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IN THE OFFICE OF THE PUBLIC AUDITOR

In the Appeal of
1-A GuamWEBZ,

Appellant

DOCKET NO. OPA-PA -16-002

APPELLANT'S HEARING BRIEF

Pursuant to the Hearing Officer's May 27, 2016 Order regarding the matter above, Appellant 1-A GuamWEBZ ("GuamWEBZ") submits the following Hearing Brief. For the reasons offered herein, the website consulting contract awarded by Purchasing Agency Guam Community College ("GCC") to WSI should be cancelled and the bid awarded instead to GuamWEBZ.

1. GuamWEBZ Timely Filed Its Bid Protest of GCC-FB-16-006 ("IFB")

A "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). Here, almost immediately after receiving notice WSI was awarded the bid, GuamWEBZ sent GCC a comprehensive Freedom of Information Act ("FOIA") request so that GuamWEBZ could review the procurement record.

GuamWEBZ had no way of knowing of the many procurement violations presented

herein prior to receiving GCC's responses of March 1, 2016. Notwithstanding the unlawfully incomplete FOIA responses, the FOIA responses gave GuamWEBZ its initial factual basis for its protest. Thus, GuamWEBZ had at least until March 15, 2016 to timely file its protest at GCC, which GuamWEBZ timely did on March 10, 2016.

2. WSI Did Not Timely Submit Its Bid

Per 2 GARR § 3109(L)(1), "Upon its receipt, each bid and modification shall be time-stamped, but not opened and shall be stored in a secure place until the time and date set for bid opening." Here, in its Appeal, GuamWEBZ has made the point that GuamWEBZ had produced evidence that GuamWEBZ's bid was time-stamped by GCC at 9:30 a.m. in light the of the February 15, 2016 at 10:00 a.m. deadline, whereas, in contrast, GCC produced nothing indicating specifically when WSI turned in its bid. In fact, GCC has consistently taken the position that it was under no obligation to keep such a time-stamp as part of the procurement record.

As indicated above, this position is contrary to Guam law. Moreover, GCC waited until the Exhibits were due to attempt to supplement its Agency Report with a document purporting to be WSI's time-stamp of 8:56 a.m., which the FOIA, Protest, and Appeal records thus far have proven did not previously exist. GuamWEBZ has objected to this untimely submission. GuamWEBZ President Rajesh "Rhaj" Sharma was present on site the morning WSI supposedly turned in its bid, and Sharma can confirm that WSI did not in fact turn in its bid at that time. The record reflects GCC failed to properly maintain the records of when the bidders submitted their bids and that WSI did not timely turn in its

bid.

3. WSI Was Unlicensed From June 30, 2013 To March 11, 2016

The terms of the “General Terms And Conditions [of the] Sealed Bid Solicitation And Award” warned that GCC would “not consider for award any offer submitted by a bidder who has not [past-tense] complied with the Guam Licensing Law and further noted it was [GCC’s] “policy...to award contracts to **qualified** local bidders.”[emphasis added]. GCC’s “Special Reminders” added that bidders may present “a copy of your *Business License* expiring June 30, 2016 (*required upon award*).” Nothing in the language of the IFB suggested that an unlicensed bidder would be considered for award; just that a bidder may later show proof that it held a current license.

Here, GuamWEBZ has presented multiple forms of credible evidence of the publicly available record which shows WSI was unlicensed until March 11, 2015, the day after GuamWEBZ filed its Protest complaining, in part, that WSI lacked a current business license, yet was awarded the bid. In response, GCC produced only Articles of Incorporation indicating that WSI was at some point in the past incorporated on Guam. Thus, the record demonstrates WSI failed to meet the one of the requirements of bid: having a valid business license, at the very least, prior to being awarded the bid.

4. As A Matter of Law, WSI, Having Been Unlicensed For Almost Three Years, Was Not Entitled To The ‘Local Procurement Preference’

Per 5 GCA § 5008 and the terms of the IFB, only a “businesses licensed to do business on Guam” is entitled to the preference. Notwithstanding the fact that it was unlicensed, WSI applied for the “Local Procurement Preference” which, per the terms of the local preference form, required that WSI be a “businesses licensed to do business on Guam.” Had GCC properly given the 15% preference only to GuamWEBZ, WSI would not have won the bid with \$87,900.00 for its “Proprietary” Content Management System (“CMS”) because GuamWEBZ’ proposal at \$99,610.00 would have been construed as if adjusted to the lowest bid at \$84,668.50. If not for GCC improperly crediting WSI as a

locally licensed business, GuamWEBZ would have won the bid as the lowest responsible and responsive bidder.

5. WSI's Lack of A Business License Left It Less Responsible

A Responsible Bidder "means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." 5 GCA § 5201(f).

Here, GuamWEBZ produced its business license in its bid packet whereas WSI, because it did not have one, did not. Businesses generally needed to be licensed to carry out business on Guam and to ensure their customers they are in fact able to continue to do so. WSI's lack of a current license at the time of bid opening was at least one indication WSI was unable "capability in all respects to perform fully the contract requirements."

6. GCC's Evaluation Team (The "Web Group") Unfairly and Improperly Evaluated The Bids And GCC Improperly Awarded The Contract To WSI.

Despite the fact the IFB warned, "Rejection of the Bid will be required if the descriptive literature(s) do not show that the product(s) offered conform(s) to the specifications and other requirements of this solicitation," WSI's "Proposed Solution" amounted to little more than a verbatim recitation of GCC's bid specifications with statements that WSI understood and intended to comply with the specifications.

GCC has not meaningfully responded to GuamWEBZ's allegations that the Web Group rushed to select WSI or that blatant errors were made in the review process. The very same day they were asked to review the bid, February 16th, the Web Group quickly

met and selected WSI despite the fact they were not asked to make a decision until 5pm on February 29th. The timing and circumstances of the Web Group's review suggests they had already settled on WSI and that going through the review process was simply a matter of going through the motions for appearances sake.

7. GCC Failed to Challenge WSI's Marking All of its Pages "Confidential"

Under 2 GARR §§ 3109(1)(2) and (3), "The opened bids shall be available for public inspection except to the extent the bidder designates trade secrets or other proprietary data to be confidential...[and]readily separable from the bid in order to facilitate public inspection of the nonconfidential portion...[still,] The Procurement Officer shall determine the validity of any requests for nondisclosure."

Here, there is no dispute WSI did in fact mark each and every page "confidential" and failed to make the non-confidential portions readily separable. There is also no dispute GCC failed to make any challenge or inquiry into what information was genuinely confidential such that it could be withheld from GuamWEBZ's inspection. The present Appeal revealed that even after GuamWEBZ 'FOIA'd' the appeal record, in violation of both procurement law and the FOIA law, GCC permitted WSI to select just 13 pages of its bid GCC would be turning over to WSI.

GuamWEBZ still has no real way of knowing whether further documents still withheld from GuamWEBZ are in fact confidential or were simply designated as such in order to thwart GuamWEBZ's appeal rights. GuamWEBZ respectfully requests that the Hearing Officer determine if any documents filed under seal should be turned over to

GuamWEBZ because they are obviously not proprietary or confidential. In any event, the record reflects that GCC colluded with WSI to withhold non-confidential information from public inspection, violating the IFB's requirement that all parties act in good faith.

8. GuamWEBZ's Protest and Appeal Were Prejudiced By GCC's Lack of Transparency

In light of overwhelming evidence to the contrary, GCC is still attempting to convince the OPA that GuamWEBZ should have filed its Protest at some earlier time because it should have known earlier its grounds for appeal. Yet GCC also maintains the position that GCC was correct to simply take WSI's word for it that each and every page of its bid was confidential simply because WSI said so. In other words, GCC argues, 'You should have known what you were going to complain about the moment the bids were opened based on the documents you were not allowed to see.'

While GuamWEBZ has long since discredited GCC's untimeliness argument, that GCC continues to make the argument at all only betrays GCC lack of good faith. To the extent GuamWEBZ is deemed to have failed to provide sufficient evidence for any of its grounds for appeal, such failure will no doubt be a direct result of GCC's concealment.

9. Joleen Evangelista's Misrepresentation To Dr. Okada That WSI Was Found the "Lowest, Most Responsive And Responsible Vendor" Prejudiced the Award Selection Process

As the person who ultimately selected the winning bidder, Dr. Okada wielded the

ultimate decision-making authority and discretion in determining whether WSI was both responsible and responsive to the IFB. The record is clear that the Web Group claimed only that WSI was the lowest bidder; not that WSI was *also* the most responsive and the most responsible as Evangelista misrepresented to Dr. Okada.

According to GCC's FOIA response signed by Dr. Okada, the factors used to pick WSI over GuamWEBZ were, "the specifications and scope of work were set forth in the invitation to Bid." Thus, had Evangelista, not made this misrepresentation, Dr. Okada would have ultimately selected GuamWEBZ over WSI.

For the reasons offered herein, the website consulting contract awarded by Purchasing Agency Guam Community College ("GCC") to WSI should be cancelled and the bid awarded instead to GuamWEBZ.

Respectfully submitted at Hagåtña, Guam this 6th day of June, 2016.



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