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PROCUREMENT APPEALS

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**OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS**

IN THE APPEAL OF	)	<b>APPEAL NO. OPA-PA-16-002</b>
	)	
1-A GuamWEBZ,	)	<b>PURCHASING AGENCY'S</b>
	)	<b>REMEDIES BRIEF</b>
	)	
Appellant.	)	
	)	
_____	)	

Pursuant to the Hearing Officer's instruction at the Hearing on Appeal ("Hearing"), Purchasing Agency Guam Community College ("GCC") submits its Remedies Brief.

**APPROPRIATE REMEDIES**

Guam's procurement laws provide a remedy for Appellant 1-A GuamWEBZ's ("GuamWEBZ") if— *and only if*— GuamWEBZ met its burden of establishing that the instant procurement "is in violation of law." 5 GCA § 5451; 5 GCA § 5452; 2 GAR, Div. 4, § 9105; 2 GAR, Div. 4, § 9106. In light of the lack of evidence to support its material complaints, GuamWEBZ's Appeal should be denied outright. If, however, the Public Auditor finds some merit in any of GuamWEBZ's material complaints, the alternative remedies articulated below are appropriate.

**A. GuamWEBZ's Appeal Should Be Denied Because It Failed to Show that the Solicitation or Award Was "In Violation of Law"**

GuamWEBZ failed to meet its burden of showing that the instant solicitation and/or award "is in violation of law." 5 GCA § 5451; 5 GCA § 5452; 2 GAR, Div. 4, § 9105; 2 GAR, Div. 4, § 9106. Where, as here, the solicitation is an IFB, the purchasing agency's evaluation of the bidders' proposals and award of the contract is governed by 5 GCA § 5211 and 2 GARR, Div. 4, § 3109(n). Neither the evidence already in the record nor the evidence presented at the Hearing established a violation of 5 GCA § 5211 and 2 GARR, Div. 4, § 3109(n). GCC properly evaluated the bidders' proposals. And because both bidders promised to perform all the specifications in the IFB's scope of work, GCC properly awarded the contract to the lowest bidder — i.e., WSI.<sup>1</sup>

Accordingly, GuamWEBZ failed to meet its burden because it failed to show that the instant solicitation and/or award "is in violation of law." 5 GCA § 5451; 5 GCA § 5452; 2 GAR, Div. 4, § 9105; 2 GAR, Div. 4, § 9106. GuamWEBZ's Appeal should therefore be denied.

**B. In the Event of a Finding that the Solicitation and/or Award Was "In Violation of Law," GCC's Contract with WSI Should Be Ratified and Affirmed**

After denying GuamWEBZ's bid protest as untimely, GCC awarded the contract to WSI. Therefore, if the Public Auditor determines that the solicitation and/or award "is in

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<sup>1</sup> Since the Local Preference Statute's price advantage is not a "remedy" and, therefore, arguments regarding this statute are not appropriate for the instant brief, GCC will not reiterate its position on the inapplicability of 5 GCA § 5008, which has been fully briefed and argued before this tribunal (*see* Purch'g Agency's Hrg. Brief (Jun. 6, 2016); Purch'g Agency's Reply re Mot. to Dismiss (May 13, 2016); Purch'g Agency's Mot. to Dismiss (Apr. 15, 2016); Purch'g Agency's Statement in Agency Rpt. (Apr. 12, 2016); *see also* closing argument at Hearing (Jul. 7, 2016) and oral argument on Motion to Dismiss (May 20, 2016)). Suffice it to say, GCC steadfastly maintains that the Local Preference Statute's price advantage does not apply to the instant case and that, even if it did, GuamWEBZ's bid prices not fall within the range where the contract should have been awarded to GuamWEBZ.

violation of law," GuamWEBZ's remedy is governed by 5 GCA § 5452. In pertinent part, that statute provides:

(a) If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) if the person awarded the contract has not acted fraudulently or in bad faith:

(A) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Territory; or

(B) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

5 GCA § 5452(a)(1).<sup>2</sup>

Importantly, 5 GCA § 5452's corresponding regulation provides that "[i]f the violation can be waived without prejudice to the territory or other bidders or offerors, the preferred action is to ratify and affirm the contract." 2 GAR, Div. 4, § 9106(c)(1).

Here, even if a "violation of law" occurred in the solicitation and/or award, GCC's contract with WSI should be ratified and affirmed. First of all, any violation of law should be waived because it would be minor and would not any inflict prejudice. *See* 2 GAR, Div. 4, § 9106(c)(1). As shown by the evidence already in the record and the evidence presented at the Hearing, both bidders' proposals were properly reviewed and evaluated, and both bidders' proposals were deemed responsive. Thus, waiving any violation that may have

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<sup>2</sup> Subsection (a)(2) of 5 GCA § 5452 does not apply here because there are no grounds for bad faith or fraud, which requires "specific findings," *see* 2 GAR, Div. 4, § 9104(a)(3) ("Bad faith or fraud shall not be assumed. Specific findings showing reckless disregard of clearly applicable laws or regulations must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or regulations.").

occurred in the evaluation or the award will not prejudice either bidder. And, it is axiomatic that GCC will not be prejudiced.

Second, ratifying and affirming the contract is most certainly in the best interests of GCC, and therefore the Territory. As the Public Auditor undoubtedly knows, substantial time and effort is expended in preparing and conducting a solicitation. And, at this point, significant resources have been expended on this particular solicitation. Thus, ratifying and affirming the contract based on lowest price — i.e., the price offered by WSI for its proprietary tool — is unequivocally in the best interests of the Territory.

Accordingly, even if a violation of law occurred, the Public Auditor should ratify and affirm the contract awarded to WSI.

**C. In the Event of a Finding that GuamWEBZ's Protest Was Timely, the Contract Would Be Void But the Appeal Should Still Be Denied Because There Was No Violation of Law**

Should the Public Auditor determine that GCC misguidedly denied GuamWEBZ's protest as untimely, the Regulations direct that the contract awarded to WSI would be void. *See* 2 GAR, Div. 4, § 9101(e). In such an event, any remedy available to GuamWEBZ is governed by 5 GCA § 5451. That statute provides:

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (a) cancelled; or
- (b) revised to comply with the law.

5 GCA § 5451.

Even if GuamWEBZ's protest was timely lodged, that timely protest alone is not sufficient to undo what would then be the "proposed award" to WSI. 5 GCA § 5451. Rather, it must be determined that the solicitation or proposed contract award to WSI "is in violation of law." *Id.* And if the violation of law is a minor informality, such a violation should be waived. *See* 2 GAR, Div. 4, § 3109(m)(4)(B).

Here, based on the evidence already in the record and the evidence presented at the Hearing, there was no violation of law that warrants undoing a proposed award to WSI. Accordingly, even if GuamWEBZ's protest was timely, the Appeal should be denied.

**D. In the Event of a Finding that GuamWEBZ's Protest Was Timely and that the Solicitation and/or Award Was "In Violation of Law," the Solicitation Should Be Revised to Rectify Any Violation**

As noted above, should the Public Auditor determine that GCC misguidedly denied GuamWEBZ's protest as untimely, any remedy available to GuamWEBZ is governed by 5 GCA § 5451. If the solicitation or the proposed contract award were in violation of law — which neither were — the remedy options would be to (1) cancel the instant procurement, or (2) revise the instant procurement to rectify any violation.<sup>3</sup>

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<sup>3</sup> Contrary to GuamWEBZ's apparent belief (*see, e.g.*, Appellant's Hrg. Brief (Jun. 6, 2016) at 7), the Procurement Code and Regulations do not provide the remedy of an award. *Accord Square One Armoring Serv., Inc. v. United States*, 123 Fed. Cl. 309, 325 (2015) ("[N]otwithstanding plaintiff's contentions to the contrary, the court is without authority to direct the award to Square One. Thus, even if the court were to find improprieties in GSA's original evaluation and award decision, the court could only enjoin the award to O'Gara, and either order GSA to re-evaluate the original proposals or re-procure the task order[.]"); *accord id.* at n.13 ("It is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties." *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 869 (D.C. Cir. 1970)); *see C.A.C.I., Inc. - Fed. v. United States*, 719 F.2d 1567, 1575 (Fed. Cir. 1983) ("[A] disappointed bidder has 'no right ... to have the contract awarded to it in the event the ... court finds illegality in the award of the contract....'" (quoting *Scanwell*, 424 F.2d at 864)); *B & B*, 2014 WL 3587275, at \*7 n.18 ("[I]t is well settled that in the event a court determines that the procurement was illegally conducted, the protestor has no right to be awarded the contract."); *CCL Serv. Corp. v. United States*, 43 Fed. Cl. 680, 688 (1999) (stating that award of a contract is an "improper exercise[ ] of the court's authority") (parentheticals as in original).

If the Public Auditor determines that GuamWEBZ's protest was timely and that a violation of law occurred in this procurement, the appropriate remedy would be for GCC to re-evaluate the bidders' proposals to rectify any violation of law and, provided funds are available,<sup>4</sup> award the contract based on this re-evaluation. Alternatively, and subject to the availability of funds, GCC could re-issue the IFB with rectifications of any violations of law.

**E. In No Event Is GuamWEBZ Entitled to Attorney's Fees; Nor Should It Be Granted Costs**

In its Notice of Appeal, GuamWEBZ requested attorney's fees. The law is very clear that attorney's fees are not available to GuamWEBZ. *See Data Mgmt. Res., LLC v. Office of Pub. Accountability*, 2013 Guam 27, ¶¶ 52-60 (discussing 5 GCA § 5425(h)). Moreover, because the material grounds of both GuamWEBZ's bid protest and Appeal lack merit, the law does not provide for granting it costs either. *See id.*

**CONCLUSION**

GCC respectfully requests that GuamWEBZ's Appeal be denied in its entirety. Or, if the Appeal is not denied outright, the appropriate remedies are as discussed above.

Respectfully submitted this 11th day of July 2016.

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By: 

**REBECCA J. WRIGHTSON**

<sup>4</sup> A pre-award remedy is unlike the aforementioned post-award remedy where GCC is contractually bound to perform for, at the very least, the first fiscal year.