public Auditor assigning the award to GuamWEBZ is not inconsistent with the principal behind 2 GAR § 9106(1)(c)(1), which allows an award to be ratified when, as is the case here, there is no prejudice to other bidders. Giving the award to the next responsive and responsible is not inconsistent with the overall policies of the procurement laws. See, e.g., 5 GCA § 5212(d), which allows the government to procure supplies or services, without re-bid, from the next lowest bidder when the lowest bidder has defaulted under its contract.

Respectfully submitted this 11th day of July, 2016.



John Richard Bordallo Bell, Esq.
Attorney for Appellant GuamWEBZ