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

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Wed, May 7, 2025 at 4:03 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

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Hafa Adai Mr. Hernandez,

Please see the attached ***Purchasing Agency's Motion to Dismiss, Purchasing Agency's Motion to Confirm Determination***, and ***Purchasing Agency's 2nd Supplemental Submission of Procurement Record*** for filing in the above-reference matter.

Kindly confirm receipt of this email and its attachment.

Sincerely,

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3 attachments

OPA-PA-25-002 - Purchasing Agency's Motion to Dismiss.pdf
401K



OPA-PA-25-002 - Purchasing Agency's Motion to Confirm Determination.pdf
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OPA-PA-25-002 - Purchasing Agency's 2nd Supplemental Submission of Procurement Record.pdf
1626K

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9 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

10 IN THE APPEAL OF

Appeal No. OPA-PA-25-002

11 GLIMPSES OF GUAM, INC.,

**PURCHASING AGENCY'S MOTION TO
DISMISS**

12 Appellant.

13 **MOTION TO DISMISS**

14 COMES NOW, Purchasing Agency, Guam Visitors Bureau ("GVB"), by and through its
15 legal counsel McDonald Law Office and hereby submits its Motion to Dismiss for failure to seek
16 confirmation of an award to protect Guam's substantial interest, 5 GCA Ch. 5 (hereinafter
17 "Procurement Law") § 5425 (g); failure to comply with the Procurement Regulations by
18 protesting without first obtaining an agency decision on its protest, 2 GARR Div. 4 (hereinafter
19 "Procurement Regs.") § 12104 (b) (7); and failure to exhaust administrative remedies, *DFS*
20 *Guam LP v. A. B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20 ¶¶ 50, 63; and lack of
21 subject matter jurisdiction because Glimpses did not exhaust administrative remedies with
22 respect to claims not raised in Glimpses' agency protest but brought to appeal. *Id.* ¶¶ 61 – 63.
23 This Motion is supported by the Memorandum of Law that follows, the procurement record, and
24 such other evidence and arguments as may be heard by the OPA.

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MEMORANDUM OF LAW

I. Background:

In 2021, Glimpses was awarded the contract for its submission in response to Request for Proposal ("RFP") 2021-003 for Project Support Services (the "PSS Contract"). Pursuant to a term in the PSS Contract, it was terminated for convenience on December 26, 2024, after which GVB issued RFP 2025-002 for Integrated Communications, Advertising and Events Support Services (the "ICAESS RFP").

Four bidders responded to the ICAESS RFP, including the Manhita Group ("Manhita"), a collaborative submission by Ruder Integrated Marketing Strategies ("RIMS") and Big Fish Creative, Inc. ("Big Fish"), Galaide Group LLC ("Galaide"), Glimpses of Guam, Inc. ("Glimpses") and The Greenlight Group ("Greenlight"). GVB evaluated these submissions and ranked Manhita first (271 points), Galaide as a close second (261 points), Glimpses as a distant third (220 points), and Greenlight as fourth (215 points).

Glimpses protested the ICAESS RFP method, solicitation or award on February 4, 2025. *See* Procurement Law § 5425 (c). GVB determined that award of the contract without delay was necessary to protect the substantial interests of Guam, obtained the concurrence of the designated Deputy Attorney General's, and thereafter notified Glimpses of the substantial interest determination ("SID") on February 24, 2025. 5 GCA § 5425 (g). Glimpses did not protest the SID within two days of its being notified of the SID. *See id.* § 5425 (g) (3). Nor did it obtain GVB's decision on its Protest of the ICAESS RFP. *See id.* § 5425 (c). Instead, Glimpses filed the instant Procurement Appeal on March 11, 2025. 5 GCA § 5425 (e).

GVB responded to Glimpses' Protest on March 21, 2025, denying it. 5 GCA § 5425 (c).

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II. Jurisdiction of the Public Auditor; Standard of Review of Agency Determinations

The Public Auditor (hereinafter "Pub. Aud.") has jurisdiction to review and determine *de novo* any matter properly submitted at procurement appeal. 5 GCA § 5703 (a). Put another way, the Pub. Aud.'s jurisdiction at a procurement appeal is circumscribed to matters "properly submitted." *Id.* No prior agency determination is final or conclusive on a procurement appeal. *Id.* § 5703 (c). The Public Auditor's jurisdiction is exercised to promote the integrity of the procurement process and the purposes of the Procurement Law. *Id.* § 5703 (f). The Public Auditor's determination of issues or findings of fact are final and conclusive unless arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law. *Id.* § 5704.

The standard of review for an agency's factual determinations is the substantial evidence standard. Substantial evidence exists where there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Perez v. Civil Serv. Comm'n*, 2018 Guam 25; *see also* 5 GCA § 9239 (agency decisions must be made in accordance with law and supported by substantial evidence). Substantial evidence is more than a mere scintilla but less than a preponderance. *Port Auth. of Guam v. Civil Serv. Comm'n*, 2018 Guam 1.

A protesting party has two (2) days to seek confirmation of an agency determination having the concurrence of the Attorney General ("AG") or designated Deputy Attorney General (hereinafter the designated "Dep. AG"), that an award of a contract is necessary to protect the substantial interests of Guam. Procurement Law § 5425 (g).¹

¹ In addition to GVB's moving to dismiss this appeal for Glimpses' failure to seek confirmation of GVB's substantial interest determination, GVB under a separately filed motion moves to confirm the SID. While the Superior Court has jurisdiction "over an action between Guam and a bidder, offeror, or contractor, either actual or prospective, to determine whether a solicitation or award of a contract is in accordance with the statutes, regulations, and the terms and conditions of the solicitation," Procurement Law § 5480 (a), it does not appear that the Superior Court has jurisdiction over the Pub. Aud.'s confirmation of a determination that award is necessary to protect substantial interests of Guam. *C.f.* Procurement Law § 5480 (a) (providing for Superior Court jurisdiction over

1 The Pub. Aud. has jurisdiction to dismiss a protest for failure to comply with § 12104 of
2 the Procurement Regs., except that a protest shall not be dismissed for failure to comply with
3 § 12104 where the contracting officer has actual knowledge of the basis of the protest, or the
4 agency, in the preparation of its report, was not prejudiced by the protester's noncompliance. *Id.*
5 § 12104 (b) (7).
6

7 All claims arising under the Procurement Law must be administratively exhausted. *DFS*,
8 2020 Guam 20 ¶¶ 50. Administrative exhaustion is not purely jurisdictional; it is necessary that
9 the opportunity is afforded to agencies to correct mistakes and to promote administrative
10 efficiency. *Id.* ¶ 63 (citations omitted). Failure to exhaust administrative remedies is a complete
11 defense to a protesting party's claims. *Id.*
12

13 III. Discussion

14 A. Glimpses failed to timely seek confirmation of the award necessary to protect
15 Guam's substantial interests (Procurement Law § 5425 (g)).
16

17 The record shows that on February 24, 2025, GVB notified Glimpses that award of the
18 contract for the ICAESS RFP was necessary to protect the substantial interests of Guam.
19 GVB0393-GVB0655; *see also* Notice of Procurement Appeal, Exh. 1. The procurement record
20 does not show that Glimpses sought confirmation of the SID because it did not. Glimpses filed
21 the instant Procurement Law § 5425 (e) appeal instead. Section 5425 (e) appeals apply to
22 agency decisions made under § 5425 (c). Therefore, Glimpses' claims regarding the SID were
23 not properly submitted, leaving the OPA without jurisdiction. Procurement Law § 5703 (a).
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27 actions involving § 5425 (e) appeals of § 5425 (c) decisions) *with id.* § 5425 (g) (3) (providing for the Pub. Aud.'s
28 jurisdiction to confirm a determination of a need to protect substantial interests of Guam).

1 B. This appeal was not properly submitted to the OPA for *de novo* review
2
3 (Procurement Regs. § 12104 (b) (7)).

4 Procurement Regs. § 12104 (b) (7) provides the Pub. Aud. discretionary jurisdiction to
5 dismiss a protested claim for failure to comply with the form and filing of a procurement appeal.
6 *Id.* Procurement Regs. § 12104 (b) requires that a procurement appeal at a minimum include a
7 copy of prior decisions or determinations of protests that is being appealed. Glimpses submitted
8 its protest to GVB on February 2, 2025. GVB0878-GVB0891. GVB attempted settlement with
9 Glimpses on or around February 14, 2025. GVB0892. Glimpses filed the instant appeal on
10 March 11, 2025. GVB issued a decision regarding Glimpses' February 4, 2025 protest on
11 March 21, 2025. GVB1202-GVB1206. The instant appeal was filed without complying with
12 Procurement Regs. § 12104 (b) as there was no SID matter properly submitted to the OPA.
13 Since the OPA's jurisdiction is circumscribed to matters "properly submitted" and since there
14 was no § 5425 (c) agency decision concerning Glimpses § 5425 (a) protest at the time of the
15 filing of the instant appeal under § 5425 (e), the OPA has discretion to dismiss this appeal.
16 Procurement Law § 5703 (a); Procurement Regs. § 12104 (b) (7).

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19 C. Glimpses failed to exhaust administrative remedies (*DFS*, 2020 Guam 20 ¶¶ 50,
20 63).

21 Glimpses failed to obtain an agency decision over its protest prior to filing this appeal.
22 "[A]dministrative exhaustion ... requirements [provide] an opportunity for agencies to correct
23 mistakes, and it promotes efficiency by taking advantage of the specialized expertise of
24 administrative agencies ... [F]ailure to exhaust nevertheless presents a complete defense to a
25 plaintiff's claims, absent waiver or some other countervailing interest." *DFS*, 2020 Guam 20 ¶
26 63. Glimpses did not provide GVB the opportunity to address its protest prior to filing this
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procurement appeal. This deprived GVB of action necessary to efficiently consider Glimpses' protest and is a complete defense to Glimpses' protest claims. *Id.*

D. Glimpses did not exhaust administrative remedies with respect to claims not raised in Glimpses' protest at GVB, leaving OPA without subject matter jurisdiction (*DFS*, 2020 Guam 20 ¶¶ 61 – 63).

Glimpses brings claims to the instant appeal that were not presented in its Protest. Glimpses' never-before raised claims are as follows:

(a) No state of public emergency existing to warrant a sole source emergency contract. Protest, 4.

(b) There was no Objective Evaluation because GVB's response to a FOIA allegedly missed a document. Protest, 5.

(c) GVB failed and refused to notify Glimpses of its right to review and appeal under 5 GCA § 5425 (c). Protest, 6.

(d) The evaluation criteria GVB used was ambiguous and unfair specification. Protest, 8.

(e) The ICAESS solicitation was supposed to be in the form of an invitation for bid, not a request for proposal. Protest, 8.

Glimpses has not exhausted administrative remedies with respect to the foregoing claims as they were not raised in its Protest. Not only has GVB not been afforded the opportunity to address them, Glimpses' failure in this regard leaves the OPA without jurisdiction over them as a matter properly submitted. Procurement Law § 5703 (a). Glimpses failed to comply with the Procurement Law's administrative exhaustion requirement. There is no exception to exhaustion of remedies under the Procurement Law. *DFS*, 2020 Guam 20 ¶ 61. Because Glimpses failed to

1 provide GVB the opportunity to address its protest with a protest decision, it did not obtain
2 waiver of sovereign immunity over the first-time claims made at appeal as enlisted *supra*; and,
3 there being no exception available, there is no jurisdiction at this appeal over those never-before
4 claims raised for the first time in this appeal. The Pub. Aud. has no jurisdiction over those
5 claims and must dismiss them.
6

7 IV. Conclusion

8 For the foregoing reasons, GVB respectfully requests that the Pub. Aud. dismiss this appeal
9 in its entirety and or dismiss Glimpses claims raised for the first time at this appeal.
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11 **RESPECTFULLY SUBMITTED THIS 7th day of May, 2025.**

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13 **McDONALD LAW OFFICE, LLC**
14 Attorneys for Purchasing Agency
15 *Guam Visitors Bureau*

16 By: _____

17 **JOSEPH B. MCDONALD**
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