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FILE NO OPA-PA: 16-002

**OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS**

IN THE APPEAL OF	)	APPEAL NO. OPA-PA-16-002
	)	
1-A GuamWEBZ,	)	PURCHASING AGENCY'S
	)	HEARING BRIEF
	)	
Appellant.	)	
	)	
_____	)	

Pursuant to the Scheduling Order for Hearing re Appellant's Appeal (*see* Order (May 27, 2016)), Purchasing Agency Guam Community College ("GCC") submits its Hearing Brief for the Hearing on Appeal ("Hearing") regarding the issues "which require evidence or arguments to be presented at the Hearing" (*id.*).

For the reasons below, and in light of the evidence already in the record and the evidence that will be presented at the Hearing in further support of the record, Appellant 1-A GuamWEBZ's ("GuamWEBZ") Appeal is both legally and factually lacking merit. Accordingly, GuamWEBZ's Appeal should be denied.

**GCC'S ARGUMENTS RE ISSUES FOR THE HEARING**

Based on GuamWEBZ's Appeal and the Lists of Issues submitted by the parties on June 3, 2016, the issues for resolution at the Hearing, as broadly stated, are: (1) whether GuamWEBZ's bid protest was timely, (2) whether the local procurement preference statute mandates that GuamWEBZ should have been awarded the contract, (3) whether GCC properly evaluated the bids and awarded the contract to WSI, and (4) whether GCC erred

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by not providing WSI's confidential information to GuamWEBZ. (*See* Appeal at ¶¶ 19-32 (Mar. 28, 2016)); Purch'g Agency's List of Issues (Jun. 3, 2016); Appellant's List of Issues, Witnesses and Exs. (Jun. 3, 2016).)

#### **A. Timeliness of GuamWEBZ's Bid Protest**

Guam's Procurement Code mandates that a bid protest "shall be submitted in writing within fourteen (14) days after such aggrieved person knows *or should know of the facts giving rise thereto.*" 5 GCA § 5425(a) (emphasis added); 2 GARR, Div. 4, § 9101(c)(1).

GuamWEBZ filed its bid protest ("Protest") on March 10, 2016, and there is little doubt that the lion's share of GuamWEBZ's Protest was based on facts regarding WSI's bid submission. (*See* GCC AR-Tab 4-001-03 (complaining that WSI failed to satisfy the IFB's requirements for a business license and the local procurement, and complaining that WSI wrongfully submitted two proposal prices in violation of the IFB).) All of these facts were available to GuamWEBZ twenty-four days before it filed the Protest.

The IFB's public bid opening occurred on February 15, 2016 where the bidders' names and bid prices were announced. (*See* GCC AR-Tab 8-0003.) GuamWEBZ stated in its papers that its "President Rajesh 'Rhaj' K. Sharma" was "dutifully present at the bid opening." (Opp'n to Mot. to Dismiss at 5 (Apr. 25, 2016).) Thus, on February 15, GuamWEBZ should have known that its bid was higher than WSI's. (*See* GCC AR-Tab 8-0002.) Moreover, the IFB's bid submissions were "publicly available" beginning February 15 — i.e., "at the time of bid opening." (GCC AR-Tab 7-0006.) Given that the lion's share of GuamWEBZ's Protest was grounded on facts contained in WSI's bid submission — which had been available since February 15 — the March 10 Protest was

untimely because it was filed more than fourteen days after GuamWEBZ "should [have] know[n] of the facts giving rise thereto." 5 GCA § 5425(a).

### **B. The Local Preference Statute**

When a pool of bidders includes on-island and off-island vendors, Guam's Procurement Code provides a price advantage for on-island vendors ("Local Preference Statute"). In pertinent part, the Local Preference Statute provides:

All procurement of supplies and services shall be made from among businesses licensed to do business on Guam and that maintain an office or other facility on Guam, whenever a business that is willing to be a contractor is:

....

(d) A service business actually in business, doing a substantial portion of its business on Guam, and hiring at least 95% U. S. Citizens, lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United States to work, based on their citizenship in any of the nations previously comprising the Trust Territory of the Pacific Islands.

Procurement of supplies and services from off Guam may be made if . . . the total cost . . . of procurement from off island is no greater than eighty-five percent (85%) of the total cost . . . 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; *see also* 2 GARR, Div. 4, § 1104.

As matters of both law and fact, the Local Preference Statute's price advantage does not apply to the instant Appeal.

*(1) As a Matter of Law, the Price Advantage Provided in the Local Preference Statute Does Not Apply to the Instant Appeal Because Nothing Might be Procured "From Off Guam"*

GuamWEBZ complains that it should have prevailed on the IFB because it was entitled to the price advantage provided in the Local Preference Statute because WSI had

not renewed its Guam business license by the date of the bid opening and, therefore, GuamWEBZ's bid should have been adjusted downward by 15%. (*See Appeal at ¶¶ 23-25.*)

As a matter of law, this complaint is devoid of merit.

The plain language of the Local Preference Statute unambiguously provides that the price advantage applies only when an item might be procured from an off-island vendor and that off-island bidder's price is *more* than 85% of an on-island bidder's price.

Procurement of supplies and services from off Guam may be made . . . if the total cost . . . of procurement from off island is no greater than eighty-five percent (85%) of the total cost . . . 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). Thus, the Statute mandates a two-step procedure for the price advantage to apply: (1) an item might be procured "from off Guam" and, if so, then (2) the cost of that off-island item is more than 85% of the cost of that same item on Guam.

What is more, the comments to the Local Preference Statute illustrate that 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.").



Furthermore, even the authority on which GuamWEBZ has repeatedly relied for this issue states that the Local Preference Statute's price advantage 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).

Accordingly, the Local Preference Statute unambiguously directs that the price advantage applies only where only an item might be procured "from off Guam" — i.e., from an off-island bidder.

Here, it is indisputable that nothing might be procured "from off Guam." 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 (see GCC AR-Tab 5-0005; GCC AR-Tab 6-0002), both companies have been established on Guam for more than a decade and GCC is a client of both companies. See *In re Appeal of Pacific Data Systems*, No. OPA-PA-12-011, Dec. at 6 (Guam Office of Pub. Accountability Sep. 5, 2012) (determining that submission of local procurement preference applications is

inconsequential when all the bidders are “local companies known to [the purchasing agency]” because no bidder suffers harm or prejudice”).

Therefore, as a matter of law, the price advantage of the Local Preference Statute applies only when an item might be procured “from off Guam.” And, applying that law to instant Appeal, the indisputable facts establish that the price advantage would not apply because no item might be procured “from off Guam.” 5 GCA § 5008.

Moreover, the instant procurement “[will] be made from [a] business[] licensed to do business on Guam and that maintain[s] an office or other facility on Guam,” 5 GCA § 5008, because — as required by the IFB (*see* GCC AR-Tab 7-0003) — WSI presented its Guam business license expiring June 30, 2016 before GCC awarded the contract (*see id.* at Tab 9-0004 & 0021) and is a long-established company on Guam (*see id.* at Tab 6-0002).

*(2) As a Matter of Indisputable Fact, Even If the Local Preference Statute Applied to the Instant Appeal, the Price Advantage Would Not Have Mandated that GuamWEBZ Should Be Awarded the IFB's Contract*

Assuming arguendo that the Local Preference Statute applies to the instant Appeal — which, as explained above, it does not — the indisputable facts establish that, contrary to GuamWEBZ's insistence, the bidder's offered prices do not mandate application of the statute's price advantage.

Importantly, the contract related to this IFB is for a maximum of three years, *with GCC's option to annually renew for two additional one-year terms — which GCC could decline to exercise for any reason whatsoever.* (*See* GCC AR-Tab 7-0025; GCC AR-Tab 9-0001.) Furthermore, as the Public Auditor is undoubtedly aware, the government's procurement contracts are annually subject to the availability of funds. *See generally* 5 GCA § 22401. And, GCC determined that the contract must be awarded to WSI based on the bidders'

prices for the first year — i.e., the only contract term that GCC could lawfully execute at the time of the IFB. (See GCC AR-Tab 8(rev'd)-0003-04.) Furthermore, even under the best-case scenario that funds remain available, the only contract amount that could even be guaranteed would be based on the bidder's prices for the first three years because of GCC's unfettered unilateral right to decline renewal.

Examining the indisputable facts establishes that *even if* the price advantage applied, GuamWEBZ's price would not have rendered it the prevailing bidder for the first year of the contract, or the two years thereafter.

	<b>Development Tool</b>	<b>1st Year</b>	<b>2d &amp; 3d Years</b>	<b>Total 3-Year Contract</b>
<b>WSI</b>	Proprietary	\$23,100	\$16,200/year	\$55,500
<b>WSI</b>	Drupal	\$26,500	\$18,000/year	\$62,500
<b>GuamWEBZ</b>	Drupal	\$31,306	\$17,076/year	\$65,458

	<b>Development Tool</b>	<b>1-Year Contract</b>	<b>WSI's % of GuamWEBZ</b>	<b>Decrease GuamWEBZ 15%</b>
<b>WSI</b>	Proprietary	\$23,100	73.79%	
<b>WSI</b>	Drupal	\$26,500	84.65%	
<b>GuamWEBZ</b>	Drupal	\$31,306		\$26,610.10

	<b>Development Tool</b>	<b>3-Year Contract</b>	<b>WSI's % of GuamWEBZ</b>	<b>Decrease GuamWEBZ 15%</b>
<b>WSI</b>	Proprietary	\$55,500	84.79%	
<b>WSI</b>	Drupal	\$62,500	95.48%	
<b>GuamWEBZ</b>	Drupal	\$65,458		\$55,639.30

Thus, for both a one-year and a three-year contract, WSI's proprietary bid is not more than 85% of GuamWEBZ's bid. And, even adjusting GuamWEBZ's bid downward by 15% — as it insists should be done — GuamWEBZ's price for a one-year and a three-year contract is, respectively, \$3,510.10 and \$139.30 higher than WSI's.

Accordingly, even if the Local Preference Statute's price advantage applied to the instant Appeal — which it does not — the indisputable facts demonstrate that WSI's proprietary bid is “no greater than eighty-five percent (85%)” of GuamWEBZ's bid. 5 GCA § 5008.<sup>1</sup>

*(3) A Guam Business License Is a Matter of Responsibility, Not Responsiveness; and Matters of Responsibility Are Not Determined Solely by the Bid Submissions*

According to GuamWEBZ, the Hearing Office should answer the question of whether possession of a Guam business license is a matter of “responsibility or responsiveness pursuant to the terms and requirements of the IFB.” (Appellant's List of Issues at No. 5.) The Public Auditor, however, has already answered this question: a business license is a matter of responsibility.

In *Appeal of Jones & Guerrero Co., Inc. dba J&G Const.*, No. OPA-PA-07-005, Decision (Guam Office of Pub. Accountability Dec. 12, 2008), the Public Auditor addressed, as matter of “first impression,” the issue of “responsibility versus responsiveness.” *Id.* at 5. In this thoughtful and well-reasoned decision that extensively examined Guam law and various other authorities, the Public Auditor decided, in pertinent part:

In essence, responsiveness goes to whether a potential contractor promises to perform the contract and is determined at bid opening from the information provide in the bid documents alone. However, responsibility goes to whether a potential contractor is able to perform and is determined before award from information accessed prior to award.

*Id.* at 7.

Appropriate subject matter for responsiveness decisions pertains to whether or not the bidder J&G, has promised to do precisely what GMHA has requested. Responsiveness is a procurement law area in which contracting officers are accorded very limited discretion. In essence the responsiveness

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<sup>1</sup> It is noteworthy that *if* GCC choses to exercise its unilateral right of renewal and *if* funds remain available, WSI's five-year contract will be nearly \$12,000 less than GuamWEBZ's.

question is simply whether the bidder J&G promised to perform the contract. Responsiveness goes to matters of substance evident from the bid document such as conformance to the contract conditions. Such conformity must be apparent at bid opening and thus is properly determined at that time. In order to implement the competitive procurement process and avoid prejudicing other bidders all prospective contractors must be bidding to perform the same identical contract. 2 G.A.R. DIV 4 Section 3109 [m].

Responsibility subject matter concerns whether the bidder can or will perform as promised and thus, as indicated above, is properly determined before award. 2 G.A.R. DIV 4 Section 3116 [b][2]. Standards of Responsibility describe in significant detail the appropriate subject matter to be considered in responsibility determination. Factors to be considered are whether a prospective contractor has the following:

....

“iv. qualified to legally contract with the territory;”

*Id.* at 9 (quoting 2 GARR, Div. 4, § 3116(b)(2)(A); citations omitted).

*Subject matter dealing with bidder responsibility cannot be metamorphosized into an issue of responsiveness simply by inserting a provision in the IFB requiring rejection of bid that do not comply. The General Services Administration Board of Contract Appeals held in Employers Sec. Co., GSBICA 6917,85-1 BCA 17, 885 that the requirement that a bidder posses an operating license properly goes to an issue of responsibility, despite language in the solicitation stating that it affects responsiveness.*

*Id.* at 12 (emphasis added).

Accordingly, as the Public Auditor has already decided, possession of a business license is a matter of responsibility to be determined prior to the award,<sup>2</sup> and the inclusion of a business license requirement in an IFB cannot convert the matter into one of responsiveness.

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<sup>2</sup> Notably, the IFB clearly stated that the prevailing bidder must provide a “[c]opy of current business license expiring June 30th, 2016 (upon issuance of the award).” (GCC AR-Tab 7-0003 (emphasis added).)

### **C. GCC's Evaluation of the Bids and Award of the Contract**

Where, as here, the solicitation is an IFB, the purchasing agency's evaluation of the bidder's proposals and award of the contract is governed by 5 GCA § 5211 and 2 GARR, Div. 4, § 3109(n).

Evaluation of the proposals is, essentially, a ministerial procedure. *See Appeal of J&G Const.*, No. OPA-PA-07-005, Dec. at 9 ("Responsiveness is a procurement law area in which contracting officers are accorded very limited discretion.") As mandated by 5 GCA § 5211:

Bid Acceptance and Bid Evaluation. Bids shall be unconditionally accepted without alteration or correction, except as authorized in this Chapter. *Bids shall be evaluated based on the requirements set forth in the Invitation for Bids . . . .* Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable . . . . The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids.

5 GCA § 5211(e) (emphasis added); *see also* 2 GARR, Div. 4, § 3109(n).

Here, the record clearly shows that (1) the evaluation sheet used by GCC's Web Group tracked the IFB's criteria for *both* GuamWEBZ's and WSI's proposals (*compare* GCC AR-Tab 7-0025-30 *with* GCC AR-Tab 8-0005-44), and (2) the Web Group found that *both* proposals met the IFB's criteria (*see* GCC AR-Tab 8-0004 ("we deemed that both companies have met the bid specifications")). Thus, there is no question that the Web Group properly evaluated the bids under the governing law.

Where, as here, more than one proposal meets the IFB's criteria, the law mandates that the agency evaluate the prices offered by the bidders to determine which bidder met the IFB's criteria at the lowest price. And like the evaluation of the IFB's criteria, this

procedure is essentially ministerial — i.e., the agency cannot take into account any difference in the quality of the items offered.

This mandated price evaluation is set forth in 2 GARR, Div. 4, § 3109(n):

(4) Determination of Lowest Bidder. Following determination of product acceptability as set forth in Subsection 3109(m)(3) [sic] of this Section, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the territory in accordance with the evaluation criteria set forth in the Invitation for Bids. Only objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. . . .

(5) Restrictions. Nothing in this Section shall be deemed to permit contract award to a bidder submitting a higher quality item than that designated in the Invitation for Bids if such bidder is not also the lowest bidder as determined in Subsection 3109(m)(4) [sic] of this Section. Further, this Section does not permit negotiations with any bidder except as authorized on Section 2108 of these Regulations with regard to a construction project.

2 GARR, Div. 4, § 3109(n).

Here, the record unequivocally shows that GCC's Web Group, in accordance with the governing law, properly selected WSI as the bidder to be awarded the contract because WSI's proprietary proposal met all the criteria at the lowest price. (*See* GCC AR-Tab 8-0004 ("the lowest bidder deemed qualified in WSI's proprietary bid price at \$23,100.00 for the first year").) Thus, GCC properly selected WSI as the bidder to be awarded the contract.

Regarding the contract award, 5 GCA § 5211(g) mandates: "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 Bids." Here, the record clearly shows that, on February 23, GCC informed WSI that it would award WSI the contract "upon receipt" of a copy of WSI's "current business license . . . (expiring June 30, 2016)" (GCC AR-Tab 9-0019) — which, as discussed above, is a matter of

responsibility. The record also clearly shows that, after WSI presented its renewed business license on March 11, the contract was awarded on March 14 when GCC's President signed the contract. (*See* GCC AR-Tab 9-0004 & 0021.) Thus, there is no question that GCC awarded the contract to WSI in accordance with the governing law.

Accordingly, the record undoubtedly shows — and the evidence presented at the Hearing will further support — that GCC's evaluation of the bidder's proposal and award of the contract to WSI both comported with the mandates directed by the governing law.

Based on its List of Issues, GuamWEBZ is requesting that Hearing Officer decide whether WSI timely submitted its bid, and whether GuamWEBZ was "denied" the bid award because a memo to GCC's President stated that "WSI is deemed the lowest, most responsive and responsible vendor." (Appellant's List of Issues at Nos. 2 & 9.) The former question is already answered in the affirmative by the record. (*See* GCC AR-Tab 8(rev'd)-0001 (Bid Abstract showing the WSI's bid was at the bid opening, which was also the deadline for bid submissions); *see also id.* at 0046-47<sup>3</sup> (cover pages from the two bids showing that, on the day of the bid opening, WSI's bid was submitted at 8:56 a.m. and GuamWEBZ's bid was submitted at 9:30 a.m.).) The record also answers the latter question. As discussed above — and in accordance with the governing law — GCC awarded the contract to WSI because it the lowest, responsive and responsible bidder.

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<sup>3</sup> On June 1, 2016, GCC supplemented its Agency Report with these pages as further documentation that both bids were timely submitted because GuamWEBZ questioned the Bid Abstract — which, as the Hearing Officer undoubtedly knows, is commonly done when a question arises or documents are inadvertently omitted. *See, e.g., Appeal of Triple J Motors*, No. OPA-PA-15-015; *Appeal of Korando Corp.*, OPA-PA-15-009.



#### **D. WSI's Proprietary Confidential Information**

Although GuamWEBZ was provided with both a detailed confidentiality log of the pages withheld WSI's proposal and the remaining portion of WSI's bid packet, GuamWEBZ indicates that it plans to pursue the issue of GCC honoring WSI's designation that certain pages of its proposal contained confidential proprietary information when, after GCC advised that intended to award the contract to WSI, GuamWEBZ sent a Sunshine Act request for review of WSI's proposal.<sup>4</sup> (See Appellant's List of Issues at Nos. 7 & 8.<sup>5</sup>) As a matter of both law and fact this issue is groundless.

The record distinctly shows that GuamWEBZ's Sunshine Act request asked GCC to "provide a copy of WSI's response (*submitted proposal*), for the said bid," *not* the entire bid packet. (GCC's Hrg. Ex. J (emphasis added); GCC-PR APPEAL-0648.) And because WSI had marked every page of its proposal "confidential," GCC confirmed with WSI the pages that were not confidential and provided those pages in response to GuamWEBZ's Sunshine Act request. (See GCC's Hrg. Ex. G; GCC-PR APPEAL-0647.) Therefore, in accordance with 2 GARR, Div. 4, § 3109(1)(3), GCC examined WSI's proposal "to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data."

GuamWEBZ's question of whether its "Protest or Appeal was prejudiced" is also groundless. At the outset, GuamWEBZ never claimed that its "Protest or Appeal was prejudiced" until now. (See, e.g., GCC-AR-Tab 4-0001-05 (Bid Protest); Notice of Appeal at ¶¶ 19-32 (Mar. 28, 2016).) And most notably, before lodging its Protest, GuamWEBZ

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<sup>4</sup> Notably, Guam's procurement law does not provide GuamWEBZ with a remedy for this issue. See 5 GCA §§ 5450-5452.

<sup>5</sup> GCC considers the issue to be moot, but included it on GCC's List of Issues because GuamWEBZ's counsel informed that he intended to pursue it.

limited its Sunshine Act request to WSI's "submitted proposal" (GCC's Hrg. Ex. J) — not the entire bid packet. In response, GCC provided exactly what GuamWEBZ requested: WSI's "submitted proposal," save for the pages deemed confidential by WSI.<sup>6</sup> Moreover, GuamWEBZ has had unfettered access to all the non-confidential pages of WSI's bid packet *since early April* when GCC submitted the Procurement Record and its Agency Report. (*See* GCC-PR APPEAL-0053-77; GCC AR-Tab 6.) And, on April 22, GCC provided GuamWEBZ with a detailed confidentiality log of the undisclosed pages that contain WSI's proprietary information. (*See* Purh'g Agency's Under Seal Subm'n at Ex. C (Apr. 22, 2016).) Thus, it is difficult to perceive how any prejudice has occurred. Indeed, GuamWEBZ's claim of prejudice appears to be based solely on a lack of access to its competitor's proprietary information — i.e., information that is protected by the procurement law. In short, there are no grounds to find that "GuamWEBZ's Protest or Appeal was prejudiced."

#### **RESERVED RULINGS BY THE PUBLIC AUDITOR**

In its Decision on GCC's Motion to Dismiss, the Public Auditor reserved ruling on GCC's arguments regarding whether any procedural deficiencies in WSI's bid were minor informalities that should be waived and whether, in any event, the contract should be ratified and affirmed in the best interest of the Territory. (*See* Dec. & Order at 3-4 (May 27, 2016).) If necessary to do so, GCC respectfully requests that the Public Auditor rule on these arguments in its decision after the hearing.

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<sup>6</sup> In fact, GCC generously provided more than is required by the Sunshine Act because GCC answered GuamWEBZ's questions. (*See* GCC-PR APPEAL 0079.) The Sunshine Act requires an agency to produce public records, not answer questions. *See* 5 GCA § 10103.

**CONCLUSION**

For the foregoing reasons, GCC respectfully requests the Hearing Officer find and the Public Auditor conclude that, as a matter of both law and fact, GuamWEBZ's Appeal should be denied.

Respectfully submitted this 6th day of June 2016.

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By:   
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