

**ORIGINAL**

**JOYCE C.H. TANG**  
**JOSHUA D. WALSH**  
**CIVILLE & TANG, PLLC**  
SUITE 200, 330 HERNAN CORTEZ AVENUE  
HAGATNA, GUAM 96910  
TELEPHONE: (671) 472-8868/9  
FACSIMILE: (671) 477-2511

*Attorneys for TLK Marketing Co. Ltd*

**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: August 24 2016

TIME: 4:44 AM PM BY: AL

FILE NO OPA-PA: 16-005 + 16-003

**IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Appeal of

TLK Marketing Co. Ltd.,

Appellant.

**DOCKET NO. OPA-PA-16-003**

**DOCKET NO. OPA-PA-16-005**

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW**

**I. INTRODUCTION**

This matter came before the Public Auditor on two Appeals filed by TLK Marketing Co. Ltd. ("TLK") on April 22, 2016 and June 1, 2016, relating to the Guam Visitors Bureau's ("GVB") decision to award RFP 2016-006 to HIC, Inc. ("HIC"). The Public Auditor conducted an extensive evidentiary hearing, spanning three (3) days, has heard the testimony of several witnesses, and received numerous documents into evidence.

Having heard the testimony and considered the evidence, the Public Auditor hereby issues the following Findings of Fact and Conclusions of Law.

## II. PROPOSED FINDINGS OF FACTS

### A. THE PROTESTS.

1. On November 25, 2015, GVB issued RFP 2016-006 for Tourism Destination Marketing Representation Services in the Republic of Korea (the “RFP”). The term of the contract under the RFP is for an initial term of one year, with two additional one year options to renew, for a maximum contract period of three years. See, Ex. 1

2. At the time the RFP was issued, TLK was providing GVB with tourism destination marketing representation services in the Republic of Korea. TLK received notice from GVB that the contract would be on a month-to-month basis.

3. The deadline for submission of proposals in response to the RFP was February 8, 2016. Four offerors timely submitted their written proposals in response to the RFP: TLK, HIC, Inc. (“HIC”), Promac Partnership Co., Ltd. (“Promac”), and Edelmann Korea (“Edelmann”).

4. On March 11, 2016, GVB sent TLK a notice of termination of their month-to-month agreement. See, Ex. 19.

5. On March 24, 2016, TLK timely filed Protest 1 with GVB. GVB denied this protest on April 8, 2016 and TLK appealed its decision on April 22, 2016 (OPA-PA-16-003). See, Ex. 21.

6. On April 21, 2016, TLK timely filed Protest 2 with GVB. See, Ex. 24. GVB denied this protest on April 21, 2016 and TLK appealed its decision on June 1, 2016 (OPA-PA-16-005). The two Appeals were consolidated on June 24, 2016.

**B. THE RFP REQUIRED ALL OFFERORS TO MEET THE 5 YEAR MINIMUM EXPERIENCE REQUIREMENT.**

7. Section 1.1 of the RFP requires all offerors to have “a minimum of 5 years extensive and consistent experience working with the Republic of Korea travel trade, close relationship with the Korean government and the US Embassy to act as GVB’s tourism destination marketing representative in the Republic of Korea...” (emphasis supplied). See, Ex. 1 at 10. In order to qualify, the Offeror had to meet the minimum 5 year “extensive and consistent experience” requirement.

8. Section 2.0 of the RFP explicitly states that the “best qualified Offeror will be based on the qualifications, experience, and commitment of the Offeror’s lead and support individuals proposed in this RFP, and the Offeror’s plan of action.” Id. at 28.

9. An Executive Summary and Commitment had to be submitted with the proposal “with a description of how your firm qualifies under the requirements of this RFP [as indicated in Section 1.1 GVB Objectives]. Id. at pp. 28-29.

10. Jon Nathan Denight, the General Manager and Chief Procurement Officer of GVB testified and confirmed that the Offeror has to meet the 5 year experience requirement:

- a. Section 2.1 (Evaluation Criteria) requires the experience described in Section 1.1 of the RFP. See, RFP at 28.
- b. Section 2.1.A (Executive Summary and Commitment) is referencing the 5 year experience requirement in Section 1.1 of the RFP. Id.
- c. Section 2.2.B.1 (Staff Qualifications and Past Performance) refers to the experience requirement in Section 1.1 of the RFP. Id. at 29.
- d. Section 2.2.E.2 (Primary Point of Contact), requiring the Offeror to specify how long the individual/company submitting the proposal has

been in business providing services similar to those requested in this RFP, is referencing the 5 year experience defined in Section 1.1 of the RFP.

11. Happy Idea Inc. (“HIC”) submitted a proposal in response to this RFP, and is the “Offeror” that will be providing the services to the GVB if awarded the contract. Ex. 2 at 1& 7. Mr. Sedong “Don” Park is the CEO, the president of HIC, is the contact prson for HIC. Id. at 3.

12. HIC relied on another company called “SD Pharm” to meet the 5 year experience requirement. HIC represented that it was [f]ounded in 2006 as “SD Pharm” in Korea then changed its name to “HIC” in 2013.” See, Ex. 2 at 8.

13. HIC’s Corporate History states that the Offeror, HIC was “founded in 2006 under a different name – “SD Pharm”.

## Corporate History

### 2006

- Founded “SD Pharm” (In Incheon)

- Signed marketing services contracts with Yuhan Corporation, Jeil Pharmaceutical Co., Ltd and Daehan Pharmaceutical Co., Ltd.

### 2007

- Singed marketing services agreement with LG Life Sciences

### 2008

- Singed marketing services agreement with CJ

### 2012

- Signed marketing services agreement and right of publicity contract with KPBPA

### 2013

- Signed Exchange Agreement of College-Industry Cooperation with the Catholic University of Korea

### 2015

- Entered into an agreement as GVB's Korea PR Agency

See, Ex. 2 at 11.

14. HIC was established on August 31, 2011, approximately 4 years and 5 months before the submission of its Proposal on February 8, 2016. See, Ex. 4A (HIC, Inc. Certificate of Incorporation). HIC did not qualify at the time submission, *first*, because it did not have the relevant experience as it had not existed for 5 years at the time of award, and *second*, because HIC was originally registered for medical business and real estate, and was not registered for advertising until *February 25, 2013*, approximately 2 years and 11 months before February 8, 2016, the bid submission deadline.

15. In its Proposal, HIC attempted to pad its experience by claiming to be the new name of a company previously called SD Pharm, which has been in existence since 2006. HIC's timeline for this change is inconsistent: in the Overview on page 7 of its technical proposal, HIC claims that the name change occurred in 2013.

### HIC Overview

Founded in 2006 as "SD Pharm" in Korea then changed its name to "HIC" in 2013. Happy Idea Company started its operation as a medical consulting group specializing in medical health and family welfare. However, with the aim of meeting the growing demands of the tourism representation market, HIC has expanded its business ground by establishing its first tourism representation office. Currently, HIC is sub-contracted to represent the Guam Visitor's Bureau (GVB) in Korea. HIC performs tourism planning, promotion, and marketing work for Guam in Korea. As a primary vendor of GVB, HIC will be allowed to showcase its dynamic abilities and take the destination to the next level.

See, Ex. 2 at 8.

In HIC's Organizational Chart, it claims the name change occurred in 2011.

### HIC Organizational Chart

*Name of Company:* HIC, Inc.

*Type of Business:* C Corporation

*No. of Employees:* 10 Full-time employees

*No. of Offices:* 2 (Seoul & Incheon)

*Age of Business:* A total of 10 years

(5 years as SD Pharm 5 years from 2011 as HIC)

See, Ex. 2 at 25.

16. Contrary to HIC's representations in its Proposal, HIC is not a continuation of SD Pharm. HIC was registered as a business in Korea on August 31, 2011, with the Korean Registry Office of Incheon District Court (Registry No. 058037; ID No.: 120111-0580375). See, Ex. 4A. SD Pharm is registered on January 23, 2006, as an "individual business" under Park, Saedong, with a Business Registration No. 12-13-41\*\*\*\*, and continues to exist as a privately-owned company involved in the wholesale medicine industry. See, Ex. 28.

17. GVB did not introduce any evidence rebutting TLK's evidence that HIC and SD Pharm are two different companies and that HIC does not meet the five year experience requirement.

18. HIC's representation that it is the same company as SD Pharm, was false and deceptive. HIC clearly does not meet the 5 year experience requirement.

19. Nate Denight testified that neither he nor anyone at GVB contacted HIC to verify whether HIC and SD Pharm are the same companies, and met the 5 year experience requirement of the RFP.

20. The Public Auditor ordered GVB to serve a copy of the Order After Hearing Scheduling Order, filed May 25, 2016, requiring GVB to "serve a copy of this Order After Hearing/Scheduling Order upon each other person or company who submitted a bid, in order that any one of the other bidders may seek or participate in this appeal as an interested party." See, Order After Hearing, filed 5/25/2016. HIC is an interested party and was thus aware of the proceedings in this appeal, and did not submit a declaration or enter an appearance in TLK's appeals.

21. HIC does not have the requisite 5 years of experience working with the Republic of Korea travel trade. At the time of bid, it had existed for less than 5 years and had been

involved in advertising for even less time. Therefore, HIC was a non-responsible bidder and its proposal was non-responsive and should have been rejected.

**B. KARL PANGELINAN'S RELATIONSHIP WITH HIC**

22. Mr. Pangelinan was approached by Don Park of HIC and possibly one of his staff, named Gemma or Anna regarding in January 2016. The discussion in January 2016 centered around the preparation of a proposal responding to the RFP, general review and where he "can add some color".

23. Karl Pangelinan confirmed that his company, KP Consulting, was retained as a consultant for HIC. KP Consulting was formed in May 2015.

24. Mr. Pangelinan testified that his actual consulting agreement had a commencement date of February 2, 2016, exactly six days before the RFP proposal submission deadline.

25. He also confirmed that under the terms of the contract he would work for three months without pay, and on the fourth month, if HIS saw that he was contributing, he would get paid. Mr. Pangelinan said that he did not charge any money for work performed from February through April, and worked up to 40 hours per month. He charged for work performed in May and June 2016, in the amount of \$2,500 - \$3,000, at the rate of \$75 per hour.

26. Mr. Pangelinan agreed that presenting as a local person, it assisted HIC in being able to deliver a good presentation, and that his contribution was during the presentation to the GVB evaluation committee.

27. Mr. Pangelinan has been appearing at GVB events in Korea representing HIC at the Hana Tour Fair and Korea Travel Fair in June 2016. He also attended a Korean Baseball Players event in April 2016 as a representative of HIC for GVB.

28. The Affidavit Disclosing Ownership and Commission (Affidavit No. 1) submitted by HIC with its Proposal dated under oath on February 1, 2016, did not disclose Mr. Pangelinan's involvement under Section B of the Affidavit. See, Ex. 2.

29. The Affidavit 1 submitted by Don Park under penalty of perjury was false when he made it, because before February 1, 2016 because Karl was already in discussion with him to act as HIC's consultant. Certainly, when HIC submitted the Proposal on February 8, 2016, Affidavit 1 was false, because HIC had entered into a contract with Mr. Pangelinan on February 2, 2016. *Id.*

### **C. GVB'S FAILURE TO TIMELY NOTIFY OFFERORS OF NON-SELECTION**

30. On February 25, 2016, GVB General Manager Nathan Denight was provided with an Evaluation Summary naming HIC as the highest-ranked offeror, and asked to give acknowledgement of his decision to either PROCEED WITH NOTICES or DO NOT PROCEED UNTIL FURTHER ADVISED. See, Ex. 10.

31. On March 9, 2016, Nathan Denight signed the Memo and "checked" PROCEED WITH NOTICES. See, Ex. 10 at 191.

32. On March 4, 2016 at 5:52 p.m., GVB Marketing Officer Gina Kono sent Don Park, Director of HIC, an email, notifying him that HIC had been selected as the highest-rated and most qualified offeror for Tourism Destination Marketing Representation Services in the Republic of Korea, and attaching a contract negotiation document. See, Ex. 33 at 2. Attached to the March 4, 2016 email was the retainer fee and scope of work. The email confirms that the "Communication is being sent to you at the instructions of GVB General Manager, Mr. Jon Nathan Denight." No other bidder received notice of the non-selection and ranking on March 4, 2016 in letter form or by email.



33. On March 5, 2016 at 8:40 a.m., Pilar Laguana, Ms. Kono's direct supervisor, instructs Ms. Kono as follows: "[f]or the procurement record, have an office notice of selection announcement put on GVB stationary bearing the signature of our GM. [Non-selection] letters to all other bidders should also be formalized." Id. at 4.

34. On March 8, 2016, at 6:21 p.m. Gina responded to Pilar Laguana indicating that she had talked to Chris Lizama about the letters, and that Chris "will produce the letter of award, letter [of non-selection] to the other offerors, and work on the contract." Id. at 12.

35. Gina Kono wrote to Don Park by email on March 9, 2016 at 11:00 a.m. (Guam time) informing him that "the GVB Manger would like to finalize the RFP and finalize all the necessary paperwork and communications to the other offerors." She further instructed him to "[p]lease refrain from publicly mentioning this until we have finalized the negotiations and signed a contract. We do not want any protest from the other offerors." Id. at 283

36. Don Park responded to her email, informing Gina Kono that he just signed the contract, and promises that HIC has "not mentioned about the result of the RFP, and also will not mention it until the contract is all done." Id at 282.

37. HIC and GVB proceeded to negotiate the contract until March 9, 2016, when Don Park confirmed that he signed the contract. See, Ex. 12.

38. On March 9, 2016, a Notice of Non-Selection was drafted and signed by Jon Denight, with last paragraph informing the bidder that "you are hereby notified that you have fourteen (14) days to request administrative review from the date of this letter." This form of the notice of non-selection was not sent out. See, Ex. 13.

39. On March 10, 2016, at 12:32 p.m. Gina Kono sent Don Park a Notice of Award. See, Ex. 17 at 307.

40. Later that day on March 10, 2016, at 7:11 p.m. Gina Kono sent Don Park (HIC) a Notice of Intent to Award. See, Ex. 16. The official contract was sent via courier for signing.

41. TLK, Promac and Edlemann were sent the Notice of Non-Selection letter on March 10, 2016, by email on March 10<sup>th</sup>, six days after Don Park was notified of his selection as the highest ranking offeror. The March 10<sup>th</sup> letter did not include the last sentence notifying bidders that “you are hereby notified that you have fourteen (14) days to request administrative review from the date of this letter.” See, Ex. 18. Mr. Denight testified that he deleted the last sentence because he believe it wasn’t necessary.

42. GVB employees Gina Kono and Christine Lizama stated that it is the regular practice of GVB not to notify unsuccessful offerors of their non-selection until *after* negotiations have already been completed with the first ranked offeror. Because contracts are generally signed shortly after the conclusion of negotiations, this practice deprives unsuccessful offerors of any meaningful opportunity to protest the procurement prior to award or to receive the automatic stay.

43. The Public Auditor asked Christine Lizama a question regarding when the notice of intent of award goes out whether that is that start of the negotiation process? Ms. Lizama said “yes.”

44. It was followed up by another question confirming the practice of when the notice of intent to award goes out and is signed by the procurement officer, that is when the non-selection would go out? Her response was that the non-selection letters would be issued after GVB and HIC reached an agreement on the terms, and would not go out at the same time as the notice of intent to award.

45. Ms. Lizama confirmed that GVB sends the contract out with the notice of intent to award and after the contract is entered into with the successful bidder, the notice of non-selection is sent out.

46. When Mr. Denight was asked why he did not stop the procurement after receiving the March 4, 2016 email from Pilar Laguana, his response was that there was no further negotiation going back and forth on the price, and that he was focused on getting the notices out. It took GVB another six days to send the notices of non-selection to the other bidders.

**D. GVB'S FAILURE TO OBTAIN BOARD APPROVAL TO PROCEED WITH NEGOTIATION AND AWARD**

47. The evaluation process was scored as follows. On February 16, 2016, the Evaluation Committee met to assess written proposals. Each written proposal was scored with a maximum of 400 points. The three proposers who scored highest on their written proposals were then invited to give an oral presentation on February 25, 2016. Each oral presentation was scored with a maximum of 320 points. See, Ex. 5 & 9. The scores for oral presentations and written proposals were combined, and the proposers were ranked according to their total score. See, Ex. 10.

48. HIC ranked highest with 366 points on the written proposal and 282.5 points on the oral presentation. TLK ranked second-highest with 364 points on the written proposal and 256.5 points on the oral presentation. Promac ranked third-highest with 343 points on the written proposal and 240 points on the oral presentation. Edelmann ranked fourth-highest with 250.5 points on the written proposal, and was not invited for an oral presentation. *Id.*

49. On February 25, 2016, the same day as the oral presentations, the Guam Visitors Bureau held a Board Meeting, an audio recording of which was included in the Procurement Record (the "Board Meeting"). See, Ex. 7. At the Board Meeting, the Board passed a Motion to

Recommend Board Approval to Authorize the GVB General Manager as Chief Procurement Officer to Enter Into Negotiation and Contract with the Highest Rate and Most Qualified Offeror for GVB RFP 2016-006: Tourism Destination Marketing Representation Service in the Republic of Korea (the “Motion”).

50. The Motion was passed after oral presentations had been given but *before* results had been tallied. At the time the Board passed the Motion, the Board did not know which offeror would be ranked highest. Prior to making and passing the Motion, the Board was not give any information about the ranking, the evaluation process, results, or the winning proposal.

51. The February 25, 2016 Motion was the only action the Board took regarding the negotiation and contract for the RFP. The Board was not given an opportunity to vote on the contract once negotiations had been finalized, and was not apprised of any details of the negotiations or contract at any time.

52. The question was posed by the Public Auditor to Gina Kono clarifying whether it is the normal practice at GVB for the board not to be informed about who is the highest ranked, and whether that this the normal process for approval of any contract, be it an RFP or Invitation for Bid, and whether someone from the relevant committee would make a motion to approve the negotiation, but the board does not know who will it is? Ms. Kono responded in the affirmative and also confirmed that the general practice at GVB is to seek board approval for whoever is ranked highest but the board at that time when making and adopting the motion, does not know who the highest ranked proposer.

53. The Public Auditor asked when the board would be informed that a company was finally selected, and whether that is ever documented in the minutes? Ms. Kono’s response was “not to her knowledge.”

54. Mr. Kono also confirmed that GVB's standard operating procedure is to make a motion to approve a contract without presenting any information about the contract.

55. When asked by the Public Auditor when the contract is done, does the General Manager report to the board that he was approved to negotiate and GVB selected company "X"? Ms. Kono's response was that she believe it has happened, but does not specifically recall with big contracts, and that while it happens, it is not consistent.

56. Ms. Kono testified that she does not recall if the Board was ever notified of the award to HIC.

### **III. PROPOSED CONCLUSIONS OF LAW**

#### **1. GVB BOARD APPROVAL WAS NOT OBTAINED.**

The Guam Visitors Bureau has the power to "[e]nter into contracts and execute all instruments necessary of appropriate in the exercise of any of its powers." 12 GCA §9105(b). "The exercise of the powers of the Bureau shall be directed by the Board of Directors" of the Guam Visitors Bureau. The Board may not, however, delegate its power to enter into contracts to the General Manager without approval of the contracts by the Board. In fact, the Guam Visitors Bureau Act allows contracting by the General Manager in only limited circumstances. Title 12 GCA § 9111, directs that:

The Bureau will always seek the most reasonable prices for services and products needed, giving due consideration to the urgency of the requirement. Purchase orders or letters of authorization will be executed by the General Manager for needed products or provisions, pursuant to the current budget. Such purchase orders or letter of authorization for expenditures in excess of One Thousand Dollars (\$1,000) except salaries shall require prior approval by the Board of Directors.

Consequently, the General Manager can proceed without Board approval to procure

products or provisions only if the procurement does not exceed \$1,000.

The Request for Proposals recognizes the requirement for Board approval of the contract.

Section 3.10 of the RFP directs that:

If compensation, contract requirements, and contract documents can be agreed upon with the best-qualified Offeror, and subject to Board approval, the contract shall be awarded to that Offeror. Written notice of award shall be public information and made a of GVB's procurement file.

Section 3.15 restates the requirement of Board approval, stating that "The award of contract, if it is awarded , will be awarded to the best qualified Offeror for the required services at a compensation determined in writing to be fair and reasonable, and subject to the approval of the Board."

Board approval of the contract was required. However, the Board did not approve and has not approved the contract to HIC. In fact, the Board did not see the contract or know the identity of the offeror before the contract was ostensibly awarded., nor is there any indication the Board has ratified the contract. There has simply been no valid award of a contract to HIC in this case.

## **2. GVB FAILED TO MAINTAIN A COMPLETE PROCUREMENT FILE REQUIRED UNDER 5 GCA §5249**

In the course of this appeal, it became evident that GVB failed to maintain a complete procurement record as required by 5 G.C.A. §5249. TLK raised the issue of missing procurement documents in its Motion for Order to Supplement Procurement Record. The portions of the record identified by TLK as missing were (1) a log of communications, (2) audio recordings of negotiations, and (3) "other relevant documents" as required by 2 GAR Div. 4 §12105(e). The third category includes any Negotiation Memorandum or other documents related to the presentation of the contract to the Board of Directors for approval (documents

which we now know do not exist) as well as documents created after the signing of the purported contract. GVB selectively produced some, but not all, post-award communications.

On June 15, 2016, the Public Auditor issued a Decision and Order requiring GVB to certify whether certain materials requested by TLK exist. GVB's General Manager and Procurement Officer, Jon Nathan Denight, certified that "[a] log of communications between government employees and any member of the public, potential bidder, vendor or manufacturer which was in any way related to the procurement do not exist... and that [t]here are no audio recordings of negotiations arising from the solicitation." See, GVB Certification, July 5, 2016. The communication log is required by 5 G.C.A. §5249(b). GVB claims that in lieu of a log, all communications were provided; however, without a log there is no record of phone or in-person communications. At the hearing it was revealed that Gina Kono had corresponded at least once with a Promac employee about a Korean news article relating to the bid. This communication was not included in GVB's Procurement Record. Moreover, the provision of source documents does not absolve GVB of the responsibility to keep a log. Likewise, no audio recording exists of the pre-bid conferences and negotiations as required under §5249(c).

Mr. Denight also certifies that "this was not a small purchase procurement"; therefore, GVB argues that it did not need to keep sound recordings. This argument relies on the version of 5 G.C.A. §5429 published by the Guam Compiler of Laws; however the original text as enacted by the Legislature read as follows:

Section 17. A new Section 6964.4 is added to the Government Code to read:

“§6964.4. Record of Procurement Actions.

Each procurement officer shall maintain a complete record of each procurement. The record shall include the following:

...

**(3) sound recording of all pre-bid conferences, negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement; . . . .**

Guam Pub. L. No. 18-44 (Nov. 14, 1986). (Emphasis added.) The original text makes it clear that sound recordings should be provided for negotiations arising from a request for proposals. A recent decision in the Superior Court of Guam canceled a procurement in which the Government Agency kept an incomplete procurement record. *See Teleguam Holdings LLC v. Government of Guam and Pacific Data Systems.*

The Court in *Teleguam Holdings* held that where the “procurement record upon which IFB GSA 064-11 and the proposed awards were based is incomplete, [a] revision of the consequent proposed awards cannot render the preceding procurement record complete and it would remain in violation of the Procurement Law...” The court ordered the IFB and the proposed awards canceled. Noting specifically that “[i]f another invitation for bids regarding this matter is issued, the agencies involved shall maintain a complete procurement record in compliance with the Procurement Law.”

Because GVB failed to maintain a complete procurement record as required under 5 GCA §5249, the award to HIC must be set aside.

**3. GVB WAS REQUIRED TO SEND THE NON-SELECTION LETTERS TO NON-SELECTED BIDDERS ON MARCH 4, 2016, WHEN HIC WAS NOTIFIED OF RANKING.**

HIC and GVB actively colluded to keep the ranking, award, and signing of the contract a secret in order to deprive other bidders of the right to protest before an award made, to avoid the automatic stay protections under 5 GCA §5425(g), and to shorten the protest period. This resulted in a fundamental unfairness to all of the non-selected offerors. Mr. Fisher, GVB' s counsel, correctly recognized the fundamentally unfair nature of GVB' s action with regard to



divergent notices. When asked by the Public Auditor during June 6th hearing regarding Protest 1, if a government agency such as GVB can indeed provide disparate notices to offerors under the same RFP, Mr. Fisher acknowledged that such a system " ... kind of rings of inequity in that it just doesn't feel right, it seems like to keep the playing field level, um, that the parties should be noticed at the same time .... " *See*, Oral Argument Recording, 00:30:34, available

At at <http://www.opaguam.org/procurement-appeals/search-procurement-appeals#5271>.

GVB's practice of giving the notice of non-selection when the contract is "done" and the notice of award is delivered to the HIC is wrong, unfair and unjust. GVB failed to discharge its duties impartially so as to assure fair competitive access to governmental procurement by responsible bidders, and failed to conduct itself in such a manner as to foster public confidence in the integrity of this procurement. *See*, 5 GCA §5001(a) & (b)(3) & (b)(4), (b)(7).

#### **4. HIC DID NOT MEET THE 5 YEAR EXPERIENCE REQUIREMENT OF THE RFP.**

HIC did not meet the five (5) year experience requirement, therefore, its proposal was non-responsive and must be rejected, and HIC should be disqualified from this solicitation. *See*, §§2.2.A.1 & 3.13, RFP. In the federal procurement system, experience requirements may be viewed as "definitive" and must be satisfied as a prerequisite to an award. In *Matter of United Materials*, B- 243669 (Comp.Gen.), 91-2 CPD P 161, 1991 WL 165242 (Aug. 16, 1991), the United States Comptroller General explained in a protest where it was claimed that there was insufficient objective evidence to support the contracting officer's determination that the bidder had the requisite experience to satisfy the explicit experience requirements. The Comptroller General explained:

Our Office generally does not review affirmative determinations that a bidder is responsible, that is, capable of performing the contract. Such determinations are based in large measure on

subjective judgments. One exception to this rule is where a solicitation contains definitive responsibility criteria, which are specific and objective standards established by an agency to measure an offeror's ability to perform a particular contract. *Calculus, Inc.*, B-228377.2, Dec. 7, 1987, 87-2 CPD ¶ 558. These special standards put firms on notice that the class of prospective contractors is limited to those who meet qualitative or quantitative criteria deemed necessary for adequate performance. *Antenna Prods. Corp.*, B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297; Although not every experience requirement in a solicitation constitutes a definitive criterion of responsibility, *see, e.g., Power Testing Inc.*, B-197190, July 28, 1980, 80-2 CPD ¶ 72 (5-year experience requirements for the electricians and foreman to be used on the job), a solicitation requirement that the prospective contractor have a specified number of years of experience in a particular area is a definitive responsibility criterion. *See, Topley Realty Co., Inc.*, 65 Comp.Gen. 510 (1986), 86-1 CPD ¶ 398; *Urban Masonry Corp.*, B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48.

*United Materials*, 1991 WL 165252 at \*1.

The Comptroller further stated:

Evidence that a bidder meets a definitive responsibility criterion must be obtained by the agency so that compliance with the requirement, which is a prerequisite to award, can be determined. *Prime Mortgage Corp.*, 69 Comp.Gen. 618 (1990), 90-2 CPD ¶ 48. Where an allegation is made that a definitive criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the criterion has been met, *BBC Brown Boveri, Inc.*, B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309; although the relative quality of the evidence regarding responsibility is a matter for the judgment of the agency, the contracting officer may only find compliance with the definitive responsibility criterion based upon objective evidence. *Vulcan Eng'g Co.*, B-214595, Oct. 12, 1984, 84-2 CPD ¶ 403.

*United Materials*, 1991 WL 165242 at \*2.

The evidence shows that HIC and SD Pharm are two different companies. HIC did not have the 5 year experience required under Section 1.1 of the RFP. HIC's made misrepresentations and fraudulent statements in its proposal. In making these false

statements and misrepresentations HIC acted in bad faith.<sup>1</sup> The putative contract should be declared null and void under 5 GCA §5452(2)(A) .

**5. HIC WAS REQUIRED TO DISCLOSE KARL PANGELINAN’S INVOLVEMENT AS A CONSULTANT IN THE AFFIDAVIT DISCLOSING OWNERSHIP AND COMMISSIONS.**

The Affidavit Disclosing Ownership and Commissions requires the proposer to identify all “persons who have received or are entitled to receive a commission, gratuity or other compensation for procuring and assisting in obtaining business related to the bid or proposal for which this affidavit is submitted...” See, Ex. 2 (Affidavit 1). HIC submitted its proposal on February 8, 2016. At the time it submitted its proposal, Karl Pangelinan had signed a consulting agreement with HIC to assist with the procuring this contract. In fact, Mr. Pangelinan had been in discussions with them regarding his role as early as early January 2016. At the time HIC submitted its proposal, it knew the affidavit was false. See, 9 GCA §52.10(b) (*material statements* are defined as “statements which affected or could have affected the course or outcome of a proceedings...”). Guam law provides that a “person is guilty of a misdemeanor if he makes a false statement under oath which he does not believe to be true and ... the falsification is intended to mislead a public servant in performing his official function.” 9 GCA §52.20(b).

//

//

---

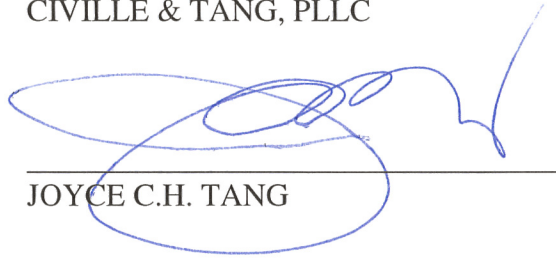
<sup>1</sup>5 GCA §5003 provides: “[t]his Chapter requires all parties involved in the negotiation, performance, or administration of territorial contracts to act in good faith.”

#### IV. CONCLUSION

TLK respectfully requests that HIC's contact be set aside and the RFP be cancelled and rebid.

Respectfully submitted this 24<sup>th</sup> day of August, 2016.

CIVILLE & TANG, PLLC

A handwritten signature in blue ink, consisting of several loops and a final vertical stroke, is written over a horizontal line.

JOYCE C.H. TANG