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Office of the Attorney General
Alicia G. Limtiaco
Attorney General of Guam
Civil Division
287 West O'Brien Drive
Hagåtña, Guam 96910 • USA
(671) 475-3324 • (671) 472-2493 (Fax)
babrams@guamattorneygeneral.com

Attorneys for the Department of Public Works

BEFORE THE PUBLIC AUDITOR
Procurement Appeal

IN THE APPEAL OF:)	DOCKET NO. OPA-PA 09-005
)	
GUAM COMMUNITY IMPROVEMENT)	
FOUNDATION, INC.)	THE GOVERNMENT'S REPLY TO
)	RESPONSE TO MOTION
Appellant.)	FOR A PROTECTIVE ORDER
)	
)	
)	

In its Response to Motion for Protective Order filed on September 23, 2009, Guam Community Improvement Foundation, Inc. ("GCIF"), asks the Public Auditor to fashion an arbitrary demarcation as to when an award occurs in a procurement based on competitive sealed proposals. At the time GCIF filed its protest, there was no final lease agreement or lease back agreement since the amounts of the rental payments under the lease back would depend on the financing actually obtained and on the Government's acceptance or approval of the financing and the lease back payments. In short, there was not an award when the GCIF protest was filed, and the regulations, as pointed out in the Motion for Protective Order, expressly preclude disclosure prior to an award.

Under GCIF's theory, a proposer or offeror could protest during on-going negotiations and obtain copies of the proposals at this time if the proposer could show sufficient development of the

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1 negotiations to warrant a conclusion that under the regulations a contract had been awarded. GCIF's
2 analysis disregards the necessity of an actual award, an actual contract, and appears to posit a theory of
3 limits where an award is deemed to have occurred, for disclosure purposes, between the stages of
4 negotiations and the actual award. For example, if negotiations are five days from being completed or
5 the contract finally approved do they constitute an award or three days, or one day? If all the terms but
6 price have been finally agreed on, is there an award? There are no regulations under Guam law which
7 justify this approach, and GCIF has not provided any authority to support its theory.

8 It is clear that in this case, there was no award. It is undisputed that at the time GCIF filed its
9 protest, there was *no* binding contract between the Government and IBC because, and, the price had not
10 been finally set or approved and the leases had not been signed. The law is clear: there is no legal
11 basis for disclosing IBC's proposal prior to award without IBC's consent.

12 GCIF's use of *Michaelis, Montanari & Johnson v. Superior Court*, 136 P.3d 194, 44
13 Cal.Rptr.3d 663 (Cal. 2006), is too broad, as the case, for purposes of this appeal, merely demonstrates
14 the policy reasons for not disclosing proposals until a final agreement is reached and, in doing so,
15 marshals federal and state authority precluding disclosure until an award has been made. GCIF argues
16 that the California Supreme Court in *Michaelis*, , a case decided in the absence of a procurement law or
17 regulation specifically precluding, as does Guam's, the disclosure of proposals until an award had been
18 made - "concluded that disclosure of competing proposals for the city's lease project properly could
19 await conclusion of Lawa's [the City of Los Angeles Department of Airports, also known as Los
20 Angeles World Airports] negotiation process." GCIF Response at 2. GCIF then states that "[a]ll of the
21 cases and arguments they cited reach the same conclusion." *Ibid.* GCIF failed to note that the court
22 found support for its conclusion in the Freedom of Information Act and state authorities which it stated
23 as follows:

24 **3. Federal and state authorities-** Federal statutes and cases implementing or
25 interpreting the federal Freedom of Information Act (FOIA) are instructive because the

1 California Act is modeled on the FOIA. (See, e.g., *Times Mirror Co. v. Superior Court*, *supra*,
2 53 Cal.3d at p. 1338, 283 Cal.Rptr. 893, 813 P.2d 240.) With regard to federal procurement
3 contracts, federal law prohibits disclosure of bid or proposal information prior to the actual
4 award of the contract. (See 41 U.S.C. §§ 253b(f)(4) [debriefing unsuccessful bidders shall not
5 include content, ranking, or evaluation of other proposals], 253b(m) [prohibition on release of
6 contractor proposals unless incorporated in contract with proposer]; 423(a) [prohibition on
7 release of contractor bid or proposal information before award]; 5 U.S.C. § 552(b)(3)
8 [exempting from FOIA disclosure any material exempted from disclosure by statute]; 48 C.F.R.
9 § 424.203 (2005) [regulation exempting competitive proposals from FOIA]; *Shermco*
10 *Industries v. Secretary of Air Force* (5th Cir.1980) 613 F.2d 1314, 1317-1318 [disclosure of bid
11 competitor's cost proposals exempt under FOIA until final award of contract]; *Morrison-*
12 *Knudsen Co. v. Dept. of the Army of U.S.* (D.D.C.1984) 595 F.Supp. 352, 355-356, *affd.*
13 (D.C.Cir.1985) 762 F.2d 138 [agency could delay release to prospective bidder of documents
14 on which Army would rely in preparing its own sealed bid to perform work in-house].)

15
16 Petitioner observes, however, that these federal cases and statutes primarily pertain to
17 public agency procurement of goods and services on a “lowest competitive bid” basis, and not
18 to competitive proposals for lease contracts seeking the *highest* competitive bid. Nonetheless,
19 we think the *governing principle* of preserving the confidentiality of competitive proposals for
20 government contracts seems equally applicable to both categories of contracts.

21 In addition, as the city's opening brief sets forth at length, the great majority of
22 states, by statute or case law, exempt from public disclosure any proposals
23 submitted to public agencies during lease or contract negotiations. Similarly, the
24 American Bar Association's 2000 Model Procurement Code for State and Local
25 Governments provides that “Proposals shall be opened so as to avoid disclosure
of contents to competing offerors during the process of negotiation...” (§ 3-
203(4).) It also provides that the “ Register of Proposals shall be ... open for
public inspection after contract award.” (*Ibid.*) Although California has not
adopted the American Bar Association's Model Procurement Code, and as

1 petitioner observes, technically procurement is not involved here, the provisions
2 of the Model Code are worthy of consideration.

3 136 P.3d at 200-201, 44 Cal.Rptr.3d at 670-71.

4 The question in *Michaelis* was whether the proposals were subject to disclosure prior to
5 submission to the Board. Under California procedure, all proposals would be disclosed once the
6 LAWA had concluded its negotiations and submitted the proposals to the Board of Airport
7 Commissioners for approval. *See* 136 P.3d at 195-95, 44 Cal.Rptr.3d at 665. The public would have
8 five days prior to Board approval in which to review the proposals and the proposed lease. *Ibid.* After
9 Board approval the lease would be sent to the Los Angeles City Council for approval. *Ibid.* The
10 procedure in Guam *does not* authorize public review prior to final approval and execution of a contract
11 awarded pursuant to a competitive negotiated sealed procurement. The reasons for and the almost
12 universal adoption of this policy by statute or regulation are discussed by *Michaelis* court, and the
13 relevance of this case lies in that discussion.

14 Aside from discussing the federal and state authorities, including the ABA Model Procurement
15 Code, after which Guam's Procurement law was patterned, which prevent disclosure prior to award,
16 and the policy against disclosing proposals during a negotiation process, *Michaelis does not* stand for
17 the proposition that there is a bifurcation in Guam's law that somehow allows disclosure prior to the
18 final approval and execution of the contract by the Governor. This had not occurred at the time GCIF
19 filed its protest.

20 GCIF's argument that non-disclosure would preclude protests or appeals simply ignores the fact
21 that the unsuccessful protesters would be notified of the award and would be in a position to protest the
22 award. In the case of competitive sealed bids, of course, the bids are publicly opened on the date set for
23 the opening of bids. In a negotiated competitive sealed procurement, however, a protest filed against
24 the selection of one proposer as the best qualified proposer would have to be based on information other
25 than the proposal itself, with the protest against the award having to await the notice of award and the

1 concomitant disclosure of the proposal.

2 As a final observation, it appears that GCIF is arguing that all the proposals should be
3 disclosed. While the Government believes that none of the proposals should be disclosed at this time,
4 the argument posited by GCIF suggests that if any proposal is to be disclosed then all proposals should
5 be disclosed.

6 Dated this 25th day of September, 2009.

7 OFFICE OF THE ATTORNEY GENERAL
8 **Alicia G. Limtiaco, Attorney General**

9
10 By:



BENJAMIN M. ABRAMS
Assistant Attorney General