

**CABOT
MANTANONA LLP**
929 South Marine Corps Dr., Ste. 200
Tamuning, Guam 96913
Telephone: (671) 646-2001
Facsimile: (671) 646-0777

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PROCUREMENT APPEALS

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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS**

IN THE APPEAL OF)	APPEAL NO. OPA-PA-16-002
)	
1-A GuamWEBZ,)	PURCHASING AGENCY'S
)	REPLY IN SUPPORT OF
)	MOTION FOR EXPEDITIOUS
)	DISPOSITION (DISMISSAL)
Appellant.)	ON THE MERITS
_____)	

Purchasing Agency Guam Community College ("GCC") submits this Reply in support of its Motion for Expeditious Disposition (Dismissal) on the Merits ("Motion") filed on April 15, 2016. In its Motion, GCC explains that, based on the record and the law, the Hearing Officer should find there are no material facts in dispute regarding the merits of the instant Appeal; therefore expeditious disposition of this case is warranted. On April 25, Appellant 1-A GuamWEBZ's ("GuamWEBZ") filed its Opposition to the Motion ("Opposition"). Nothing in the Opposition precludes the conclusion that the GuamWEBZ's Appeal fails on its merits.

BACKGROUND SUMMARY¹

GCC issued Bid Invitation No. GCC-FB-16-006 ("IFB") for a redesign, hosting and maintenance of its website on January 25, 2016. (See generally Agency Report [cited "GCC AR"] -Tab 7.) On February 5, GCC issued the IFB's Amendment #1 to three

¹ GCC's Motion provides a more detailed background.

ORIGINAL

prospective bidders responding to inquiries it had received. (*See* GCC AR-Tab 7-0033-35.)

In response to a question regarding a preference on development tools, Amendment #1 answered: "[GCC has] no preference at this point, but both proprietary and non-proprietary options are welcome (you can submit both options in your bid proposal if you would like to)." (GCC AR-Tab 7-0034.)

Two bidders submitted proposals in response to the IFB: GuamWEBZ and WSI. (*See* GCC AR-Tab 8(rev'd)-0003.) GCC's Web Site Advisory Group ("Web Group") reviewed the bids, and "[b]ased on a thorough analysis of each company's packets, [the Web Group] deemed that both companies ha[d] met the bid specifications." (GCC AR-Tab 8(rev'd)-0004.) And, because GCC "did not specify a preference for either proprietary or open source CMS (content management system)," the Web Group concluded, "the lowest bidder deemed qualified is WSI's proprietary bid at \$23,100.00 for the first year" and, therefore, "selected WSI as the redesign/developer/host/administrator for [GCC's] web site." (*Id.*)

On February 24, GCC sent a Notice of Bid Award to WSI and sent GuamWEBZ a Notice of Non-Award that advised the contract would be awarded to WSI. (*See* GCC AR-Tab 9-0017-19.) The following day, GuamWEBZ delivered a Sunshine Act request to GCC regarding WSI's bid and the evaluation of all bids submitted for the IFB. (*See* GuamWEBZ's Appeal [cited "Appeal"] at Ex. 15.) GuamWEBZ filed a bid protest on March 10. (*See* GCC AR-Tab 4.) On March 14, GCC denied the protest as untimely. (*See* GCC AR-Tab 3.)

GuamWEBZ filed the instant appeal on March 28. (*See* Appeal (Mar. 28, 2016).) On April 12, GCC filed its Agency Report, with a Statement Answering Allegations of the Appeal. (*See* GCC AR-Tab 1.) GuamWEBZ filed its Comments on the Agency Report on April 15. (*See* Appellant's Cmts. on Agency's Report (Apr. 15, 2016).) The same day, GCC

filed the instant Motion for an expeditious dismissal of the Appeal on the merits. (*See* Purch'g Agency's Mot. for Exped. Dispos. (Dismissal) on the Merits [cited "Mot. to Dismiss"] (Apr. 15, 2016).)

The Public Auditor convened a status conference on April 18. During the status conference, it was decided that, inter alia, GCC would file under seal the entirety of WSI's bid packet — which includes pages deemed confidential by WSI — and provide GuamWEBZ with a log summarizing the content of the confidential pages. Also, the Hearing Officer advised he would issue an Order that would include a briefing schedule for the Motion. On April 22, GCC filed and served several documents in accordance with matters decided at the status conference. And pursuant to the regulations, *see* 2 GAR, Div. 4, § 12104(c)(4), GCC filed its Rebuttal to GuamWEBZ's Comments on the Agency Report. (*See* Purch'g Agency's Rebuttal to Appellant's Cmts. on Agency Report (Apr. 22, 2016).)

Although a briefing schedule had not yet been issued for Motion, GuamWEBZ filed its Opposition on April 25. (*See* Appellant's Opp'n to Purch'g Agency's Mot. to Dismiss [cited "Opp'n to Dismiss"] (Apr. 25, 2016).) Because the Opposition improperly contained arguments addressing its Rebuttal for the Agency Report, GCC filed a motion to strike the improper material on April 29. (*See* Purch'g Agency's Mot. to Strike Pages 3-6 of Appellant's Opp'n to Dismiss [cited "Mot. to Strike"] (Apr. 29, 2016).) That same day, the Hearing Officer issued the Motion's briefing schedule. (*See* Order (Apr. 29, 2016).)

On May 9, GuamWEBZ filed an opposition to GCC's motion to strike. (*See* Appellant's Opp'n to Mot. to Strike (May 9, 2016).) Contemporaneous with this Reply, GCC is filing its reply in support of its motion to strike.

ARGUMENT

According to GuamWEBZ's Appeal, the merits issues are: WSI's bid failed to qualify for the local procurement preference, GCC inadequately compared the bids, and GCC erred by not providing WSI's confidential information. (*See* Appeal at ¶¶ 19-32.) In its Motion, GCC demonstrates that there are no disputed material facts regarding the merits issues raised in GuamWEBZ's Appeal and that these undisputed facts reveal the Appeal is unavailing on its merits. (*See* Mot. to Dismiss at 4-11.)

GuamWEBZ's Opposition interjects improper material,² misconstrues the legal standard for dismissal, and dwells on matters that are either moot or irrelevant. In short, to the extent that the Opposition addresses the Appeal's merits issues, GuamWEBZ provides no reason for finding that the record does **not** warrant dismissal of the instant Appeal on its merits.³

A. Dismissal Is Warranted Because No *Material* Facts are in Dispute

GCC's Motion set forth the legal standard that governs an expeditious dismissal of the merits issues for GuamWEBZ's Appeal: "[T]here are no genuine issues of material fact concerning an issue when the facts are clear from the record and the parties do not dispute them." (Mot. to Dismiss at 4 (quoting *In re Appeal of Korando Corp.*, No. OPA-PA-15009, Dec. & Order re Appellant's Mot. for Summ. J. (Dec. 3, 2015); *In re Appeal of Korando Corp.*,

² For example, the Opposition's pages 3 through 6 contain an improper sur-rebuttal to timeliness arguments addressed in the briefs regarding the Agency Report. (*See, e.g.*, Opp'n to Dismiss at 3-4 (discussing timeliness under the heading: "GuamWEBZ's Protest Was Timely Filed"); *id.* at 5-6 (discussing timeliness under the heading: "GuamWEBZ Could Prepare for a Zombie Apocalypse; Not That It Should".) GCC has moved to strike these improper pages. (*See* Purch'g Agency's Mot. to Strike Pages 3-6 of Appellant's Opp'n to Dismiss (Apr. 29, 2016).) Because the instant Motion in no way requested dismissal on the ground of timeliness, a response to pages 3 through 6 of the Opposition is not necessary herein.

³ This Reply strives to discern and respond to the Opposition's relevant legal arguments. Matters in the Opposition not responded to herein are in no way conceded.

No. OPA-PA-15009, Dec. & Order re Purch. Agency's Mot. for Summ. J. (Dec. 3, 2015)). The United States Supreme Court has elucidated: "materiality" means that a fact "*might affect the outcome* of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis added).

Throughout its Opposition, GuamWEBZ misconstrues which of the facts are actually material to the merits issues of its Appeal. (*See, e.g.*, Opp'n to Dismiss at 1 ("Because several material facts remain hotly disputed between the parties, GCC's motion should be denied.")) As explained below, GuamWEBZ fails to establish that any disputed *material* fact precludes dismissal of its Appeal on the merits.

B. As a Matter of Law, the Local Procurement Preference Does Not Apply

In its Motion, GCC explains that the Appeal's issue regarding the local procurement preference lacks merit because, when all the bidders are on-island vendors, the local preference is inconsequential. (*See* Mot. to Dismiss at 5-6 (citing *In re Appeal of Pacific Data Systems*, No. OPA-PA-12-011, Decision at 6 (Guam Office of Pub. Accountability Sep. 5, 2012)).) GuamWEBZ retorts by positing there is a disputed material fact regarding this issue. (*See* Opp'n to Dismiss at 6-7.) This retort is unpersuasive because, as a matter of law, the local preference statute does not apply to the instant case.

As the comments to the local preference statute illustrate, the goal of the law is to encourage procurement from on-island, rather than off-island, vendors. *See* 5 GCA § 5008, cmt. ("The aim is to encourage local businesses to the maximum extent possible. However, some needs of the government must be procured from off-island, especially services, and often such businesses do not have a system of agencies. Also, while local businesses are to be encouraged, they are not to be encouraged at a too-great expense to the general

treasury. A safeguard is added to ensure that the comparison is equalized—so that what is compared is the total, delivered cost, not just the relative catalog costs between the on and off-island vendors.”).

Indeed, the local preference statute itself clearly states that the price advantage applies only when an off-island vendor is involved:

Procurement of supplies and services from off Guam may be made if no business for such supplies or services may be found on Guam or if the total cost F.O.B. job site, unloaded, of procurement from off island is no greater than eighty-five percent (85%) of the total cost F.O.B. job site, unloaded, of the same supplies or services when procured from a business licensed to do business on Guam that maintains an office or other facility on Guam and that is one of the above-designated businesses entitled to preference.

5 GCA § 5008(d) (emphasis added).

Furthermore, even GuamWEBZ's chosen authority on this issue (see Opp'n to Dismiss at 7 (quoting John T. Brown, *Procurement Lore or Procurement Law?: A Guam Procurement Process Primer*, at 103 (ver. 2.1 June 2011)) states that the local preference statute applies only when both on-island and off-island bidders are involved.

“Procurement of supplies and services from **off Guam** may be made *if* no business for such supplies or services may be found on Guam *or if* the total cost F.O.B. job site, unloaded, of the same supplies or services” obtainable from a business *on Guam* is not more than 115% of the *off-island* cost. Thus, **as between an on-island bidder and an off-island bidder**, the off-island bidder loses unless its bid is no more than 85% of the on-island bidder. Putting numbers to it, an on-island bidder with a \$100 bid price wins over an off-island bidder with a bid price of \$85.01.

John T. Brown, *Procurement Lore or Procurement Law?: A Guam Procurement Process Primer*, at 22 (ver. 2.1 June 2011) (quoting 5 GCA § 5008) (sixth emphasis added; other emphases in original).

Here, there is no dispute that neither WSI nor GuamWEBZ are off-island vendors. (See GCC AR-Tab 5-0005; GCC AR-Tab 6-0002.) Moreover, GCC undoubtedly knew that WSI and GuamWEBZ — the only bidders — were both local companies. As stated in their respective IFB bid submissions, both companies have been established on Guam for more than a decade and GCC is a client of both companies. (See GCC AR-Tab 5-0005; GCC AR-Tab 6-0002.)

In short, there is no material disputed fact regarding the local procurement preference because both WSI and GuamWEBZ unequivocally are on-island vendors. And, as a matter of law, the local preference statute does not apply in the absence of an off-island bidder's involvement. Accordingly, dismissal is warranted.

C. No Material Facts Warrant Even Suggesting that GCC's Proper Evaluation of the Bids Should Be Second-Guessed

In its Motion, GCC explains how it is improper for GuamWEBZ to suggest that the Public Auditor should second guess the bid evaluations performed by GCC's Web Group — a group comprised of IT persons. (See Mot. to Dismiss at 7-8; GCC AR-Tab 8(rev'd)-0003.) GuamWEBZ nonetheless posits that the Public Auditor's re-evaluation is necessary because the Web Group committed "obvious errors" when "evaluating GuamWEBZ's proposal." (Opp'n to Dismiss at 8.) Contrary to GuamWEB's supposition, the record establishes the undisputed material fact that the Web Group evaluated both bids using evaluation sheets that tracked the IFB's technical specifications. (Compare GCC AR-Tab 7 with GCC AR-Tab 8(rev'd).) In fact, it is undisputed that the Web Group concluded "*both [WSI's and GuamWEBZ's bids] have met the bid specifications,*" and relayed their conclusion to GCC's ultimate decision makers. (GCC AR-Tab 8(rev'd)-004 (emphasis added).) Also undisputed

is the material fact that the Web Group recommended WSI should be awarded the contract because WSI's proprietary bid met the IFB's specifications at the lowest price. (See GCC AR-Tab 8(rev'd)-003; *id.* at -004.)

Tellingly, GuamWEBZ provides no contrary authority to the general rule that the minutiae of the procurement process criteria are best left to the purchasing agency's expertise — particularly when such minutiae involve a technical evaluation of the bid submissions. (See Mot. to Dismiss at 7-8 (citing, inter alia, *TRC Env'tl. Corp. v. Office of the Pub. Auditor*, No. SP160-07, Dec. & Order on Pet. for Writ of Mandate (Guam Super. Ct. Nov. 21, 2008); *L-3 Commc'ns EOTech, Inc. v. United States*, 87 Fed. Cl. 656 (Fed. Cl. 2009).)

Furthermore, and contrary to GuamWEBZ's contention (see Opp'n to Dismiss at 8), the IFB did not require the bidders to "explain how" they would meet each and every specification. Rather, only certain specifications asked the bidders to "describe," "discuss" or "recommend" a "process," "plan" or "ability." (See GCC AR-Tab 7-025-30.)

There is no dispute that the material facts in the record reveal (1) the Web Group's evaluation sheet tracked the IFB's criteria for *both* GuamWEBZ's and WSI's bids, and (2) *both* bids met the IFB's criteria. (Compare GCC AR-Tab 7-0025-30 with GCC AR-Tab 8(rev'd)-0005-44.) And, because WSI's proprietary proposal met all the criteria at the lowest price, it cannot be disputed that GCC's Web Group properly selected WSI as the bidder to be awarded the contract. See 5 GCA § 5211(g) ("The contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bid[.]").

Accordingly, the Appeal's ground that GCC inadequately compared the bids is devoid of merit and dismissal is warranted.

D. The Issue Regarding WSI's Proprietary Information Is Moot

The Motion explained how GuamWEBZ's complaint that GCC did not provide the entirety of WSI's bid for review was unavailing. (*See* Mot. to Dismiss at 8-9). In light of the status conference discussion, the subsequent submission of WSI's entire bid under seal, and service on GuamWEBZ of a confidentiality log, this complaint is moot. Nonetheless, GuamWEBZ expends two pages of its Opposition continuing to propound patently false and wholly unsubstantiated accusations of "collusive activity" simply because GCC honored the confidentiality of WSI's proprietary material. (Opp'n to Dismiss at 9-10.) Because this issue is moot and these two pages of GuamWEBZ's Opposition are essentially gratuitous insults, no response is necessary.⁴

E. At Most, GuamWEBZ's Complaints are Minor Informalities in WSI's Bid that GCC Could Waive

GuamWEBZ provides nothing of substance to counter the law that entitles GCC to waive any non-prejudicial minor informalities in WSI's bid submission — of which there were none. Rather, GuamWEBZ baldly states that "GCC did not refute" the claims of error assigned by GuamWEBZ. (Opp'n to Dismiss at 10.) GuamWEBZ's mistaken statement completely overlooks that GCC has addressed and rebutted every material error claimed by GuamWEBZ in not only the instant Motion (*see* Mot. to Dismiss at 5-9) but also in briefs regarding the Agency Report (*see* Purch'g Agency's Statement Answering Allegations of Appeal, GCC AR-Tab 1 (Apr. 12, 2016); Purch'g Agency's Rebuttal to Comments on Statement (Apr. 22, 2016)).

⁴ Noticeably, like with pages 3 through 6 of its Opposition, the bulk of pages 9 and 10 are also an improper sur-rebuttal to GCC's Rebuttal regarding the Agency Report. (*See* Opp'n to Dismiss at 9 ("GuamWEBZ rejects GCC's false narrative in its Rebuttal").)

F. In Any Event, the Award to WSI is in the Best Interest of the Territory and Should be Ratified and Affirmed

In its Motion, GCC explained that assuming arguendo any or all of GuamWEBZ's complaints do have merit — which none of them do — the award to WSI should be “ratified and affirmed” because “doing so is in the best interests of the Territory.” (Mot. to Dismiss at 10 (quoting 5 GCA § 5452).) GuamWEBZ's Opposition provides no counter to this argument; therefore, a response is not necessary.

CONCLUSION

For the foregoing reasons and those articulated in the Motion, GCC requests that the Hearing Officer find an expeditious dismissal of the instant appeal is warranted because the record reveals that there are no material disputed facts and that, on the record's undisputed material facts, GuamWEBZ's Appeal fails on its merits.

Respectfully submitted this 13th day of May 2016.

CABOT MANTANONA LLP
Attorneys for Purchasing Agency
Guam Community College

By: 

REBECCA J. WRIGHTSON