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OPA-PA-25-006: In the Appeal of Glimpses of Guam, Inc.

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Fri, May 2, 2025 at 3:50 PM

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Hafa Adai Mr. Hernandez,

Please see the attached **Purchasing Agency Report and Statement** for filing in the above-reference matter.

Kindly confirm receipt of this email and its attachment.

Sincerely,

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

IN THE APPEAL OF

GLIMPSES OF GUAM, INC.,

Appellant.

Appeal No. OPA-PA-25-006

**PURCHASING AGENCY
REPORT AND STATEMENT**

This is the Agency Report and Statement pursuant to 2 GAR, Div. 4 §§ 12104(c)(3) and 12105 of Purchasing Agency Guam Visitors Bureau (“Bureau,” or “GVB”), made in the Procurement Appeal captioned above.

I. GVB filed a copy of the Protest made by Appellant Glimpses of Guam, Inc. (“Glimpses”) with the Procurement Record filed in this appeal. This makes two procurement appeals *See* GVB1202-GVB1259.

II. GVB filed a copy of the bid or offer submitted by Glimpses, and a copy of the bid or offer being protested, with the Procurement Record filed in this appeal. *See* GVB0697-GVB0786; GVB787-GVB877.

III. GVB filed a copy of the solicitation, including the specifications or portions thereof relevant to the protest with the Procurement Record filed in this appeal. *See* GVB0001-GVB0047; GVB0056-GVB0157.

IV. GVB filed a copy of the contract awarded, pertinent amendments, and plans and drawings with the Procurement Record filed in this appeal. *See* GVB0669-GVB0691.

V. GVB has not issued a decision concerning the matters in this, Glimpses' Second Protest.

VI. Statement in Response to Allegations:

A. Glimpses' alleges in its Second Protest that no individual RIMS bid was ever submitted in response to the ICAESS RFP. *See* Second Protest at 4-5.

1. This alleged ground for protest comes too late since Glimpses has known of the fact of RIMS' Manhita submission for more than 14 days but only stated this ground in its Second Protest. Glimpses did not exhaust administrative remedies with the agency before bringing this, its Second Appeal. *DFS Guam LP v. A. B. Won Pat Guam Int'l Airport Auth.*, 2020 Guam 20.

2. GVB has not responded to this allegation with a 5 GCA § 5425 (c) protest decision. The OPA lacks jurisdiction over this alleged ground. *Id.* § 5425 (e).

3. Alleged surprise about RIMS' Manhita submission in response to the solicitation is irrelevant because of the sealed bid requirement of the ICAESS RFP. *See id.* § 5211. Glimpses is charged with knowledge of the fact of RIMS' collaboration with Big Fish and SKIFT from the first time GVB provided a copy of it. 1 GCA § 719. It does not matter that Glimpses did not understand its significance until its Second Appeal here. *DFS* ¶ 87. At any rate, Glimpses was not entitled to see what RIMS' Manhita submission entailed prior to its own submission and cannot claim that its submission was in any way prejudiced by Manhita's submission. It was simply determined by GVB's selection panel to be inferior to two other submissions. *See* GVB0239-GVB0282. Finally, there is nothing in the terms of the solicitation or the Procurement Law that prohibits a collaborative submission like RIMS' Manhita. In fact, Glimpses allegation, if found to be valid ground, would serve to lessen competition, in

1 contravention to the purposes of the Procurement Law, 5 GCA § 5001 *et seq.* *See id.* § 5001 (b)
2
3 (6). The Public Auditor should exercise discretion to promote the integrity of the procurement
4 process and purposes of the Procurement Law. *Id.* § 5703 (f).

5 4. Glimpses alleges no Dept. of Revenue & Taxation (“DRT”) documents
6 showing a formal partnership between RIMS and Big Fish to state grounds that GVB has no
7 factual basis to assume that Big Fish and RIMS partnered. Review of the agreement shows that
8 RIMS and Big Fish signed a “Partnership Agreement” on or around Jan. 15, 2025 for the
9 purposes of providing marketing, advertising and communication services in a collaboration of
10 expertise and resources to fulfill the ICAESS contract. *See* GVB0662-GVB0663. Although
11 titled as a partnership agreement, the terms disclaim formal partnership or agency status and
12 affirms the two are independent contractors. Thus, Manhita is an agreement between RIMS and
13 Big Fish to collaborate as independent contractors to provide services outlined in the ICAESS
14 RFP and not a formal partnership *per se*. Glimpses points to nothing in the ICAESS RFP or the
15 procurement law that prohibits collaborations like Manhita. Indeed, RIMS’ Manhita submission
16 was rated higher than the next submission by Galaide and substantially higher than Glimpses’.
17
18

19 B. Glimpses next alleges that GVB’s award of the ICAESS contract to protect the
20 substantial interest of Guam is void.

21 1. This alleged ground for protest comes too late since Glimpses had known
22 of the fact of the substantial interest determination for more than 14 days but only stated this
23 ground in its Second Protest, making it too late under Procurement Law § 5425 (a).
24 Additionally, Glimpses is charged with knowledge of the fact of the substantial interest
25 determination from the first time GVB notified RIMS of it. 1 GCA § 719. It does not matter
26 that Glimpses did not understand its significance until its Second Appeal here. *DFS* ¶ 87.
27
28

1 Glimpses did not exhaust administrative remedies with the agency before bringing this, its
2
3 Second Appeal. *DFS*, 2020 Guam 20.

4 2. GVB has not responded to this allegation with a 5 GCA § 5425 (c) protest
5 decision. The OPA lacks jurisdiction over this alleged ground. *Id.* § 5425 (e).

6 3. Glimpses alleges that the OPA should read a notice of a right to
7 administrative review into § 5425 (g). Section 5425 (c) expressly requires that notice of a protest
8 decision inform a protesting party of its right to administrative and judicial review, but there is
9 no similar language in § 5425 (g). Failure to include a term in a statute is a significant indication
10 that its exclusion was intended. *E.g. Commonwealth of N. Marianas Is. V. Canadian Imperial*
11 *Bank of Commerce*, 21 N.Y.3d 55 (N.Y. Ct. App. 2013); *Bd. of Trade, Inc. v. State Dept. of*
12 *Labor, Wage and Hour Admin.*, 968 P.2d 86 (Alk. 1998). When the legislature intends not to
13 include a term, courts should not supply one. *Mazzotti v. Swezey*, 103 N.Y.S.2d 956 (Sup. Ct.
14 N.Y. 1951); *People v. Superior Ct.*, 319 Cal.Rptr. 3d 100 (Cal. Ct. App. 2024).

15
16 4. Glimpses alleges that notice of a substantial interest determination cannot
17 issue prior to a decision on the protest. Despite this ground coming too late and there being no
18 agency decision on which to appeal, Glimpses argues that a substantial interest determination
19 depends on whether there has been a protest denial. This is wrong. Plain reading of § 5425 (a)
20 shows that a protest on grounds regarding method of source selection, solicitation or award must
21 be brought within 14 days' notice of facts giving rise to a protest. Under § 5425 (b) the head of a
22 purchasing agency has authority to resolve a protest; no specific time is provided for the agency
23 to resolve the protest; and no mention is made of a substantial interest determination. Section
24 5425 (g) plainly states that Guam shall not proceed with solicitation or award before final
25 resolution of a protest unless the agency and the designated Deputy Attorney General make a
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1 written substantial interest determination. Clearly, resolution of the protest is not a prerequisite
2 for a substantial interest determination.
3

4 5. Glimpses alleges that Feb. 24, 2025 substantial interest determination was
5 void because GVB was supposed to comply with 5 GCA § 5425 (c). In addition to this ground
6 coming too late and there being no agency decision to appeal, this alleged basis is wrong because
7 the substantial interest determination under § 5425 (g) makes no reference to § 5425 (c) or an
8 agency decision.
9

10 6. Assuming *arguendo* that Glimpses' Second Protest is not untimely (but, of
11 course, it was), Glimpses gives no reason why the substantial interest determination should not
12 be confirmed. A proper substantial interest determination identifies the state interest and why it
13 is necessary to protect those interests. *CARL Corp. v. State, Dept. of Educ.*, 946 P.2d 1, 23
14 (Haw. 1997). The determination sent to Glimpses on Feb. 24 identified the state interest as
15 Guam's tourism industry; tourism's role in generating hundreds of millions of dollars of gross
16 island product, thousands of jobs and tens of millions of dollars in tax revenues. The
17 determination cited to shortcomings in GVB's promotion efforts as found by a tourism study
18 presented at a board meeting by the Governor and why it was necessary to change the scope of
19 the contract under RFP 2021-003. The determination justified why RIMS' submission was the
20 superior by a substantial margin as rated by panel. The determination concluded that RIMS's
21 submission was complete, visually compelling, professional, strategic and would support GVB's
22 efforts to revitalize the tourism industry. Glimpses provides no grounds in its Second Protest to
23 challenge any part of the substantial interest determination.
24
25

26 7. Glimpses alleges that it was not told of its right to administrative and
27 judicial review in GVB's Mar. 24, 2025 Decision Denying Protest. Even though not included,
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1 Glimpses is charged with notice of the contents of the decision. At any rate, the OPA may
2 consider the grounds alleged by Glimpses in its first protest (Feb. 4, 2025) and decided by GVB,
3 or require GVB to issue a decision stating 14 days to file a procurement appeal.
4

5 8. Glimpses alleges that GVB's action to provide notice of the substantial
6 interest determination and award the contract were arbitrary, capricious and an abuse of agency
7 discretion. Glimpses cites to *URS Fed. Servs., Inc. v. United States*, 102 Fed.Cl. 664, 673-674
8 (Ct. Cl. 2011) to support its argument. *URS* was about an agency decision regarding the basis for
9 avoiding a stay under federal procurement law and not about an aggrieved party's right to seek
10 confirmation of a substantial interest determination. Under *URS*, agency action is arbitrary and
11 capricious if it "relied on factors which Congress has not intended it to consider, entirely failed
12 to consider an important aspect of the problem, offered an explanation for its decision that runs
13 counter to the evidence before the agency, or is so implausible that it could not be ascribed to a
14 difference in view or the product of agency expertise." *Id.*, 670 citing *Citizens to Preserve*
15 *Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Glimpses fails to provide how GVB's
16 substantial interest determination relied on factors which the legislature has not intended it to
17 consider, entirely failed to consider an important aspect in its substantial interest determination,
18 offered an explanation for its decision that runs counter to the evidence, or was so implausible
19 that it could not be ascribed to a difference in view or the product of agency expertise. GVB did
20 not act arbitrarily or capriciously.
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22

23 9. Glimpses alleges that GVB made no serious attempt to consider
24 procurement system integrity when it awarded the contract. GVB followed the express
25 provisions of § 5425 (g) in making a substantial interest determination, provided support and
26 reasoning for its substantial interest determination.
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VII. GVB filed the Determination under 2 GAR § 9101(e) with the Procurement Record.
See GVB0358 to GVB0392.

VIII. A statement indicating whether the matter is the subject of a court proceeding is
attached as Exhibit A.

RESPECTFULLY SUBMITTED THIS 2nd day of May, 2025.

McDONALD LAW OFFICE, LLC

Attorneys for Purchasing Agency

Guam Visitors Bureau

By: _____

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9 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

10 IN THE APPEAL OF

Appeal No. OPA-PA-25-006

11 GLIMPSES OF GUAM, INC.,

DECLARATION OF COUNSEL

12 Appellant.

13 Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses
14 interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action
15 on any appeal where action concerning the protest or appeal has commenced in any court.

16 The undersigned party does hereby confirm that to the best of his or her knowledge, no
17 case or action concerning the subject of this Appeal has been commenced in court. All parties are
18 required to and the undersigned party agrees to notify the Office of the Public Auditor within 24
19 hours if court action commences regarding this Appeal or the underlying procurement action.

20 **RESPECTFULLY SUBMITTED THIS 2nd day of May, 2025.**

21 **McDONALD LAW OFFICE, LLC**

22 Attorneys for Purchasing Agency

23 *Guam Visitors Bureau*

24 By:

25 **JOSEPH B. MCDONALD**

26
27
28 **Exhibit A**