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DATE: 6/27/16  
TIME: 4:30  AM  PM

*Attorneys for Appellant TLK Marketing Co. Ltd.*

**BEFORE THE PUBLIC AUDITOR  
PROCUREMENT APPEAL**

In the Appeal of  
  
TLK Marketing Co. Ltd.,  
  
Appellant.

Docket No. OPA-PA-16-003  
  
Docket No. OPA-PA-16-005  
  
**TLK MARKETING CO. LTD.'S  
RESPONSE TO AGENCY REPORT**

**I. INTRODUCTION**

TLK Marketing Co., Ltd. ("TLK") has appealed two decisions of Guam Visitors Bureau ("GVB") denying TLK's protests filed on March 24, 2016 and April 21, 2016, regarding GVB RFP No. 2016-006 to HIC, Inc. (the "RFP"). GVB denied TLK's first protest on April 8, 2016, and denied the second protest on May 24, 2016. TLK filed the first Notice of Appeal on April 22, 2016 (Docket No. OPA PA-16-003) ("Protest 1"), and the second Notice of Appeal was filed on June 4, 2016 (Docket No. OPA PA-16-005) ("Protest 2"). The Protest 1 and Protest 2 matters were consolidated on June 24, 2016, and the expedited hearing is scheduled for July 6, 2016. See, *Order Consolidating Appeals/Scheduling Order* at 1, June 24, 2016.

TLK submits its response to GVB's *Agency Report filed Pursuant to 2 Guam Admin. R. and Reg. §12105* ("Agency Report") in Protest 2, filed on June 17, 2016.

In Protest 2, TLK Appealed GVB's April 8, 2016 agency decision on the following grounds: (1) TLK's protest was timely filed; (2) GVB violated the Guam Procurement Law by withholding information regarding the ranking and award of the contract to deprive the offerors of their rights under Guam procurement law; (3) GVB violated §3.10 of the RFP when it failed to obtain the required Board approvals to negotiate with the best offeror and to award the contract; (4) HIC failed to disclose in the affidavit disclosing ownership and commission Karl Pangelinan's involvement with the RFP; (5) HIC misrepresented its experience by relying on SD Pharm's experience to meet the 5 year experience requirement; and (6) TLK will be irreparably harmed if GVB is allowed to usurp the OPA's authority and circumvent the Guam Procurement Laws.

As discussed in TLK's Notice of Appeal and TLK's Response to the Agency Report ("TLK Response") in Protest 1, nothing in the Agency Report filed by GVB in Protest 1 and Protest 2, or the Procurement Record (filed by GVB on June 8, 2016 in Protest 2) rebuts TLK's allegations.

All of these issues are properly before the Public Auditor and the OPA has jurisdiction to review and consider these issues in this Appeal.

## **II. ARGUMENT**

There are six issues in the Protest 2 Appeal. The Public Auditor has jurisdiction to review all of the issues raised in the Protest.

### **A. TLK IS ENTITLED UNDER GUAM PROCUREMENT LAW AND PURSUANT TO THE PUBLIC AUDITOR'S FINDINGS TO THE RELIEF IT SEEKS.**

In its Agency Report, GVB argues that the relief requested by TLK is not supported by authority. TLK has not argued for any relief that is beyond the authority of the Public Auditor.

The Public Auditor was given broad power by the Guam Legislature to “promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5 [Guam’s procurement laws].” *See*, 5 GCA §5703. Evidence of GVB’s attempt to extinguish TLK’s substantive right to protest under 5 GCA §5425 is supported by Procurement Record. In an email dated March 9, 2016, to Don Park (HIC), GVB was explicit in its attempt to extinguish the substantive rights of TLK and other unsuccessful offerors: “Please refrain from mentioning this [contract award] until we have finalized the negotiations and signed a contract. We do not want any protest from the other offerors. Thank you for your understanding.” *See*, **Ex. E** (3/9/16 Email Exchange) attached to TLK’s Response to Agency Report in Protest 1 filed May 19, 2016) (“TLK Response - Protest 1”).

Based on these facts, the Public Auditor correctly made the following findings:

1. “TLK was deprived of any meaningful opportunity to protest the procurement prior to award or to receive the benefits of the automatic stay. This appears to be a trend with procuring agencies awarding contracts concurrently without notifying non-selected bidders, in an attempt to limit the protesting period and avoid the automatic stay.” *See*, Protest 1, *Decision and Order* at 3, June 15, 2016.
2. GVB’s actions resulted in “fundamental unfairness” to TLK. *Id.*

The Public Auditor’s findings are consistent with the statutory guidance provided in 5 GCA §5001(a) & (b) regarding the interpretation and application of Guam Procurement Law:

- (a) Interpretation. This Chapter shall be construed and applied to promote the underlying purposes and policies.
- (b) Purposes and Policies. The underlying purposes and policies of this Chapter are:
  - . . . .
  - (4) to ensure fair and equitable treatment of all persons who deal with the procurement system of this Territory.

(7) to provide safeguards for the maintenance of a procurement system of quality and integrity.

5 GCA §5001(a)&(b).

The role of the Public Auditor include, among other things, enforcing Guam Procurement Laws and to protecting the integrity and quality of the procurement system. The Public Auditor is authorized under §5001(b) to insure that agencies notify bidders who were not selected that a selection has been made, thus, giving the non-selected bidder the opportunity to protest pre-award. GVB intentional delay in sending the Notice of Intent to Award to bidders who were not selected until after the purported contract award, violated the basic tenet of the Guam Procurement Law.

GVB's response to TLK's protests of violations of Guam Procurement Law is telling – it threatens TLK.

First, it raises a false issue of purported non-payment of invoices issue. These invoices were paid. GVB raises it again in its Agency Report for Protest 2, even though it admits it knew about the payments in February 2016 and continued its contract with TLK. *Agency Report – Protest 2* at 7. This issue is completely irrelevant to any of the issues before the OPA in Protest 1 and Protest 2, and has nothing to do with TLK's grounds for protest. It was raised by GVB in an attempt to distract from the issues at hand. Certainly, until Protest 1 was filed, GVB did not express any concerns about payment of invoices when the proposals were submitted and the evaluation committee met with TLK. TLK submitted its proposal, made its presentation, and earned a high ranking as it competed for the contract. In a termination letter sent on March 10, 2016, *after* the resolution of this dispute over invoices, GVB praised TLK, noting that “Your hard work and professionalism were key factors in the tremendous growth of the Korean market.” *See Ex. C, TLK Appeal – Protest 1.*



Second, GVB threatened TLK with criminal, financial, contractual and/or debarment sanctions for pursuing its due process rights. Confronted with its wrongful acts, GVB refused to acknowledge and to take responsibility for its wrongful actions, and instead defaulted to making threats against TLK for daring to challenge the agency's actions. *See*, Agency Report – Protest 2 at 6-8. Acts of government employees, board members, and counsel for these government agencies, threatening aggrieved bidders with criminal, financial, contractual and/or debarment sanctions for pursuing its due process rights should not be condoned. This is not how a government agency should behave. The “fundamental unfairness” caused by government agencies responsible for carrying out its procurement duties will continue unabated, unless and until each person who violates the Guam Procurement Law, including but not limited to its board members, employees, and counsel, are held accountable. The Public Auditor can effect these changes by enforcing the procurement laws.

Similarly, GVB argues that TLK's refusal to turn over operations to HIC damaged GVB's reputation in Korea. GVB provides no actual evidence that this has damaged its reputation, instead relying on an email from, HIC, a party which surprisingly has not made an appearance in these proceedings. These retaliatory accusations against TLK are irrelevant to the question of whether GVB's award of the contract to HIC was proper. GVB's attempt to shift the blame to TLK does not change the fact that GVB improperly awarded a contract to an unqualified offeror.

**B. THE ORDER FOR CONSOLIDATION IS APPROPRIATE.**

In its Agency Report, GVB argues that TLK's request for consolidation was improper. The OPA issued an Order Consolidating Appeals on June 24, 2016. At the hearing on June 6, 2016, consolidation of Protest 1 and Protest 2 was raised and discussed. Counsel for GVB did

not object to the consolidation of these two matters. Furthermore, the Public Auditor has the discretion to consolidate matters, which she has exercised in these proceedings.

**C. GVB COLLUDED WITH HIC TO VIOLATE THE GUAM PROCUREMENT LAW BY WITHOLDING INFORMATION REGARDING THE RANKING AND AWARD OF THE CONTRACT TO DEPRIVE OFFERORS OF THEIR RIGHTS UNDER GUAM PROCUREMENT LAW.**

GVB argues that it could not have colluded with HIC because TLK and HIC were ranked closely. GVB's argument ignores the overwhelming evidence regarding the collusion. The evidence submitted by TLK on this issue is not limited to the ranking of TLK against HIC, but all of the GVB email communications and documents relating to the secret award and signing of the TLK contract. The collusion at issue involved GVB's failure to send the notification of intent to award, and not the ranking of bidders. The Public Auditor has stated that, by failing to notify bidders concurrently, GVB deprived TLK of a meaningful opportunity to protest, resulting in "fundamental unfairness." *Decision and Order* at 3. This fundamental unfairness was not the result of an administrative mistake, but rather the intended effect of the collusion between GVB and HIC, as proven by Gina Kono's March 9, 2016 email in which she stated:

BTW, I was contacted by someone mentioning that HIC is communicating with the Korea media announcing that they have successfully been awarded the GVB Marketing Representative contract. Please 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 ....

The Public Auditor's decision could not be clearer. It is this evidence on which the Public Auditor based her finding that "as a result of the manner in which GVB awarded the contract to HIC, the Protest, as is conceded by TLK<sup>1</sup>, was filed after award. The Public Auditor

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<sup>1</sup> TLK does not concede that GVB's purported award of the contract to HIC was proper and in compliance with Guam Procurement Law. TLK has consistently taken the position that the purported award was improper and invalid.

finds that TLK was deprived of any meaningful opportunity to protest the procurement prior to award or to receive the benefits of the automatic stay.” *Decision and Order – Protest 1*, at 3.

**D. GVB VIOLATED §3.10 OF THE RFP WHEN IT FAILED TO OBTAIN THE REQUIRED BOARD APPROVALS.**

GVB argues that the purported award of the contract to HIC was proper. This is not true. First, the RFP specifically requires approval of the GVB Board after determination of who is the “best-qualified Offeror.” *See*, RFP at 32. Further, the RFP, at Section 3.10 requires that “[i]f 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 part of GVB’s procurement file.” (emphasis added). *Id.*

At the February 25, 2016, GVB board meeting, Director Hong Soon Im made a motion seconded by Mr. Shinohara, regarding the negotiation and contracting of the Korean Marketing Contract. A verbatim transcript of tape from the February 25<sup>th</sup> board meeting submitted by GVB as part of the Procurement Record discloses that no such award took place:

H.S. Im: I have ah, one motion. Uh, I think right now we have ah, a RFP for Korea market going on this morning. So motion to recommend Board approval to authorize the GVB General Manager as Chief Procurement Officer to **enter into negotiation and contract** with the highest rated and most qualified Offeror for GVB RFP 2016-006: Tourism Destination Marketing Representation Service in the Republic of Korea.

M. Baldyga: May I have a second please?

S. Shinohara: Second.

M. Baldyga: Thank you. Nate, any update?

N. Denight: Uh, yeah so the committee did the um, uh the ---

M. Baldyga: Evaluation--

N. Denight: --The first evaluation and they did the uh, in person interviews with the companies this morning--

M. Baldyga: Oh, good.--

N. Denight: And, and so uh--

M. Baldyga: So four hours... Wow.

N. Denight: --So four hours, yeah. So we're still, we're still in the process of tallying the, the results but at that point we would want to start ah, negotiations with the highest rated proposer as our standard operating procedures.

M. Baldyga: Alright, makes sense. Any comments or questions? Okay all in favor of approving the motion as stated please say aye.

[Board]: Aye.

M. Baldyga: Any opposed, please say nay. The ayes have it and the motion carries. There is no old business, there is no new business, there is no executive session, there is an announcement... (emphasis added).

*See, Ex. J, 2/25/16 Board Meeting - CD from Procurement Record from 1:09:50 to 11:11:18, TLK Response - Protest 1 .*

GVB does not dispute the following facts: (1) GVB General Manager, Mr. Denight (now the CEO), did not obtain GVB Board's approval of the HIC Contract *after* the evaluation team ranked and selected HIC as the "best-qualified Offeror," and (2) Mr. Denight also did not obtain board approval to begin negotiations and to award the contract to HIC.

During the February 25, 2016 GVB Board Meeting, the board "authorize[d] the GVB General Manager as Chief Procurement Officer to enter into negotiation and contract with the highest rated and most qualified Offeror for GVB RFP 2016-006: Tourism Destination Marketing Representation Service in the Republic of Korea." *Id.*

The transcript of the February 25<sup>th</sup> board meeting confirms that the results of the evaluation team had not been tallied, and that Mr. Denight did not present the ranking of the best-qualified offerors or the recommendations or results of the evaluation team to the Board of Directors for consideration and approval. Without the necessary board approvals, there can be no award.

Second, the Guam Procurement Law requires the Agency to negotiate a contract with the best qualified offeror for the required services at compensation determined in writing to be fair and reasonable. 2 GAR §3114(1)(1). Guam law also requires that at the conclusion of the negotiations, a “Memorandum of Evaluation and Negotiation” must be prepared setting forth the basis for the award. 2 GAR §3114(m). Specifically, the Memorandum of Evaluation and Negotiation should contain the following information:

(m) **Memorandum of Evaluation and Negotiation.** At the conclusion of negotiations resulting in the award of the contract, the head of the agency conducting the procurement or a designee of such officer *shall* prepare a memorandum setting forth the basis of award including:

(1) how the evaluation factors stated in the Request for Proposals were applied to determine the best qualified offerors; and

(2) the principal elements of the negotiations including the significant considerations relating to price and the other terms of the contract. All memoranda shall be included in the contract file and be available for public inspection. (emphasis added).

*Id.*

GVB did not prepare a Memorandum of Evaluation and Negotiation after negotiations with HIC were concluded, and thus, did not comply with Guam law. In its Agency Report, GVB did not rebut this fact, and has therefore conceded this fact. *See, Agency Report* at 11. Without the Memorandum of Evaluation, there is no record of the negotiations and what, if any, significant considerations were considered, and most importantly, there can no basis for determining whether this is a fair and reasonable contract. Board approval of a contract cannot

be made in a vacuum, but, must be based on the Memorandum of Evaluation and Negotiation required under 2 GAR §3114(1)(1).

In response to TLK's argument regarding the importance and requirement in the RFP and Guam Procurement Law of obtaining board approvals, GVB argues, without providing any legal authority, that to support its position that board approval is "not relevant." *See, Agency Report* at 10.

There overwhelming weight of evidence supports a finding that GVB violated the Guam Procurement law when it colluded with HIC to deprive TLK of its rights under Guam Procurement law and the RFP, and that GVB failed to obtain board approvals, failed to prepare a Memorandum of Evaluation and Negotiation, and failed to keep a log of communications. The purported award and contract should be invalidated and set aside.

**E. HIC WAS REQUIRED TO DISCLOSE IN ITS AFFIDAVIT REGARDING OWNERSHIP AND COMMISSION REGARDING KARL PANGELINAN'S DIRECT INVOLVEMENT IN THE RFP, PRESENTATION, AND EVALUATION.**

The former GVB General Manager, Karl Pangelinan, acted as a consultant for HIC and presented HIC's proposal to the evaluators. Each of the evaluators responded favorably to Mr. Pangelinan's presentation, and noted their comments in their evaluation sheets. Mr. Pangelinan's direct involvement in the RFP, presentation and evaluation for HIC was noted by all evaluators as a key factor in the scoring of HIC. In the section of the evaluation sheet where evaluators were asked to note the strengths of each presentation, Gina Kono stated that HIC "[h]ad a former GVB management on their team." *Procurement Record* at 203. Norman Analista noted the use of "a local representative" as a strength of HIC's presentation. *Procurement Record* at 197. Telo Taitague noted as a strength "Having a person from Guam on the team that is well knowledge [sic] of our island." *Procurement Record* at 215. Sam

Shinohara noted that HIC “[h]ad local pitcher” and praised the delivery as a strength of HIC’s presentation. *Procurement Record* at 208-209.

GVB argues Mr. Pangelinan’s involvement was not a violation of 5 GCA §5632(b) because “the solicitation does not involve a judicial or other proceeding, application, request for a ruling, or other determination, contract claim or charge or controversy (§5632(b)). *Agency Report* at 13.” The missing comma between “contract” and “claim” in GVB’s response is illustrative: GVB misreads the law as requiring a “contract claim” instead of a contract *or* claim. The law, correctly cited is as follows:

(2) One Year Representation Restriction Regarding Matters for Which a Former Employee Was Officially Responsible. It shall be a breach of ethical standards for any former employee, within one (1) year after cessation of the former employee’s official responsibility, knowingly to act as a principal, or as an agent for anyone other than the Territory, in connection with any:

- (A) judicial or other proceeding, application, request for a ruling or other determination;
- (B) contract;
- (C) claim; or
- (D) charge or controversy; in matters which were within the former employee’s official responsibility, where the Territory is a party or has a direct or substantial interest.

5 GCA §5632(b)(2).

Clearly Mr. Pangelinan was involved as a consultant and the principal presenter for HIC in connection with the contract purported awarded to HIC, in violation of 5 GCA §5632(b)(2)(B). Similarly, GVB absurdly misinterprets §5632(c) to require that Mr. Pangelinan himself be a business, rather than a person with financial interest in a business. A plain reading of the statute shows this to be false.

Notably, GVB does not dispute the fact that Mr. Pangelinan was an undisclosed consultant to HIC, and that in failing to disclose Mr. Pangelinan's relationship HIC committed perjury.

**E. HIC PROPOSAL WAS NON-RESPONSIVE.**

**1. Section 1.1 Of The RFP Contains A Mandatory Five (5) Years Experience Requirement.**

TLK protested the purported award of the contract to HIC on the ground that HIC did not meet the mandatory five (5) year experience requirement. *See, Ex. D* at pp. 1-2, TLK Appeal – Protest 1. TLK asserts that Section II of the RFP states that “[s]election of the best Offeror will be based on the qualifications, experience and commitment of Offerors lead and support individuals proposed for this RFP, and the Offeror’s plan of action. More importantly, §1.1 of the RFP explicitly imposes a mandatory requirement that the Proposer establish that it is a “qualified professional tourism destination marketing agency with 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....” *See, Ex. A* at pp. §1.1, TLK Appeal – Protest 1.

GVB mischaracterizes TLK’s claim, referring to the claim as raising “collateral issues [*sic*] ... not properly before the Office of Public Accountability on appeal since they were not first raised at the agency level”, is patently false. *Agency Response* at 7. TLK Protested the selection and ranking of HIC. TLK identified the RFP minimum experience requirements and references HIC’s Certificate of Registered Incorporation establishing February 25, 2013 as the date it was licensed to provide advertising, travel and entertainment services, in Korea. *See, Ex. D* at pp. 1-2, TLK Appeal – Protest 1. GVB was the drafter of the RFP, which RFP included a clear mandatory five (5) year minimum experience requirement. GVB cannot ignore the clear



mandatory five year experience in the RFP simply because “[s]uch a specification would be unduly restrictive, would disqualify joint offers or teaming agreements and would tend to advantage an incumbent over competitive efforts.”

In the federal procurement system, certain 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. *Topley Realty Co., Inc.*, 65 Comp.Gen. 510 (1986), 86-1 CPD ¶ 398. Here, while the experience requirement was stated in terms of the “installer,” the requirement was clearly understood by the agency and the bidders to be a definitive criterion applicable to the bidders (as indicated below, Blazer intends to install the waterproofing). *See Urban Masonry Corp.*, B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48. Thus, the requirement that the waterproofing installer have at least

3 years of “specialized” experience in the installation of fluid-applied waterproofing is a definitive responsibility criterion.

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 \*\*1-2.

By ignoring its own unambiguous experience requirements and accepting HIC proposal although it did not meet these experience requirements, GVB gave HIC an unfair advantage over TLK and over other persons or companies who may have been dissuaded from submitting proposals because of the requirement of experience in the RFP.

Also GVB’s argument is unavailing because the clear purpose of experience requirements is to weed out non-qualified offerors who do not have the necessary experience for the services required. Setting an objective criterion, in this case, five years, insures that Government Agency receives proposals from qualified offerors with the minimum experience.

GVB also argues that the experience requirement was not a requirement, but was a suggestion for offerors. *See, Agency Report* at 8. The threshold five year Korean travel marketing experience was not merely a “suggestion” and to argue otherwise is disingenuous. As the author of the RFP, GVB could have excluded the minimum experience requirement or written it as a recommendation, soliciting proposers with “as much experience as possible” or

who “preferably have experience” in the relevant areas. GVB did not do this. The language of the RFP is clear: proposers must have a *minimum* of 5 years relevant experience. GVB’s argument, that a minimum experience requirement is meaningless or flexible, should be rejected.

The RFP should be construed against GVB, the author and drafter, and GVB should not be allowed to re-define or interpret provisions in the RFP after a protest is filed to suit its purposes.

**2. HIC Did Not Meet the Five Year Mandatory Requirement Under §1.1 Of The RFP And Its Proposal Must be Rejected.**

With respect to the merits of the claim, TLK states in the Protest that “HIC has been licensed in Korea as an advertising, travel, and entertainment company for approximately three years. HIC’s *Certificate of Registered Incorporation* shows that it registered advertising, travel and entertainment services as additional purposes on February 25, 2013.” *See, Ex. D* at 2, TLK Appeal – Protest 1. GVB identifies five points to support of HIC’s qualifications and ability to meet the experience criterion:

- As SD Pharm it entered marketing contracts with various entities as far back as 2006
- Happy Idea Company’s founding member has close to 15 years of experience in the field of public relations and is a successful public relations and marketing professional
- A Director at Happy Idea Company has marketing experience and over 10 years’ experience in magazine publishing
- A Deputy General manager has at least 5 years’ experience organizing overseas trips for clients
- A manager for HIC has more than 5 years in the hospitality industry as well as experience in sales and marketing.

*See, Agency Report* at pp. 8-9.

First, the RFP states it is the *Offeror entity* which must meet the minimum five year “extensive and consistent experience,” not a director, employee, or officer of the Offeror. *See*, §1.1, RFP. This means, the Offeror *entity* must have been licensed, in business as a Korean marketing firm, and have had the necessary Korean marketing experience for at least five (5) years. GVB’s argument that the experience requirement should be based solely on the experience of an employee, director or officer, and not the Offeror *entity* completely ignores the plain meaning of §1.1 of the RFP. Nor are the individual employees’ experience in unrelated fields, such as magazine publishing, sufficient to meet the experience requirements of the RFP.

Second, GVB argues that HIC has existed the past five (5) years without offering any evidence or documents to support this assertion. This is a false statement because HIC has not been in existence for five (5) years, let alone as a tourism destination marketing agency. *See*, **Ex. A** (Certificate of Registered Incorporation) – TLK Response to Agency Report – Protest 1.<sup>2</sup> HIC’s Certificate of Registered Incorporation confirms that its original purposes are medical or real-estate related and include “technical development, manufacturing and sales of medicine,” and “sale and lease of real estate business.” HIC was not registered and did not obtain a license for any travel-related purposes until *February 22, 2013* -- over three years ago. *See*, **Ex. A** (Certificate of Registered Incorporation) TLK Response to Agency Report – Protest 1. HIC misrepresents its experience by relying on the experience of a SD Pharm – a company for which no information is provided in HIC’s Proposal. HIC claims that it changed its name from “SD Pharm” in 2013. *See* **Ex. B** (“Why HIC” Excerpt from HIC Technical Proposal), TLK

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<sup>2</sup> HIC’s representations about its age and relationship with SD Pharm are inconsistent. At one point in the technical proposal, HIC claims to have changed from SD Pharm to HIC in 2013. *See* **Ex. B** (“Why HIC” Excerpt from Technical Proposal), TLK Response to Agency Report – Protest 1. At another point in its proposal, HIC claims to have existed since 2011. *See*, **Ex. C** (“Organizational Chart” from HIC Technical Proposal.), TLK Response to Agency Report – Protest 1.

Response to Agency Report – Protest 1. However, an online report shows SD Pharm to be an individually owned company in the name of Park, Saedong (Don Park), which is still in existence. *See Ex. D* (SD Pharm Online Info), TLK Response to Agency Report – Protest 1.

There is nothing in the Procurement Record which explains who SD Pharm is and why its experience, should be used to qualify HIC in this solicitation. SD Pharm is not the Offeror, and its experience, if any, cannot be adopted by HIC to meet the five year “extensive and consistent experience” requirement of the RFP. HIC has misrepresented its experience, and should not be rewarded for its bad acts.

At the most, HIC may have had 3 years’ relevant experience by the time of its bid and award – well under the 5 year requirement. This renders HIC a non-responsive Offeror.

**F. TLK WILL BE IRREPARABLY HARMED.**

Contrary to GVB’s claim that TLK’s claims of harm are based on TLK’s assumption that it has a “right to perpetual succession,” rather, the basis of TLK’s claim of irreparable harm is premised on “the possibility of TLK to be awarded the contract.” *TLK Appeal* at 7. The Federal Claims court has held that where an aggrieved offeror can only gain the costs of bid preparation in a suit for damages, and not anticipated profits, such a bid protester is irreparably harmed. *See, Bannum, Inc. v. United States*, 60 Fed. Cl. 718, 730 (Fed. Cl. 2004) citing *Essex Electro Eng'rs, Inc. v. United States*, 3 Cl. Ct. 277, 287 (1983), *aff'd*, 757 F.2d 247 (Fed.Cir.1985). This is the exact situation faced by TLK.

**III. CONCLUSION**

TLK requests a ruling from the OPA as follows:

1. That agencies of the Government of Guam may not usurp the procurement process and the protections of 5 GCA 5425(g) by negotiating and entering into a contract with a selected

offeror prior to informing other offerors that they have not been selected for negotiation and award;

2. That all offerors responding to a Request for Proposal or other similar procurement process be informed at the same time, and that a selection was made by an Agency;

3. That the ranking of HIC as the highest ranked offeror for GVB RFP No. 2016-006 be set aside;

4. A declaration that the Contract negotiated and executed between GVB and HIC be declared void *ab initio* and set aside;

5. A determination that as the first ranked responsive offeror, GVB should immediately begin negotiations with TLK and award the contract to TLK;

6. For an award of reasonable attorney's fees and costs of this protest and appeal; and

7. For such other relief that the OPA may determine is just and proper.

Submitted this 27<sup>th</sup> day of June, 2016.

**CIVILLE & TANG, PLLC**

By: \_\_\_\_\_

**JOYCE C. TANG**

*Attorneys for Appellant TLK Marketing  
Co. Ltd.*