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IN THE OFFICE OF THE PUBLIC AUDITOR

In the Appeal of

Docket No. OPA-PA-16-002

1-A GuamWEBZ, Appellant,

**APPELLANT'S COMMENTS TO
PURCHASING AGENCY REPORT**

Pursuant to 2 GAR §10104(c)(4), Appellant 1-A GuamWEBZ ("GuamWEBZ"), via its undersigned counsel, responds herein to Purchasing Agency Guam Community College's ("GCC's") Agency Report submitted April 12, 2016.

GCC maintains on page 4 of its answering statement that GuamWEBZ's March 10, 2016 appeal to GCC was untimely beyond the 14-day time limit because GuamWEBZ "could have" requested to review winning-bidder WSI's bid submission on February 15, 2016 and also "could have" requested that information on February 24, 2016. As an initial matter, GuamWEBZ 'FOIA'd' GCC on February 25, 2016, received a very limited response from GCC on March 1, 2016, and submitted its initial appeal on March 10, 2016, just *nine* days after GCC released its very limited FOIA response.

Thus, by GCC's own account of what GuamWEBZ "could" have done, had GuamWEBZ requested the information on February 24, 2016, it still under the FOIA law would have gotten the responses on the same day it actually did – March 1, 2016, and, thus still would have had until March 15, 2016 to submit its protest based on actual facts made *available*. While GCC equivocates between 'should' versus 'could' have known, the relevant analysis is not when GuamWEBZ "could have" known under 5 GCA § 5425(a) of the facts "giving rise to [its protest]" but when it *should*¹ have known them in light of the factual and procedural circumstances.² Here, GuamWEBZ had no reason to *suspect* any of the facts and circumstances leading to its protest until, at the very earliest, March 1, 2016, when GCC released its selected portions of the procurement record.

On pages 5-7 of its answering statement, GCC maintains that WSI was entitled to the local procurement preference, that it could and did present a current license 'upon award', and, in any event, GuamWEBZ suffered no prejudice because of GCC overlooking this "inconsequential" oversight, citing *In re Appeal of Pacific Data Systems*,

¹ Fun exercises differentiating "should" from "could" are available at <http://www.grammar-quizzes.com/modal5b.html>.

² "The period allowed for filing an appeal or a request for review is usually short to speed up the procedure. For the review process to be credible and effective, however, the aggrieved party must be given time to verify the facts and to estimate the potential risks and benefits of lodging an appeal; allowing enough time for filing also helps avoid premature and unfounded complaints...suspicious [are not enough. An aggrieved bidder] could not know, it was aggrieved until it was finally given the procurement file, which revealed the purchases were not conducted in accordance with the law and regulation [emphasis added]." *John Brown, Procurement Law Primer (version 2.1)*, ("the Primer"), pp 179-180.

"Where a protesting offeror had, at an earlier date, received notice of intent to award the contract to another offeror, but did not protest until later when information was revealed in a government memorandum which suggested the protester may be aggrieved, the Guam Supreme Court held the protesting offeror "did not know, nor should it have known, of the facts giving rise to this protest until it received" the memorandum, thus the protest was timely filed based on that revelation, and was not time barred because of the earlier notice of intent to award to another. (*Guam Imaging Consultants, Inc. V. GMHA, 2004 Guam 15, at ¶ 33.*) The Primer pp 180.

No. OPA-PA-12-011, Decision ¶ 6 (Guam Office of Pub. Accountability Sep. 5, 2012).

What the aforementioned case actually held was, “Local procurement was not applicable in this case as [**because**] all of the businesses which submitted a bid [were] considered to meet the requirement to be **considered local and** have the local preference **available** [emphasis added].”

A simple construction of this statement reveals that not all businesses who are ‘considered local’ are entitled to the local procurement preference [which requires the business to be licensed]. Moreover, GuamWEBZ actually *was* prejudiced because it expended the time and money to maintain and renew its license, only to be ostensibly unable to compete with the pricing of a competitor who was able to save money by running its operation *without* a current business license, yet claim competitive advantage credit as a ‘locally licensed business.’

As indicated at Exh. 6. Pp 17 of GuamWEBZ’s appeal herein, the “Local Procurement Preference” filled out by WSI, by its very terms, required that WSI be a “businesses licensed to do business on Guam.” By GCC’s logic, any business not licensed on Guam is entitled to the competitive advantage as a ‘locally licensed business’ simply because it *intends* to get licensed in the future *if* it wins the award. GCC concurs the bid packet required a license “upon award.” GCC’s own records confirm WSI did not submit a current license as of the February 15, 2016 bid opening [see Exhibit 11 of GuamWEBZ’s March 28, 2016 Protest] and it remains undisputed that the award was made on or before February 23, 2016.

As indicated in GuamWEBZ's March 28, 2016 Protest, "On March 11, 2016, the **day after GuamWEBZ complained** to GCC that WSI was operating and submitting bid proposals and claiming preference as a locally licensed business, **WSI renewed its business license** which has been expired since June 30, 2013. **Exh. 1.**" Thus, it cannot be disputed that WSI obtained its license not "upon award," as required but only as a result of GuamWEBZ's original appeal.

While WSI's failure to have a valid license at the time of bid opening may not have disqualified it from GCC considering its bid *altogether*, for purposes of applying the 15% competitive advantage intended for locally licensed businesses, this failure was fatal as to such credit. "The **local preference is a factor** in determining the lowest acceptable bid. Since that is a matter **determined at bid opening**, it should follow that having a Guam business license is an issue of responsiveness solely for the purpose of determining if the bid of the bidder claiming the preference is entitled to the local preference, and not to further disadvantage or penalize an **off-island** bidder." [emphasis added] The Primer pg 103.

On page 7 of its statement, GCC boldly proclaims its evaluation team should not be "Second-Guessed," despite the fact that GuamWEBZ in its Protest was able to point to specific concrete errors by GCC, including but not limited to obvious errors by specific individuals on the evaluation sheets, the deficiency of *any* meaningful specifics provided by WSI in its bid, and GCC's inexplicable misrepresentation of the evaluation team's finding that WSI was simply 'cheaper' into a letter to the deciding GCC officer that WSI was effectively 'cheaper and *better*.'

Guam's preeminent procurement expert advises, "While an officer is responsible for the execution of the written determination, other personnel, particularly technical personnel and appropriate personnel in the Using Agency, are responsible for furnishing to the cognizant procurement official, in an accurate and adequate fashion, the information pertinent to the determination." The Primer pp 34. For whatever reason, the findings of the evaluation team GCC demands should not be "Second-Guessed" were materially represented to the deciding officer, Dr. Mary Okada.

GCC on page 8 of its statement further claims GuamWEBZ and (presumably) the Office of the Public Auditor ("OPA") are not entitled to meaningfully review the full procurement record simply because WSI *claims* its product is proprietary and marked *every single page of its entire bid packet 'confidential.'* In short, GCC reasons that so long as a bidder *claims* that its entire proposal package is 'confidential,' the purchasing agency, the other bidder(s), and the OPA will simply have to take the bidder's and procuring agency's word for it. Presumably, every bidder and procuring agency can engage together in the procurement process without any worry about transparency or oversight by the mere *proclamation* that the records are 'confidential.'

This analysis is proven wrong even by mere review of the bid packet itself, which required WSI to separate confidential materials from non-confidential materials for the very purpose of public review, required GCC to determine the validity of WSI's confidentiality claims, and, importantly, required both WSI and GCC to act in good faith (e.g., not try to obscure the entire process by proclaiming virtually everything is confidential). GuamWEBZ submits that, "under general trade secret laws, proprietary

information which has been allowed to come into the public domain has lost its proprietary nature and cannot be sequestered or protected....[but must be eventually released]" The Primer pg 139; 277. At the very least, the OPA can review the ostensibly confidential materials *in camera*. The Primer pg 139.

Evidence of bad faith collusion on the part of both WSI and GCC includes the fact that even the stamp indicating the time and date WSI's bid was actually submitted has been withheld from GuamWEBZ under the premise that even *that* information, crucial to the very concept of a competitive bidding process, is confidential because GCC and WSI *say* it is. GCC's proclamation that GuamWEBZ "need only look at the Abstract," which does not shed any light on the issue, only further evidences GCC's 'you'll just have to take our word for it' line of reasoning. By this reasoning, there is no need for the OPA office at all because bidders should just take every party to the procurement process at their word; never a need for oversight.

As to GCC's claim that GuamWEBZ makes much of "minor [and hence waiveable] informalities," GuamWEBZ responds that collusive actions taken to eviscerate any semblance of transparency and accountability are not "minor informalities." GCC's allegation that "GuamWEBZ is merely a disgruntled bidder" amounts to nothing more than name-calling which has no place in a professional public document and hence needs no serious rebuttal beyond the merits laid forth herein.

Finally, on page 9, GCC's reasons 'websites are important and therefore it is in the best interest of Guam to ignore any procurement irregularities' is not persuasive. There is no dispute GCC currently has a website, the new website being procured in the

first place is not needed until at least July of 2016, and, if successful, GuamWEBZ can easily come in and provide GCC the needed services following timely resolution of this Protest.

Respectfully submitted at Hagatna, Guam this 15th day of April 2016.

A handwritten signature in black ink, appearing to read 'JRB', is written over a horizontal line.

John Richard Bordallo Bell
Attorney for Appellant 1-A Guam WEBZ