

ORIGINAL

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**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEAL**

In the Appeal of

TLK Marketing Co. Ltd.,

Appellant.

Docket No. OPA-PA16-003

**MOTION FOR ORDERS
CONFIRMING THE AUTOMATIC
STAY AND REQUIRING THE
GUAM VISITORS BUREAU TO
ISSUE A FINAL DECISION ON
PROTEST 2**

**REQUEST FOR AN EXPEDITED
HEARING**

I. INTRODUCTION.

On March 24, 2016 and April 21, 2016, Appellant, TLK Marketing Co. Ltd. (“TLK” or “Appellant”) filed two protests regarding the *RFP for Proposal – Tourism Destination Marketing Representation Services in the Republic of Korea* (GVB RFP No. 2016-006) (the “RFP”), challenging the award of the putative contract to HIC, Inc. See, **Exhibit A** (“3/24/16 Protest” or “Protest 1”) and **Exhibit B** (“4/21/16 Protest” or “Protest 2”), *Declaration of Joyce C.H. Tang*

filed herewith (“Tang Dec.”). TLK timely filed Protest 1 and Protest 2. This is an appeal from Protest 1. The Guam Visitor’s Bureau has not issued a final decision regarding Protest 2.

Guam Procurement Law imposes an automatic stay under 5 GCA §5425(g) upon the filing of a protest. Because GVB refused to stay the solicitation and has tried to award the contract to HIC, Inc. (“HIC”) without following the RFP and Guam Procurement Law, TLK is compelled to seek an order from the Office of Public Accountability (“OPA”) confirming that the automatic stay under 5 GCA §5425(g) was triggered upon the filing of Protest 1, and that the stay continues to be in force until final resolution of these protests and any appeals. The stay prohibits the Guam Visitors Bureau (“GVB”) from proceeding with the solicitation and/or award, and allowing HIC to perform under the putative contract.

TLK requests an expedited hearing on its Motion because GVB has refused to comply with the §5425(g) imposition of an automatic stay, and has demanded the TLK turn over its work product to HIC, INC. *See*, Tang Dec. **Exhibit C** (5/11/16 email from Gina Kono to Henry Lee). TLK has, in good faith, offered to continue providing services under its previous contract, on a month to month basis, until final resolution of these protests. *See*, Tang Dec. **Exhibit D** (4/29/16 Letter from Joyce Tang to Thomas Fisher). GVB has not formally responded to TLK’s offer.

The Procurement Appeals Rules are intended to be “construed and applied to provide for the expeditious resolution of controversies in accordance with the requirements of 5 GCA Chapter 5 (Guam Procurement Law) and the Guam Procurement Regulations...” *See*, 2 GAR §12101. TLK timely filed Protest 2 on April 21, 2016, fifteen (15) days ago, and now seeks an Order from the OPA requiring GVB to issue a Final Decision Protest 2 by Thursday, May 12, 2016. In the event that GVB denies TLK’s Protest 2, TLK will appeal the denial of Protest 2.

For purposes of efficiency and judicial economy, TLK requests that upon filing of TLK's Protest 2 Appeal, that TLK's Protest 1 Appeal be consolidated with the Protest 2 Appeal.

Because GVB refused and continues to refuse to comply with the mandatory stay requirements of §5425(g), and has demanded TLK turn over its work product to HIC, Inc., an expedited hearing is required to affirm the automatic stay and to set a clear deadline for GVB to provide its final decision.

This motion is supported by the appended Memorandum in Support of Motion, the Declaration of Joyce C. Tang submitted with this motion, the papers on file in this matter, and any argument that the OPA may entertain on this issue.

II. CHRONOLOGY OF EVENTS

A. GVB Issues the RFP

TLK had the Korean Marketing Contract when the RFP was issued on November 25, 2015. *See*, Tang Dec. **Exhibit E** (GVB RFP 2016-006). GVB received proposals from four interested parties: HIC, Inc., TLK, Edelman, and Promac. The deadline for submission of proposals was February 8, 2016.

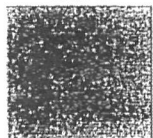
B. The Evaluation, Rankings, and Presentations

The evaluation took place on February 16, 2016. The evaluation team comprised of four individuals, namely, Telo Taitague, Gina Kono, Norman Analista, and Sam Shinohara. *See* Tang Dec. **Exhibit F** (2/16/16 Initial Evaluation Summary). Per GVB's evaluation procedure, the top three (3) ranked proposers would be asked to give oral presentations, and the fourth ranked offeror would be notified that it was not selected. *Id.* On February 19, 2016, GVB notified by email the three top ranking Offerors that a formal presentation was scheduled for February 25, 2016. *See*, Tang Dec. **Exhibit G** (2/19/16 Invitation Letters).

HIC, TLK and Promac gave their presentations to the evaluation team on February 25, 2016 between 8:30 a.m. and 11:45 a.m. GVB prepared a Summary of Evaluations which shows that TLK's total score was 364 and HIC was 366, ranking HIC in the first place. *See*, Tang Dec. **Exhibit H** (Final Evaluation Summary).

GVB RFP 2016-006 Tourism Destination Marketing Representation Services in the Republic of Korea
 Proposal Evaluation - held TUE 2/16/16; 9am
 Oral Presentations - held THU 2/25/16; 8:30-11:45

SUMMARY OF EVALUATIONS

Criteria (#) x (4) number of evaluators	Max. # of Points	PROMACC	TLK	EDELMANN	HIC
Executive Summary and Commitment (35)	140	98	129	89	130
Staff Qualifications and Past Performance (35)	140	134	128	108	127
Organizational Structure and Chart (15)	60	53	47	41	52
References (10)	40	40	40	1	37
Primary Point of Contact (5)	20	18	20	11.5	20
TOTAL	400	343	364	250.5	366
WRITTEN PROPOSAL MAX # OF POINTS (100x4)	400	343/400	364/400	250.5/400	366/400
WRITTEN PROPOSAL AVERAGE:	100.00%	86.00%	91.00%	63.00%	91.50%
ORAL PRESENTATION MAX # OF POINTS (80 x 4)	320	240/320	256.50/320		282.50/320
ORAL PRESENTATION AVERAGE:	100.00%	75.00%	80.16%		88.28%
COMBINED AVERAGE PERCENTAGE:	100.00%	80.50%	85.58%		89.89%

C. GVB Board Meeting on February 25, 2016

The RFP at §2.4 requires after results of the evaluation team are compiled and a cumulative score with recommendations are presented to the General Manager, the “General Manager shall then request the Board of Directors approval to enter into negotiations with the best qualified Offeror.” *See*, **Exhibit E** at 29 (RFP).

At the February 25, 2016, GVB Board of Directors Regular Meeting, ten (10) members of the Board met. *See*, Tang Dec. **Exhibit I** at 1 (2/25/16 Board of Directors Regular Meeting Minutes). Sam Shinohara, a director and a member of the evaluation team for this RFP, attended and voted at this meeting. *Id.* Director Hong Soon Im made a motion, which was seconded by

Mr. Shinohara, regarding negotiation and contracting of the Korean Marketing Contract. The transcript of Mr. Im's motion and following discussion is as follows:

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).

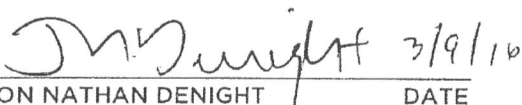
See, Tang Dec. **Exhibit J** (Partial Transcript of Board Meeting 2/25/16 Tape from Procurement Record From 1:09:50 to 11:11:18).

It is undisputed that at the afternoon meeting of the February 25th GVB Board meeting, the results of the evaluation team had not been tallied, and that Mr. Denight did not present the rankings, recommendations or results to the Board of Directors for consideration and approval. The Motion that was passed “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.” The RFP expressly requires approval of the Board after determination of who is the “best-qualified Offeror.” See, **Exhibit E** at 32. The Board has never approved HIC as the best qualified Offeror or the Contract that was negotiated by the General Manager with HIC.

D. Post Evaluation Notices.

A Memorandum dated February 25, 2016, was prepared by Christine Lizama, a Management Analyst, directed to Mr. Denight, regarding “EVALUATION SUMMARY OF ORAL PRESENTATIONS.” See, Tang Dec. **Exhibit H** (2/25/2016 Final Evaluation Summary). At the end of the 2/25/2016 Final Evaluation Summary, Mr. Denight checked “PROCEED WITH NOTICES” and signed and dated it March 9, 2016. *Id.*

PROCEED WITH NOTICES DO NOT PROCEED UNTIL FURTHER ADVISED

 3/9/16

JON NATHAN DENIGHT DATE

On **March 4, 2016**, Ms. Gina Kono, a GVB Marketing Officer, notified HIC that it was selected as the highest rated and most qualified offeror. See, Tang Dec. **Exhibit K**

(3/4/2016 Email Exchange). To the best of its knowledge, TLK and the other two offerors, did not receive any information regarding the ranking of best qualified offerors until March 10, 2016.

On **March 9, 2016**, Ms. Kono wrote to Mr. Don Park (HIC) regarding the RFP.

See, Tang Dec. **Exhibit L**, (3/9/2016 Email Exchange).

----- 원본 메일 -----
보낸사람: Gina Kono <gina.kono@visitguam.org>
받는사람: Don Park <psduj@daum.net>
참조: Anna Kim <anna_kim@hicompany.co.kr>, 윤호석 <jacob_yoon@hicompany.co.kr>, Colleen Cabedo <colleen.cabedo@visitguam.org>
날짜: 2016년 3월 09일 수요일, 11시 25분 05초 +0900
제목: GVB Korea Marketing Representative RFP
Hafa Adai Don,

Hope your visit to Guam was successful and your flight back to Korea was pleasant and comfortable.

Don, I am emailing you to request if you can urgently respond to our GVB RFP2016-006 Retainer Fee Negotiation communication? GVB General Manager would like to finalize the RFP and finalize all the necessary paperwork and communications to the other offerors.

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. Thank you for your understanding.

Please urgently get back to us today.

Senseramente' (Sincerely),

Gina Kono
Marketing Officer II, Marketing Department

GUAM VISITORS BUREAU
401 Pale San Vitores Road | Tumon, Guam 96913 | (671) 646-5278
gina.kono@visitguam.org | www.visitguam.org

Mr. Park responded to Ms. Kono on the same day at 3:06 p.m. *Id.*

박세동 <psduj@hanmail.net>

Wed, Mar 9, 2016 at 3:06 PM

To: gina.kono@visitguam.org

Cc: Anna Kim <anna_kim@hicompany.co.kr>, 윤호석 <jacob_yoon@hicompany.co.kr>,

Colleen Cabedo <colleen.cabedo@visitguam.org>

Hafa Adai Gina,

Thank you for your email.

I just got to the office and signed the document. I will send it to you as soon as I finish scanning the document right after this email.

I would like to let you know we have not contacted any Korean media regarding the announcement. As you know, I arrived in Korea this morning.

I also checked with Anna and Gemma if they contacted any medias, but they didn't as well. I heard that Anna received only one phone call from one of the newspaper company, and she just said that there is nothing she can talk about it now. I promise you that we have not mentioned about the result of RFP, and also will not mention it until the contract is all done.

Sincerely,

Don

On March 10, 2016, Ms. Kono sent two emails to Mr. Park.

The first email was sent at 12:32 a.m. attaching the *Notice of Award* and the *Contract* that GVB asked HIC to “review, accept by signing, and then send the contract back as soon as possible.” See, Tang Dec. **Exhibit M** (3/10/2016 12:32 a.m. Email).

The second email was sent at 7:11 p.m. attaching the *Notice of Intent to Award* and noting in her email that she “was to send this letter with our previous negotiation email I sent yesterday.” See, Tang Dec. **Exhibit N** (3/10/2016 7:11 p.m. Email).

On **March 11, 2016**, Ms. Kono sent a follow up email to Mr. Park notifying him that TLK’s contract will be terminated by March 31, 2016, and attached a handover item list. See, Tang Dec. **Exhibit C** (3/11/2016 Email).

On March 14, 2016, Ms. Kono sent an email to Mr. Park asking for a signed copy of the Contract. She explained “[GVB] want[s] to have the signed contract so that we can say the RFP process has been completed and finished.” *See*, Tang Dec., **Exhibit O** (3/14/2016 Email).

The HIC Contract was signed by Sedong Park for HIC, Inc. and dated March 11, 2016 by John Denight for GVB and dated March 14, 2016. *See*, Tang Dec., **Exhibit P**, GVB Contract.

On March 10, 2016, TLK along with Promac and Edelman received a notice of non-selection, attaching a copy of the Evaluation Summary. *See*, Tang Dec., **Exhibit Q** (Notices of Non-Selection). To this date, GVB has not provided a Notice of Award to TLK or to the other Offerors.

TLK is entitled to the protections of the §5425(g) stay, and a expeditious resolution of its protests.

III. LEGAL ARGUMENT

A. The Automatic Stay Is In Effect and Any Acts with Respect To the Solicitation Of Or Award of the HIC Contract Should be Stayed.

TLK seeks an order declaring the automatic stay to be in effect, *see, e.g. Appeal of G4S Security Systems (Guam), Inc.*, Appeal No. OPA-PA-13-013, Decision and Order Re Appellant’s Motion to Declare Automatic Stay In Effect (Nov. 12, 2013) (finding automatic stay in effect and award of contract in violation of stay void), and staying and enjoining any further acts with respect to the solicitation of and the award of the contract pending final resolution of this appeal, *see Appeal of JMI Edison*, Appeal No.: OPA-PA-13-009, Order Re: JMI-Edison’s Motion For Issuance Of A Stay, at 3 ((Nov. 4, 2013) (because automatic stay is in effect, “GMHA is prohibited from proceeding further with the solicitation or with the award of the contract until final resolution of JMI’s appeals to the Public Auditor and if subsequently timely filed, to the

Superior Court of Guam Accordingly, GMHA is ordered not to proceed further with the solicitation or award of the contract until final resolution of JMI' s protest. Additionally, GMHA is enjoined from taking any further action on the contracts purportedly awarded to MedPharm until final resolution of JMI' s Protest or until the stay is lifted”).

B. TLK’s Protests 1 and 2 Were Timely Filed And The Automatic Stay Was Triggered Upon the Filing of Protest 1.

TLK’s timely filed Protests 1 and 2 on March 24, 2016 and April 21, 2016, respectively.

At the time Protests 1 and 2 were filed, GVB had not awarded the Contract to HIC.

First, the RFP expressly requires approval of the Board after determination of who is the “best-qualified Offeror.” *See, Exhibit E* at 32. The RFP, at Section 3.10 also 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.*

As discussed in Section II.C (Chronology) above, there was no award, because the HIC Contract had not been approved by the Board *after* determination of who is the “best-qualified Offeror” and *after* negotiation and reaching agreement regarding the contract terms and price with the best-qualified Offeror. 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.” *See, Exhibit J* (Partial Transcripts).

The transcript of the February 25th 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.

Secondly, 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(l)(1). Furthermore, 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.

A review of the Procurement Record confirms that GVB did not prepare a Memorandum of Evaluation and Negotiation after negotiations with HIC were concluded. A Memorandum of Evaluation and Negotiations protects the integrity of the procurement process by requiring the Agency to explain and disclose, in writing, the principal elements of the negotiations with the best qualified offeror, significant considerations relating to how the price and terms were determined, and why the contract is fair and reasonable. 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(l)(1).

C. The Public Auditor Should Order the Agency to Issue a Final Agency Decision in Protest 2.

The Public Auditor, as the arbiter of procurement appeals, is empowered to “promote the integrity of the procurement process and the purposes 5 GCA Chapter 5 [Guam’s procurement laws].” *See*, 5 GCA §5703. As the Public Auditor, she has the power to review and determine “any matter properly submitted” to her and reviews *de novo*, denials of protests in connection with the solicitation or award, or an award of a contract. *See*, 5 GCA § 5703 & 5 GCA § 5425(e). The Guam Legislature intended for the power of the OPA has been construed broadly when it established the Public Auditor’s jurisdiction as follows: “[t]he Public Auditor’s jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.” 5 GCA §5703. The broad interpretation of her powers can be found in the Procurement Regulations which provide that the hearing officers appointed by the Public Auditor have the power “power, among others, to ... Rule on motions, and other procedural items on matters pending before such officer.” 2 GAR §12109.

The Public Auditor is also specifically tasked with reviewing Agency decisions and actions involving the automatic stay imposed by Guam law. Title 2 GAR § 12501(b) expressly states the “Public Auditor *shall* review and confirm or reject any determination by the Chief Procurement Officer or the Director of Public Works that award of a contract without delay pending Appeal is necessary to protect the interests of the government. (emphasis supplied).” 2 GAR §12501(b).

The Procurement Law is also clear in that the Public Auditor has the power to order an Agency to issue a final decision. The authority and power of the Public Auditor to order Government of Guam agencies to render a decision on a protest. *See, In the Appeal of Town House Department Stores, Inc., dba Island Business Systems and Supplies, OPA-PA -08-003, Decision and Order, July 14, 2008* (Public Auditor ordered the Agency to render a protest decision). TLK requests that the Public Auditor order GVB to render a decision on Protest 2 so that all protest matters related to the RFP can be timely and efficiently resolved by the OPA.

Submitted this 6th day of May, 2016.

CIVILLE & TANG, PLLC

By: 
JOYCE C. TANG
Attorneys for Appellant
TLK Marketing Co. Ltd.