



OFFICE OF PUBLIC ACCOUNTABILITY

Doris Flores Brooks, CPA, CGFM

Public Auditor

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

IN THE APPEAL OF

TLK MARKETING CO. LTD. (TLK),

Appellant,

GUAM VISITORS BUREAU,

Purchasing Agency.

DOCKETS OPA-PA-16-003 & OPA-PA-16-005

DECISION

INTRODUCTION

This is the Decision of the Public Auditor for the consolidated appeals filed by TLK Marketing Co., Ltd. ("TLK") for OPA-PA-16-003 and OPA-PA-16-005. The appeals are made as follows: (1) OPA-PA-16-003: from the Guam Visitors Bureau's ("GVB") April 8, 2016 denial of TLK's March 24, 2016 Protest ("Protest 1"); and, (2) OPA-PA-16-005: from GVB's May 24, 2016 denial of TLK's April 21, 2016 Protest ("Protest 2"). On June 24, 2016, the Public Auditor ordered that these appeals be consolidated.

TLK raised the following issues in its notices of appeal:

OPA-PA-16-003

- A. GVB's claim that TLK's Protest is untimely is wrong, and undermines the procurement process.
- B. GVB is wrong in its assertion that Happy Idea Company Inc. (HIC) "has sufficient experience" and meets qualifications of the RFP.
- C. GVB has violated the automatic stay requirements mandated by 5 GCA § 5425(g).

1 D. TLK will be irreparably harmed if GVB were allowed to usurp the OPA's authority and
2 circumvent the Guam Procurement Laws.

3 Appeal issue A was resolved prior to the appeals hearings pursuant to GVB's stipulation
4 that Protest 1 was timely. Appeal issue C was resolved by the Public Auditor's June 15, 2016
5 Decision and Order. Issues B and D proceeded to the appeals hearings on the merits.

6 **OPA-PA-16-005**
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8 A. TLK's Protest 2 was timely filed.

9 B. GVB colluded with HIC, Inc. to violate the RFP and Guam Procurement Law by
10 withholding information regarding the ranking and award of the contract to deprive the
offerors of their rights under the Guam Procurement Law.

11 C. GVB violated section 3.10 of the RFP when it failed to obtain the required Board
12 approvals.

13 D. HIC failed to disclose in the Affidavit Disclosing Ownership and Commission Karl
Pangelinan's involvement in this RFP.

14 E. HIC misrepresented its experience by relying on SD Pharm's experience to meet the 5-
15 year experience requirement.

16 F. TLK will be irreparably harmed if GVB is allowed to usurp the OPA's authority and
17 circumvent Guam Procurement Laws.

18 Appeal issue A was resolved prior to the appeals hearings pursuant to GVB's stipulation
19 that Protest 2 was timely filed. Issue E, which is the same as issue B in OPA-PA-16-003; issues B;
20 C; D; and issue F, which is the same as issue D in OPA-PA-16-003, proceeded to the appeals
21 hearings on the merits.

22 Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection
23 with the method of source selection, solicitation or award of a contract, may protest to the Chief
24 Procurement Officer..." 5 G.C.A. § 5425(a). The Chief Procurement Officer's decision on the
25 protest may be appealed to the Public Auditor. 5 G.C.A. §5425(e). The Public Auditor shall have
26 the power to review and determine de novo any matter properly submitted to her. 5 G.C.A. § 5703.
27 TLK's appeals arise from GVB's denial of the issues raised in its Protests 1 and 2. This Decision
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1 addresses the issues raised by TLK in its notices of appeal for OPA-PA-16-003 and OPA-PA-16-
2 005.

3 Hearings on the appeals were held on July 6, 2016, August 9, 2016 and August 10, 2016
4 before Doris Flores Brooks, CPA, CGFM, Public Auditor, and Peter C. Perez, Esq., Hearing
5 Officer. Joyce C.H. Tang, Esq. and Joshua D. Walsh, Esq. appeared on behalf of TLK along with
6 TLK representative Henry Lee. Thomas Fisher, Esq. appeared on behalf of GVB along with GVB
7 General Manager Jon Nathan Denight. GVB Deputy General Manager Telo Taitague would
8 occasionally appear in Mr. Denight's absence.

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10 **FINDINGS OF FACT**
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12 The Public Auditor issues this Decision based upon the procurement record, the documents
13 submitted by the parties, and the testimony, evidence, and arguments presented at the appeal
14 hearings, and makes the following findings of fact:

- 15 1. Beginning in 2008, TLK had provided GVB with tourism destination marketing
16 representation services in the Republic of Korea.
- 17 2. Korean visitor arrivals increased significantly from 2008 to 2015, the period during which
18 TLK provided GVB with services.
- 19 3. Still, GVB management determined that it was in GVB's best interests to issue an RFP
20 because the situation had not been optimum. GVB thought TLK did well in sales but was
21 not so strong in public relations and marketing and that TLK had a small office of 3 people.
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- 23 4. In or around October, 2015, GVB advised TLK that its contract would be on a month to
24 month basis.
- 25 5. On November 25, 2015, GVB issued RFP 2016-006 for Tourism Destination Marketing
26 Representation Services in the Republic of Korea (the "RFP"). The term of the contract
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1 under the RFP is for an initial term of one year, with two one year options to renew, for a
2 maximum contract period of three years. [Procurement Record, Volume I, Tab B].

3 6. The RFP, Section 1.1 states:

4 GVB seeks to retain a qualified professional tourism destination marketing
5 agency (“Agency”) with a minimum of 5 years extensive and consistent
6 experience working with the Republic of Korea travel trade, close
7 relationship with the Korean government and the US Embassy to act as
8 GVB’s tourism destination marketing representative in the Republic of
9 Korea for the purpose of assisting GVB in promoting Guam tourism and
achieving visitor arrival goals, and to act as GVB’s Republic of Korea liaison
office in matters relative to the scope of services pertaining to Guam.
[Procurement Record, Volume I, Tab B]

10 7. The RFP, Section 1.2 provides that “Proposals will be reviewed and evaluated based on the
11 qualifications of the Offeror and the plan submitted to perform the services in the RFP,

12 which include but are not limited to...identification of the person or persons who will be
13 responsible for the Project, including a list of their recent work done in this area and related
14 experience...[r]esumes or background information on each team member’s...professional
15 experience...note the availability of any previously completed documentation for similar
16 work...”[Procurement Record, Volume I, Tab B]

17 8. The RFP, Section 2.0 states:

18 Selection of the best qualified Offeror will be based on the qualifications,
19 experience, and commitment of the Offeror’s lead and support individuals
20 proposed for this RFP, and the Offeror’s plan of action. GVB plans to
21 negotiate a contract with the best-qualified Offeror for the required services
22 at a compensation rate determined in writing to be fair and reasonable.
[Procurement Record, Volume I, Tab B]

23 9. The RFP, Section 2.1 states:

24 The Evaluation Committee will review and evaluate the offers according to
25 the following criteria based on a maximum possible value of 100 points. In
26 the evaluation, rating and selecting proposals, the factors and their relative
importance will be as follows:

- 27 A. Executive Summary and Commitment (35 Points)
- 28 B. Staff Qualifications and Past Performance (35 Points)
- C. Organizational Structure and Chart (15 Points)

- 1 D. References (10 Points)
2 E. Primary Point of Contact (5 Points)
[Procurement Record, Volume I, Tab B].

3 10. The RFP, Section 2.4 states:

4 GVB General Manager will nominate an Evaluation Committee. Evaluation
5 may be conducted as a group or individually, however, the same evaluation
6 form shall be used by each Evaluator and the results compiled to present a
7 cumulative score with recommendation(s) to the General Manager. The
General Manager shall then request the Board of Directors approval to enter
8 into negotiations with the best qualified Offeror. [Procurement Record,
Volume I, Tab B].

9 11. The RFP, Section 2.5 states:

10 GVB shall review and determine whether an Offeror has the necessary
11 qualifications, staffing, management, and experience required to properly
conduct the work in accordance with all applicable laws, statutes, and
regulations. [Procurement Record, Volume I, Tab B].

12 12. The RFP, Section 3.9 provides that “GVB shall negotiate a contract with the best-qualified
13 Offeror for the required services at a compensation rate determined in writing to be fair and
14 reasonable.” [Procurement Record, Volume I, Tab B]

15 13. The RFP, Section 3.10 provides that “If compensation, contract requirements, and contract
16 documents can be agreed upon with the best-qualified Offeror, and subject to Board
17 approval, the contract shall be awarded to that Offeror...” [Procurement Record, Volume I,
18 Tab B]

19 14. The RFP, Section 3.13 provides *inter alia* “...Proposals submitted by Offerors who do not
20 meet the evaluation criteria will not be considered for review by GVB.” [Procurement
21 Record, Volume I, Tab B]

22 15. The RFP, Affidavit No. 1, required offerors to submit an Affidavit Disclosing Ownership
23 and Commissions. [Procurement Record, Volume I, Tab B]. Section B of the Affidavit
24 states:

25 Further, I say that the persons who have received or are entitled to receive a
26 commission, gratuity or other compensation for procuring or assisting in
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1 obtaining business related to the bid or proposal for which this affidavit is
2 submitted are as follows [*if none, please so state*]:

3 16. The deadline for submission of proposals in response to the RFP was February 8, 2016.

4 17. Four offerors timely submitted their written proposals in response to the RFP: TLK, HIC,
5 Promac Partnership Co., Ltd. (“Promac”) and Edelman Korea (“Edelman”).

6 18. GVB GM Jon Nathan Denight selected the members of the RFP Evaluation Committee. He
7 selected Norman Analista, Gina Kono, Sam Shinohara, and GVB, Deputy General Manager
8 Telo Taitague. Shelly Calvo was also selected, but did not show up for the evaluation.
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10 19. On February 16, 2016, the Evaluation Committee assessed and scored the written proposals.

11 When the evaluation of the written proposals was done, the evaluation sheets were collected

12 and tabulated separately from the Evaluation Committee. GVB Management Analyst
13 Christine Lizama compiled, and Lisa Linek, Accountant III, certified the following scores
14 and averages out of a total 400 points for the written proposal:

15 a. Promac – 343 points (86.00%)

16 b. TLK – 364 points (91.00%)

17 c. Edelman – 250.5 points (63.00%)

18 d. HIC – 366 points (91.50%)

19 [Procurement Record, Volume I, Tabs K and O]
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21 20. There was only a two point or .50% difference between HIC and TLK scores based on the
22 written proposals.

23 21. GVB decided to only invite the three offerors who scored the highest on their written
24 proposals to give an oral presentation on February 25, 2016. They were HIC, TLK, and
25 Promac. Thus, Edelman was not allowed to provide give an oral presentation. [Procurement
26 Record, Volume I, Tabs I and M]
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1 22. On February 25, 2016, Oral Presentations were held by the three offerors who scored
2 highest on their written proposals. Adele Kim presented for Promac, Emily Kim presented
3 for TLK, and Karl Pangelinan presented for HIC. [Procurement Record, Volume I, Tab N]

4 23. The Evaluation Committee assessed and scored the presentations, and when they were
5 finished, the evaluation sheets were collected and tabulated separately from the Evaluation
6 Committee. GVB Management Analyst Lizama compiled and Accountant Linek certified
7 the following scores and average out of a total 320 points for the oral presentations:
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- 9 a. TLK – 256.50 points (80.16%)
- 10 b. Promac – 240 points (75.00%)
- 11 c. HIC – 282.50 points (88.28%)

12 [Procurement Record, Volume I, Tab O]

13 24. The offerors were then ranked according to the combined average of their written proposals
14 and oral presentations. The Evaluation Committee did not know the final scores or ranking
15 of the offers after they completed their evaluations for both the written proposals and oral
16 presentations.
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18 25. Although they did not know, the Evaluation Committee ranked HIC as the highest with an
19 89.89% combined average of their written proposal and oral presentation; ranked TLK as
20 the second highest with an 85.58% combined average; and ranked Promac as the third
21 highest with an 80.50% combined average.¹ This was included in the Evaluation Summary,
22 drafted by Ms. Lizama on February 25, 2016 for GM Denight's review and sign-off.
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27 ¹ Edelman was ranked as the fourth highest with 250.5 points (63.00%) on the written proposal
28 but because Edelman was not invited to give an oral presentation, it did not receive any points for an oral presentation.

1 26. A GVB Board of Directors meeting was held on February 25, 2016. At that meeting, the
2 Board approved a motion authorizing the GVB General Manager as Chief Procurement
3 Officer to enter into negotiation and contract with the highest rated and most qualified
4 offeror for the RFP. [Appellant EX 7 & 8].

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6 27. On March 4, 2016, at 5:52 p.m., Ms. Kono sent HIC CEO/President Sedong Park an e mail
7 notifying him that HIC had been selected as the highest rated and most qualified offeror.
8 The retainer agreement and scope of work was attached to the e mail. [Procurement Record,
9 Volume I, Tab Y].

10 28. On March 9, 2016, Ms. Kono sent Mr. Park an e mail stating that the GVB General Manager
11 would like to finalize the RFP and finalize all the necessary paperwork and communications
12 to the other offerors. The e mail also stated:

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14 BTW, I was contacted by someone mentioning that HIC is communicating
15 with the Korea media announcing that they have successfully been awarded
16 the GVB Marketing Representative contract. Please refrain from publicly
17 mentioning this until we have finalized negotiations and signed a contract.
18 We do not want any protest from the other offerors. [Procurement Record,
19 Volume I, Tab W].

20 29. On March 9, 2016, Mr. Park signed the Scope of Work as Agreed by GVB & HIC.
21 [Procurement Record, Volume I, Tab W].

22 30. On March 9, 2016, GM Denight check-marked "Proceed with Notices" and signed off on
23 the February 25, 2016 Evaluation Summary.

24 31. On March 9, 2016, GVB issued to HIC a Notice of Award that had attached to it the contract
25 for review and signature. [Procurement Record, Volume I, Tab Q].

26 32. On March 10, 2016, GVB issued notices of non-selection to TLK, Promac and Edelman.
27 [Procurement Record, Volume I, Tabs R, S, T].

28 33. On March 10, 2016, at 7:11 p.m., Ms. Kono sent an e mail to Mr. Park with GVB's Notice
of Intent to Award letter. [Appellant EX 16].

1 34. On March 10, 2016, GVB issued a notice to TLK advising that TLK's month to month
2 Agreement would be terminated effective March 31, 2016. [Appellant EX 19].

3 35. On March 11, 2016, Mr. Park signed the contract. [Procurement Record, Volume I, Tab U].

4 36. On March 14, 2016, GM Denight signed the contract. [Procurement Record, Volume I, Tab
5 U].

6 37. On March 24, 2016, TLK timely filed a Protest with GVB ("Protest 1"). [Appellant EX 21].

7 In it, TLK asserted that HIC failed to satisfy the RFP's minimum five-year requirement.

8 TLK also asserted that its Protest was timely and that the automatic stay was triggered.

9 38. On March 31, 2016, GVB terminated TLK's contract.

10 39. On April 8, 2016, GVB denied Protest 1. [Appellant EX 22].

11 40. On April 21, 2016, TLK timely filed a second protest with GVB ("Protest 2"). [Appellant

12 EX 24]. In it, TLK asserted (1) that GVB colluded with HIC to violate the RFP and Guam

13 Procurement Law by withholding information regarding the ranking and award of the

14 contract to deprive the offerors of their rights under Guam Procurement Law; (2) that GVB

15 failed to obtain Board approval after the procurement officer negotiated the compensation,

16 contract requirements, and contract documents as required in Section 3.10 of the RFP; (3)

17 that HIC failed to disclose in the Affidavit Disclosing Ownership and Commission Karl

18 Pangelinan's involvement in this RFP; and, (4) that HIC misrepresented its experience by

19 relying on SD Pharm's experience to meet the 5 year experience requirement.

20 41. On May 24, 2016, GVB denied Protest 2. [Appellant EX 25].

21 42. On April 22, 2016, TLK appealed GVB's denial of its Protest 1 (OPA-PA-16-003).

22 43. On June 1, 2016, TLK appealed GVB's denial of its Protest 2 (OPA-PA-16-005).

23 44. On June 24, 2016, the two appeals were consolidated. [Order Consolidating

24 Appeals/Scheduling Order].

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CONCLUSIONS OF LAW

Pursuant to 5 G.C.A. § 5703, the Public Auditor reviews GVB’s denials of TLK’s Protest 1 and Protest 2 *de novo*. In reviewing *de novo* the issues raised by TLK in these consolidated appeals, the Public Auditor concludes as a matter of law, the following:

I. GM Denight obtained GVB Board approval to negotiate and contract with the highest rated and most qualified offeror: HIC.

The GVB Board authorized GM Denight to negotiate and contract with HIC. The Board had the statutory discretion to issue this authority. 12 G.C.A. § 9106(a) provides that “The exercise of the powers of the Bureau shall be directed by the Board of Directors...” 12 G.C.A. § 9108(a) provides that “The GVB GM shall serve as the Bureau’s chief administrative officer, and his duties...shall be determined and approved by the Board.”²

² 12 G.C.A. § 9108 provides:

- (a) The Board, by affirmative vote of at least eight (8) votes, shall appoint a General Manager. The General Manager shall serve as the Bureau’s chief administrative officer, and his duties and compensation shall be determined and approved by the Board. The General Manager will serve at the pleasure of the Board.
- (b) The day-to-day operations of the Bureau shall be the province of the General Manager. The General Manager shall be primarily responsible for the maintenance, operation, development, and administration of the Bureau’s business affairs.
- (c) The duties of the General Manager shall include the following:
 - (1) Insuring that the Board’s rules and regulations are enforced;
 - (2) Attending all Board meetings unless excused by the Board;
 - (3) Keeping the Board advised as to the needs of the Bureau;
 - (4) Approving demands for the payment of obligations of the Bureau within the purposes and amounts authorized by the Board;
 - (5) Selecting, appointing, terminating, with or without cause, and supervising employees of the Bureau;
 - (6) Publishing a financial report in a manner provided by the Board within one hundred twenty (120) days from the end of each fiscal year showing the result of operations for the preceding fiscal year and the financial status of the Bureau on the last day thereof;
 - (7) Rendering a monthly accounting statement to the Board in such form as the Board directs;
 - (8) Annually submitting to the Board and the Governor programs and financial plans in accordance with the provisions of the Executive Budget Act set forth in Title VI, Chapter III of the Government Code of Guam; and

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With respect to contracts, 12 G.C.A. § 9111 provides:

The Bureau will always seek the most reasonable prices for services and products needed, giving due consideration to the urgency of the requirement. Purchase orders or letters of authorization will be executed by the General Manager for needed products or provisions, pursuant to the current budget. Such purchase orders or letter of authorization for expenditures in excess of One Thousand Dollars (\$1,000) except salaries shall require prior approval by the Board of Directors

The RFP, Section 2.4 provided that after the GM appointed Evaluation Committee presents its cumulative scores and recommendations to the GM, the GM then requests the Board of Directors approval to enter into negotiations with the best qualified Offeror. [Procurement Record, Volume I, Tab B].

On February 25, 2016, GM Denight was presented the Evaluation Committee’s Evaluation Summary which indicated that HIC was the highest ranking offeror with 89.89%, a combined average of their written proposal and oral presentation. The RFP, Section 3.9 provides that “GVB shall negotiate a contract with the best-qualified Offeror for the required services at a compensation rate determined in writing to be fair and reasonable.” RFP, Section 3.10 provides that “If compensation, contract requirements, and contract documents can be agreed upon with the best-qualified Offeror, and subject to Board approval, the contract shall be awarded to that Offeror...”

A GVB Board of Directors meeting was held on February 25, 2016 where the Board approved a motion authorizing the GM Denight as Chief Procurement Officer to enter into negotiation and contract with the highest rated and most qualified offeror for the RFP. [EX 7]. The testimony by GVB employees and the evidence presented established that under GVB’s practices, the Board is not advised of the identity of the highest ranked offeror. After the contract has been awarded, it does not go back to the Board for approval. As such, the Board did not issue a prior

(9) Performing such other and additional duties as the Board may direct.

1 written delegation of authority to GM Denight with respect to his authority to contract with
2 Offerors. GM Denight testified that this contract is valued at \$1.2 million. While the Public Auditor
3 finds that the better practice would have been for the Board to issue a prior written delegation of
4 authority to its GM memorializing his authority to contract with an Offeror on behalf of GVB, GM
5 Denight was following existing GVB practices with respect to contracting under this RFP.
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7 **II. GVB did not collude with HIC, Inc. to violate the RFP and Guam Procurement**
8 **Law by withholding information regarding the ranking and award of the**
9 **contract to deprive the offerors of their rights under the Guam Procurement**
10 **Law.**

11 GVB did not employ the best practices in conducting this procurement particularly in the
12 manner in which it communicated with HIC and issued notices of non-selection to offerors, and
13 although GVB's practices are inconsistent with other Government of Guam (GovGuam) agencies,
14 they do not arise to collusion, as has been asserted by TLK.

15 TLK did not establish that the GVB violated the RFP. The RFP, Section 1.2 provides that
16 "Proposals will be reviewed and evaluated based upon the qualifications of the Offeror and the plan
17 submitted to perform the services in the RFP, which include but are not limited to...identification
18 of the person or persons who will be responsible for the Project, including a list of their recent work
19 done in this area and related experience...[r]esumes or background information on each team
20 member's...professional experience...note the availability of any previously completed
21 documentation for similar work..." The RFP, Section 2.0 states:

22 Selection of the best qualified Offeror will be based on the qualifications,
23 experience, and commitment of the Offeror's lead and support individuals
24 proposed for in this RFP, and the Offeror's plan of action. GVB plans to
25 negotiate a contract with the best-qualified Offeror for the required services
at a compensation rate determined in writing to be fair and reasonable.
[Procurement Record, Volume I, Tab B]

26 The Evaluation Committee's Evaluation Summary is dated February 25, 2016. On March
27 4, 2016, at 5:52 p.m., Ms. Kono sent Mr. Park an e mail notifying him that HIC had been selected
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1 as the highest rated and most qualified offeror. The retainer agreement and scope of work was
2 attached to the e mail. [Procurement Record, Volume I, Tab Y]. On March 4, 2016, Mr. Park sent
3 Ms. Kono an e mail acknowledging HIC's selection by GVB as the most qualified offeror.
4 [Procurement Record, Volume I, Tab W]. As of March 8, 2016, the only persons who knew the
5 offeror's rankings were Chris Lizama, Lisa Linek, Pilar Laguana, Gina Kono, and GM Denight.
6 On March 9, 2016, Ms. Kono sent Mr. Park an e mail stating that the GVB General Manager would
7 like to finalize the RFP and finalize all the necessary paperwork and communications to the other
8 offerors. The e mail also stated:

10 BTW, I was contacted by someone mentioning that HIC is communicating
11 with the Korea media announcing that they have successfully been awarded
12 the GVB Marketing Representative contract. Please refrain from publicly
13 mentioning this until we have finalized negotiations and signed a contract.
14 We do not want any protest from the other offerors. [Procurement Record,
15 Volume I, Tab W].

14 Ms. Kono included the language about not revealing the selection publicly because GVB
15 and HIC were still going through the negotiation process and the RFP had not been concluded. She
16 was also concerned that someone had told her that the Korean media had reported that HIC was
17 awarded the contract.

18 On March 9, 2016, Mr. Park signed the Scope of Work as Agreed by GVB & Happy Idea
19 Company (HIC), Inc. [Procurement Record, Volume I, Tab W]. On March 9, 2016 at 3:06 p.m.,
20 Mr. Park sent an e mail to Ms. Kono stating that he had signed the document and would not mention
21 the result of the RFP until the contract is all done. [Procurement Record, Volume 1, Tab W]. On
22 March 9, 2016, GM Denight check-marked "Proceed with Notices" and signed the Evaluation
23 Summary. That same date, GVB issued to HIC a Notice of Award that had attached to it the contract
24 for review and signature. [Procurement Record, Volume 1, Tabs O and Q].

26 On March 10, 2016, six days after HIC was noticed via e mail that it was the highest ranked
27 offeror, GVB issued notices of non-selection to TLK, Promac and Edelman. [Procurement Record,
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1 Volume 1, Tabs R, S, and T]. On March 10, 2016, at 7:11 p.m., Ms. Kono sent an e mail to Mr.
2 Park with GVB's Notice of Intent to Award letter. [Procurement Record, Volume 1, Tab W]. On
3 March 11, 2016, Mr. Park signed the contract. [Procurement Record, Volume 1, Tab U]. On March
4 14, 2016, GM Denight signed the contract. [Procurement Record, Volume 1, Tab U].

5 Ms. Kono testified that the practice throughout her 32 years at GVB was that letters of non-
6 selection do not go out until after negotiation and the contract is signed with the highest ranked
7 offeror. Ms. Lizama testified that the notice of intent to award goes out signed by the GM. GVB
8 negotiates with the highest ranked offeror regarding the scope of work and the terms and conditions.
9 After negotiations, the agreement is issued. Then, notices of award and non-selection are issued.
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11 There was no evidence of any collusion on the part of GVB personnel or GVB personnel
12 with HIC to deprive TLK of its ability to protest. No one directed Ms. Kono as to what the result
13 of the RFP should be; no one directed her to cut-off TLK's right to protest; she did not fashion a
14 scheme to control the outcome of the RFP; and that she acted in accordance with the law, without
15 any corrupt purpose. GM Denight did not collude with HIC or anyone at GVB to deprive TLK of
16 its ability to protest.
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18 The Public Auditor finds that while GVB did not employ the best practices in the manner
19 in which it communicated with HIC and issued notices of non-selection to offeror, it was not
20 inconsistent with procurement law³, and did not indicate collusion.
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22 ³ 2 G.A.R. § 3114 provides:

23 (j) Selection of the Best Qualified Offerors. After conclusion of validation of
24 qualifications, evaluation, and discussion as provided in §3114(i) (Discussions), the
25 head of the agency conducting the procurement or a designee of such officer shall
26 select, in the order of their respective qualification ranking, no fewer than three
acceptable offerors (or such lesser number if less than three acceptable proposals
were received) deemed to be the best qualified to provide the required services.

27 (l) Negotiation and Award of Contract.
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1 **III. GVB’s determination that HIC had sufficient experience and met the**
2 **qualifications of the RFP was not in error.**

3 In its appeal, TLK asserts that GVB is wrong in its assertion that HIC “has sufficient
4 experience” and meets qualifications of the RFP and that HIC misrepresented its experience by
5 relying on SD Pharm’s experience to meet the 5-year experience requirement. Appellant
6 representative, Henry Lee, asserted that the HIC online company registry (Appellant EX 28) and
7 the HIC Corporate Registry (Appellant EX 4) as translated (Appellant EX 4A) established that HIC
8 misrepresented its experience and did not meet the RFP 5-year experience requirement.

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10 The determination of whether or not HIC met the RFP requirements, including *experience*,
11 was made by GVB in accordance with the RFP, Section 2.5 which states, “GVB shall review and
12 determine whether an Offeror has the necessary *qualifications, staffing, management, and*
13 *experience required* to properly conduct the work in accordance with all applicable laws, statutes,
14 and regulations. [Procurement Record, Volume I, Tab B].

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16 In making this determination, the RFP stated that GVB’s “[s]election of the best qualified
17 Offeror will be based on the qualifications, experience, and commitment of the Offeror’s *lead and*

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20 (1) General. The head of the agency conducting the procurement or a designee
21 of such officer shall negotiate a contract with the best qualified offeror for the
22 required services at compensation determined in writing to be fair and
23 reasonable.

24 (2) Elements of Negotiation. Contract negotiations shall be directed toward:
25 (A) making certain that the offeror has a clear understanding of the scope
26 of work, specifically, the essential requirements involved in providing the
27 required services;
28 (B) determining that the offeror will make available the necessary
 personnel and facilities to perform the services within the required time;
 and
 (C) agreeing upon compensation which is fair and reasonable, taking into
 account the estimated value of the required services, and the scope,
 complexity, and nature of such services.

 (3) Successful Negotiation of Contract with Best Qualified Offeror. If
 compensation, contract requirements, and contract documents can be agreed
 upon with the best qualified offeror, the contract shall be awarded to that
 offeror.

1 *support individuals proposed for this RFP ...*” [Procurement Record, Volume I, Tab B]. HIC’s
2 Response included:

- 3 a. HIC’s Executive Summary describing generally its company experience and its
4 understanding of the commitment needed to fulfill the services requested by GVB.
- 5 b. Overview that stated that the company was founded in 2006 as “SD Pharm” in Korea and
6 then changed its name to “HIC” in 2013..
- 7 c. Staff Qualifications and Past Performance. The HIC team members had 7 principals with at
8 least 5 years of experience in marketing and related activity and with 3 more having more
9 than 10 years of experience.
- 10 d. Organizational Chart. The Chart indicated that the business had 10 employees, 2 offices,
11 and had an age of 10 years (5 years as SD Pharm 5 years from 2011 as HIC).

12 [Procurement Record, Volume II, Tab C]

13 The Evaluation Committee ranked HIC as the highest offeror. Ms. Taitague testified that
14 HIC had the experience required under the RFP. She absolutely considered HIC’s experience in
15 making that determination. Ms. Kono testified that HIC satisfied the experience requirement under
16 the RFP.

17 Additionally, the RFP, does not state that the 5-year provision was an RFP *requirement*.
18 The RFP, Section 1.1 states, “GVB *seeks to retain* a qualified professional tourism destination
19 marketing agency (“Agency”) with a minimum of 5 years extensive and consistent experience
20 working with the Republic of Korea travel trade...” [Procurement Record, Volume I, Tab B].

21 The RFP did not include the 5-year provision in the evaluation criteria. The RFP, Section 1.2
22 provides that “Proposals will be reviewed and evaluated based upon the qualifications of the
23 Offeror and the plan submitted to perform the services of the RFP, which include but are not
24 limited to...identification of the person or persons who will be responsible for the Project,
25
26
27
28

1 including a list of their recent work done in this area and related experience...[r]esumes or
2 background information on each team member's...professional experience...note the availability
3 of any previously completed documentation for similar work..." The RFP, Section 3.13 provides
4 *inter alia* "...Proposals submitted by Offerors who do not meet the evaluation criteria will not be
5 considered for review by GVB." GVB's determination that HIC met the evaluation criteria, had
6 sufficient experience, was the highest rated Offeror, was not in error.
7

8 **IV. HIC was not required to disclose Karl Pangelinan's involvement as a**
9 **consultant in Affidavit No. 1.**

10 The RFP, Affidavit No. 1, required offerors to submit an Affidavit Disclosing Ownership
11 and Commissions. [Procurement Record, Volume I, Tab B]. Section B of the Affidavit states:

12 Further, I say that the persons who have received or are entitled to receive a
13 commission, gratuity or other compensation for procuring or assisting in
14 obtaining business related to the bid or proposal for which this affidavit is
submitted are as follows [*if none, please so state*]:

15 The evidence presented failed to establish that HIC was required to disclose Karl
16 Pangelinan's involvement as an HIC consultant under Affidavit No. 1. Karl Pangelinan served as
17 the GVB GM from January 2013 through January 2015. January 31, 2015 was his last day of
18 GVB employment. In his testimony, he noted that he started a business, KP Consulting, in May
19 2015. Mr. Pangelinan entered into a consulting agreement with HIC on February 2, 2016, 1 year
20 and 2 days after he left GVB. 5 G.C.A. § 5632(b)(2) provides:

21 Restrictions on Employment of Present and Former Employees.

22 (b) Restrictions on Former Employees in Matters Connected with Their Former
23 Duties.

24 (2) One Year Representation Restriction Regarding Matters for Which a
25 Former Employee Was Officially Responsible. It shall be a breach of ethical
standards for any former employee, within one (1) year after cessation of the
former employee's official responsibility, knowingly to act as a principal, or as
an agent for anyone other than the Territory, in connection with any:

26 (A) judicial or other proceeding, application, request for a ruling or other
determination;

27 (B) contract;

28 (C) claim; or

1 (D) charge or controversy; in matters which were within the former employee's
2 official responsibility, where the Territory is a party or has a direct or
substantial interest.

3 Mr. Pangelinan acted as the reviewer of the HIC proposal, he did edits on the HIC proposal,
4 and on February 25, 2016, he gave an oral presentation to the Evaluation Committee on behalf of
5 HIC.

6 Under the terms of his agreement with HIC, Mr. Pangelinan would not receive
7 compensation for the first 3 months. On the fourth month, compensation would be subject to
8 negotiation. His hourly rate was \$75.00. There was a 40 hour per month billing cap. He never billed
9 HIC more than 40 hours per month. From February 2016 through April 2016, Mr. Pangelinan did
10 not receive any compensation from HIC. From May 2016 through June 2016, Mr. Pangelinan
11 received a total amount of compensation of around \$3,000.00.

12 While Mr. Pangelinan's employment by HIC did not violate section 5632(b)(2), his
13 involvement in the oral presentations clearly had an impact on the evaluation scores. The score
14 differences between HIC and TLK on the written proposal was only 2 points (HIC received 366
15 points (91.50%) and TLK received 364 points (91.00%)). The score difference between HIC and
16 TLK became much wider for the oral presentations, by 26 points. (HIC received 282.50 points
17 (88.28%) and TLK received 256.50 points (80.16%)). In looking at the comments of the evaluation
18 sheets for the oral presentation, evaluators noted strengths of HIC's presentation was directly linked
19 to Mr. Pangelinan's presence:
20
21

- 22
- 23 a. "Had a former GVB Management on their team... Has local rep presence on Guam." – Gina
24 Kono
 - 25 b. "Having a local representative" – Norman Analista
 - 26 c. "Having a person from Guam on the team that is well knowledge of our island" – Telo
27 Taitague
- 28

1 In the end, HIC was ranked the highest with a combined average of 89.89% and TLK was
2 ranked the second highest with a combined average of 85.58%.

3 Based upon the evidence presented, HIC was not required to state in Affidavit No.1 that
4 Mr. Pangelinan received or was entitled to receive a commission, gratuity or other compensation
5 for procuring or assisting in obtaining business related to the bid or proposal for which this affidavit
6 is submitted. Mr. Pangelinan did not receive nor was he entitled to receive a commission, gratuity
7 or other compensation for the consulting services he provided to HIC for the RFP. HIC's statement
8 that "none" applied with respect to Mr. Pangelinan, was accurate.
9

10
11 **V. TLK's irreparable harm assertion.**

12 TLK asserts on appeal that it will be irreparably harmed if GVB is allowed to usurp the
13 OPA's authority and circumvent Guam Procurement Laws. TLK argues that "[s]ince TLK will only
14 be able to recover the costs of its bid if the stay is not enforced and its protest appeal is sustained
15 by the OPA, TLK will be irreparably injured." [Notice of Appeal, OPA-PA-16-005, 11:13-14].
16 Because the Public Auditor denied TLK's Motion for Orders Confirming the Automatic Stay
17 [Decision and Order, June 15, 2016) and because TLK has not prevailed on its other bases for
18 appeal, the issue of irreparable harm is moot.
19

20 **VI. The purposes and policies underlying Guam procurement.**

21 The instant procurement, while legal, raises numerous concerns regarding fairness,
22 transparency, and public confidence. These include but are not limited to:
23

- 24 • The decision to issue an RFP for the Korean market, where visitor arrivals had increased;
- 25 • The representation of an Offeror by a former GVB GM, who officially began work with the
26 Offeror one year and two days after leaving GVB;
- 27 • The manner in which GVB communicated with HIC;
- 28 • The timing with which GVB issued notices of non-selection;

- 1 • The lack of a written delegation of authority from the Board to its GM to contract with HIC
2 or any other vendor;
- 3 • The failure by GVB to advise its Evaluation Committee of the Offerors' scores and rankings
4 after evaluation; and
- 5 • The lack of coordination among and between GVB management and staff in conducting
6 this procurement.

7 GVB and all GovGuam agencies are reminded about the purposes and policies underlying
8 Guam procurement. 5 G.C.A. § 5001 provides:

9 (a) Interpretation. This Chapter shall be construed and applied to promote its
10 underlying purposes and policies.

11 (b) Purposes and Policies. The underlying purposes and policies of this Chapter are:

12 (1) to simplify, clarify, and modernize the law governing procurement by this
13 Territory;

14 (2) to permit the continued development of procurement policies and practices;

15 (3) to provide for increased public confidence in the procedures followed in
16 public procurement;

17 (4) to ensure the fair and equitable treatment of all persons who deal with the
18 procurement system of this Territory;

19 (5) to provide increased economy in territorial activities and to maximize to the
20 fullest extent practicable the purchasing value of public funds of the Territory;

21 (6) to foster effective broad-based competition within the free enterprise
22 system;

23 (7) to provide safeguards for the maintenance of a procurement system of
24 quality and integrity; and

25 (8) to require public access to all aspects of procurement consistent with the
26 sealed bid procedure and the integrity of the procurement process.

27 It is incumbent on all procuring GovGuam entities, including GVB, to not only conduct
28 procurement activities in accordance with the law but also in accordance with the purposes and
policies underlying Guam Procurement Law, and the Public Auditor encourages all procuring
government entities to adopt practices consistent with these purposes and policies.

DECISION

1. TLK's appeal is DENIED.

2. The parties shall bear their respective costs and attorneys' fees.

This is a Final Administrative Decision. The Parties are hereby informed of their right to
appeal from a Decision of the Public Auditor to the Superior Court of Guam in accordance with

1 Part D of Article 9 of 5 G.C.A. § 5481(a) within fourteen (14) days after receipt of a Final
2 Administrative Decision. A copy of this Decision shall be provided to the Parties and their
3 respective attorneys, in accordance with 5 G.C.A. § 5702, and shall be made available for review
4 on the OPA website at www.opaguam.org.

5 **DATED** this 3rd day of October 2016.

6
7 

8 **DORIS FLORES BROOKS, CPA, CGFM**
9 **Public Auditor of Guam**

Suite 401 DNA Building
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Hagåtña, Guam 96910



FAX

To:	Jon Nathan Denight General Manager Guam Visitors Bureau 401 Pale San Vitores Road Tumon, Guam 96913 Phone: (671) 646-5278 Fax: (671) 646-3917	From:	Doris Flores Brooks Guam Public Auditor Office of Public Accountability
	Thomas J. Fisher, Esq. (Attorney for GVB) Fisher & Associates 167 East Marine Corp. Drive Hagatna, Guam 96910 Phone: (671) 472-1131 Fax: (671) 472-2886	Pages:	22 (including cover page)
CC:	Joyce C.H. Tang, Esq. (Attorney for TLK Marketing) Civille & Tang, PLLC 330 Hernan Cortez Avenue Suite 200 Hagatna, Guam 96910 Phone: (671) 472-8868/9 Fax: (671) 477-2511	Date:	October 3, 2016
		Phone:	(671) 475-0390 x. 208
		Fax:	(671) 472-7951

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