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April 22, 2016

VIA HAND DELIVERY

Doris Brooks, CPA
Public Auditor
OFFICE OF PUBLIC ACCOUNTABILITY
Suite 401, DNA Building
238 Archbishop Flores Street, Suite 309
Hagatna, Guam 96910

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 04-22-16

TIME: 4:20 AM PM BY: JT

FILE NO OPA-PA: 16-003

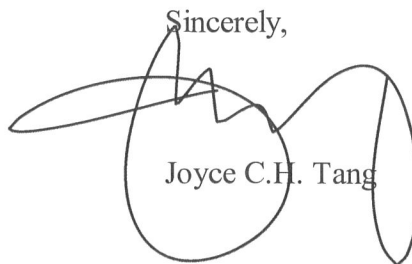
Re: PROCUREMENT APPEAL OF TLK MARKETING CO. LTD.

Dear Ms. Brooks:

Enclosed herewith are the Original and two (2) copies of TLK MAREKTING CO. LTD's Notice of Appeal with respect to GVB RFP 2016-006 (Tourism Destination Marketing Representation Services In The Republic of Korea).

Thank you very much.

Sincerely,



Joyce C.H. Tang

Enclosures

330 Hernan Cortez Avenue, Suite 200 • Hagåtña, Guam 96910
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8 **PROCUREMENT APPEAL**
9 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

10
11 In the Appeal of
12
13 TLK Marketing Co., Ltd.
14
15 Appellant.
16
17

DOCKET NO. OPA-PA-_____

1 TLK MARKETING CO., LTD. (“TLK”) hereby appeals a decision rendered by the Guam
2 Visitors Bureau (“GVB”), an agency of the Government of Guam, on April 8, 2016 denying the Bid
3 Protest raised buy TLK relative to RFP No. 2016-006 seeking proposals from “professional and
4 experienced companies” to be GVB’s marketing representative in Korea.

5
6 **I. APPELLANT INFORMATION**

7 Name: TLK Marketing Co., Ltd.
8 Mailing Address: Rm 616 Koryo Bldg.,
9 24, Sinmunro 1-Ga, Jongro-Gu,
10 Seoul, Korea 110-796
11 Business Address: *same address indicated above*

12
13 For purposes of this appeal, please direct correspondence to TLK’s counsel, Joyce C.H. Tang,
14 Esq. (jtang@civilletang.com), Civile & Tang, PLLC, 330 Hernan Cortez Avenue Suite 200,
15 Hagatna, Guam 96910. Telephone: 671/472-8868; Facsimile: 671/477-2511.

16
17 **II. APPEAL INFORMATION**

- 18 A. Purchasing Agency: Guam Visitors Bureau
19 B. Contract No: GVB RFP No. 2016-006 (TOURISM DESTINATION
20 MARKETING REPRESENTATION SERVICES IN THE
21 REPUBLIC OF KOREA)
22 C. Date of Contract: Solicitation issued on November 25, 2015
23 D. This appeal is made from the Guam Visitors Bureau denial of TLK’s March 24, 2016 protest
24 issued by the GVB on April 8, 2016.
25 E. The name of competing bidders known to appellant are: PROMACC, EDELMANN, and HIC,
26 INC.

1 five years, and therefore, did not meet the minimum five (5) year threshold experience requirement in
2 the RFP. HIC’s proposal was non-responsive and should have been rejected by GVB. *Id.*, at 2.

3 On April 8, 2016 GVB denied TLK’s protest on timeliness ground. *See*, Letter dated April 8,
4 2016, attached as **Exhibit E**. The one page denial letter states that “...TLK marketing received and
5 was aware (or should have been aware) of the content of the RFP as well as the method of
6 procurement more than fourteen (14) days prior to the submission of its Protest. TLK’s Protest is
7 therefore untimely.” *Id.* The denial letter did not address HIC’s lack of experience and the non-
8 responsive proposal, only noting in passing that “[GVB] do[es] not agree.” *Id.* GVB then
9 declared—without any factual support or authority— that “the Successful offeror has sufficient
10 experience in and relating to the relevant field(s), meets qualifications, and has received an award of
11 a contract in accordance with the RFP and Guam law and regulations.” *Id.* GVB’s denial of TLK’s
12 protest is baseless and without merit.¹

13 IV. STATEMENT OF GROUNDS FOR APPEAL

14 A. GVB’s Claim that TLK’s Protest is Untimely is Wrong, and Undermines the 15 Procurement Process.

16
17 GVB claims that TLK’s protest is untimely because “TLK marketing received and was aware
18 (or should have been aware) of the content of the RFP as well as the method of procurement more
19 than fourteen (14) days prior to the submission of its Protest.” *See*, **Exhibit E** at 1. It is clear that
20 TLK’s protest centers on the selection of HIC— a fact that TLK did not learn about until it received
21 the letter of ranking on March 10, 2016. The protest was filed on March 24, 2016, within fourteen
22

23
24
25
26 ¹ GVB’s vague and uninformative protest decision is a form of decision that is disfavored. In
27 *In the Appeal of JMI Edison*, Decision, OPA-PA-13-009, 5 (November 27, 2013), the OPA
28 admonished GMH, the relevant agency, for issuing a protest decision that did not address the merits
of the protestant’s challenge. Here, the agency has addressed the merits of the protest by simply
opining “we do not agree.” Notably, Mr. Tom Fisher represented GMH in that OPA matter, and also
represents GVB in this appeal.

1 (14) days of receiving the March 10, 2016 ranking letter. GVB mention of evaluation methodology
2 obscures the actual nature of this protest. A simple reading of the protest shows that this protest is
3 not about the evaluation methodology, it is only about the selection of HIC.

4
5 TLK's protest could not have been filed any earlier than March 10, 2016, when GVB sent the
6 ranking letter to TLK. Guam Procurement Law provides that only an "aggrieved" party may file a
7 procurement protest. *See*, 5 GCA 5425(a). TLK was not aggrieved until it received information that
8 a non-responsive offeror—HIC— was ranked highest of four offerors. In the *Appeal of Guam*
9 *Community Improvement Foundation, Inc. [vs DPW]*, OPA-PA-09-005, the Public Auditor clearly
10 stated that "a losing bidder is an aggrieved bidder." TLK was not a losing bidder until GVB
11 informed TLK that HIC was the highest ranked offeror and its decision to select HIC on March 10,
12 2016. *See also Tumon Corporation v. Guam Memorial Hospital Authority*, CV 1420-01, 3, Decision
13 and Order October 22, 2001, (Superior Court of Guam). ("(Offeror is an aggrieved offeror because it
14 was not selected as the best qualified offeror.")

15
16 There is no question that TLK timely filed its protest fourteen (14) days after receiving the
17 March 10th ranking letter.

18 **B. GVB's Is Wrong In Its Assertion That HIC "has sufficient experience" And "meets**
19 **qualifications" Of The RFP.**

20 In its summary denial letter, GVB did not state any factual or other basis countering TLK's
21 position that HIC failed to meet the definitive five (5) year experience requirement. In response to
22 TLK's Sunshine Act request, GVB provided HIC's proposal, but, TLK believes there are other
23 responsive documents that have not been produced by GVB.

24
25 Moreover, GVB's response to TLK's March 24, 2016 Sunshine Act Request shows that HIC
26 misrepresented its experience by relying on an unrelated entity, "SD Pharm", to meet the 5 Year
27 experience requirement of the RFP. *See*, HIC Proposal at p. 10, attached as **Exhibit F**. HIC failed to
28 disclose in its proposal that HIC was registered as a company in Korea on August 31, 2011, which

1 means at the time of the submission of its Proposal (February 5, 2016), it had only been established
2 for 4 years and 5 months. Page 10 of HIC's Proposal sets forth the Corporate History of HIC:

3 4 Corporate History

5 **2006**

- 6 - Founded "SD Pharm" (In Incheon)
- 7 - Signed marketing services contracts with Yuhan Corporation, Jeil Pharmaceutical Co., Ltd
8 and Dachan Pharmaceutical Co., Ltd.

9 **2007**

- 10 - Signed marketing services agreement with LG Life Sciences

11 **2008**

- 12 - Signed marketing services agreement with CJ

13 **2012**

- 14 - Signed marketing services agreement and right of publicity contract with KPBP

15 **2013**

- 16 - Signed Exchange Agreement of College-Industry Cooperation with the Catholic University of Korea

17 **2015**

- 18 - Entered into an agreement as GVB's Korea PR Agency

19 The Corporate History does not satisfy the experience requirement. The reference to SD Pharm
20 in 2006 as HIC's commencement date is irrelevant as to HIC's attempt to establish a five (5) year
21 existence and/or experience. The reference to "Founded 'SD Pharm'" is also misleading and wrong.
22 HIC did not disclose what the relationship is between SD Pharm and HIC, and does not explain why
23 SD Pharm's experience should be considered in determining the qualifications of HIC.

24 HIC's failure to disclose the fact that HIC had not been in existence for at least 5 years at the
25 time its proposal was submitted, and the misleading statements made in reference to SD Pharm in its
26 proposal are separate and independent grounds for disqualifying HIC and finding that HIC was not
27 qualified. *See*, §1.1, RFP (an Offeror must have "a minimum of 5 years extensive and consistent
28 experience working with the Republic of Korea travel trade, close relationship with the Korean
government and the US Embassy....").

1 **C. GVB Has Violated The Automatic Stay Requirements Mandated by 5 GCA 5425(g).**

2 TLK’s timely protest triggered the automatic stay pmandated by 5 GCA §5425(g). 5 GCA
3 §5425(g) provides, in relevant part, that “in the event of a timely protest... the Territory shall not
4 proceed further with the solicitation of with the award of the contract prior to final resolution of such
5 protest, and any such further action is void, unless there is a written determination by the Chief
6 Procurement Officer with the written concurrent of the head of the purchasing agency and the
7 Attorney General, that the award of the contract without delay is necessary to protect the substantial
8 interests of the Territory. . . .” 5 GCA § 5425(g)(1). In previous decisions, the OPA has made it
9 clear to the agencies that the automatic stay is triggered by a timely filed protest, and remains in place
10 during the entire protest process, including any appeals to the courts of Guam. *See In the Appeal of*
11 *JMI Edison*, Decision, OPA-PA-13-009, 5 (November 27, 2013).
12

13 Here, GVB, in an effort to circumvent the §5425(g) stay, colluded with HIC to negotiate,
14 award and execute a contract **prior to informing the other offerors that a selection was even**
15 **made.**
16

17 **D. TLK Will Be Irreparably Harmed if GVB Were Allowed to Usurp the OPA’s**
18 **Authority and Circumvent The Guam Procurement Laws.**

19 Guam law is clear that if Appellant TLK is successful in its protest, TLK “shall be entitled to
20 the reasonable costs incurred in connection with the solicitation and protest, including bid preparation
21 costs, excluding attorney’s fees....” 5 GCA §5425(h). GVB and HIC’s collusive acts to effectuate a
22 secret selection, negotiation and award, was a deliberate attempt to deprive TLK of its rights under
23 the Guam Procurement law. Furthermore, the possibility of TLK to be awarded the contract is also
24 cut off, because the GVB Board can try to ratify and affirm the putative HIC’s contract, regardless of
25 the outcome of the instant appeal. 5 GCA § 5425(a)(1); (2). As more Korean tourism marketing and
26 visitor events are organized by HIC, TLK becomes less and less likely of having a meaningful
27 outcome to its appeal. Since TLK will only be able to recover the costs of its bid if the stay is not
28

1 honored and its protest appeal is sustained by the OPA, TLK will be irreparably injured. Irreparable
2 injury is defined as injury for which there is no adequate remedy at law. *Shin v. Fujita Kanko Guam,*
3 *Inc.*, CVA 07-002, 2007 WL 4348300 (Guam Dec. 6, 2007); *Reilly's Wholesale Produce v. United*
4 *States*, 73 Fed. Cl. 705, 716-17 (Fed. Cl. 2006). The Federal Claims court has held that where an
5 aggrieved offeror can only gain the costs of bid preparation in a suit for damages, and not anticipated
6 profits, such a bid protester is irreparably harmed. *See Bannum, Inc. v. United States*, 60 Fed. Cl. 718,
7 730 (Fed. Cl. 2004) *citing Essex Electro Eng'rs, Inc. v. United States*, 3 Cl.Ct. 277, 287 (1983), *aff'd*,
8 757 F.2d 247 (Fed.Cir.1985). This is the exact situation faced by TLK. An order from the OPA
9 confirming that the automatic stay is in effect and enjoining GVB from further violations of the
10 automatic stay is necessary to protect TLK's rights and to protect the integrity of the procurement
11 system.
12

13 14 **IV. RELIEF REQUESTED BY TLK**

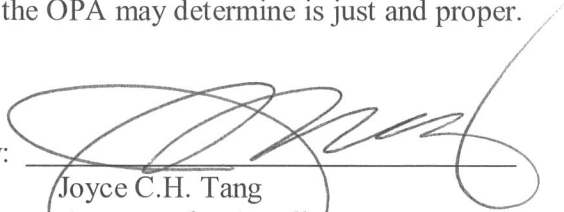
15 Appealing Offeror TLK Requests a ruling from the OPA as follows:

- 16 1. That agencies of the Government of Guam may not usurp the procurement process and
17 the protections of 5 GCA 5425(g) by negotiating and entering into a contract with a selected offeror
18 prior to informing other offerors that they have not been selected for negotiation and award;
- 19 2. For a ruling that all offerors responding to a Request for Proposal or other similar
20 procurement process be informed at the same time, and that a selection was made by an Agency;
- 21 3. That the ranking of HIC as the highest ranked offeror for GVB RFP No. 2016-006 be
22 set aside;
- 23 4. A declaration that the Contract negotiated and executed between GVB and HIC be
24 declared void *ab initio* and set aside;
- 25 5. A determination that as the first ranked responsive offeror, GVB should immediately
26 begin negotiations with TLK and award the contract to TLK;
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- 6. For an award of reasonable attorney's fees and costs of this protest and appeal; and
- 7. For such other relief that the OPA may determine is just and proper.

Dated: April 22, 2016

By: 
Joyce C.H. Tang
Attorneys for Appellant
TLK Marketing

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V. DECLARATION RE COURT ACTION

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

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

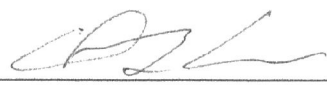
Dated: April 22, 2016

By: 
Joyce C.H. Tang
Attorneys for Appellant
TLK Marketing

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VERIFICATION

I, HENRY LEE, am the president of Appellant TLK MARKETING and I am authorized to make this verification. I have read the foregoing Notice of Appeal and, based on information and belief and to the best of my knowledge, the facts stated therein are true and correct. I declare under penalty of perjury under the laws of Guam that the foregoing is true and correct. This verification was executed on the 22nd day of April, 2016.

By: 
HENRY LEE
President
Appellant TLK Marketing